97TH CONGRESS
1st Session

SENATE

REPORT
No. 97-307

CRIMINAL CODE REFORM ACT OF 1981

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

TO ACCOMPANY

S. 1630

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Technical and conforming amendments to provisions outside title 18 and title 18 Appendix 1431

97TH CONGRESS
1st Session

SENATE

REPORT
No. 97-307

CRIMINAL CODE REFORM ACT OF 1981

DECEMBER 22, 1981.—Ordered to be printed

Filed under authority of the order of the Senate of DECEMBER 16 (legislative day, NOVEMBER 30), 1981

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1630]

The Committee on the Judiciary, to which was referred the bill (S. 1630) to codify, revise, and reform title 18 of the United States Code, and for other purposes, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill as amended pass.

AMENDMENT

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

S. 1630, as reported, is the Committee's composite of the best features of the Report of the National Commission on Reform of Federal Criminal Laws,[1] prior bills in the Ninety-Third, Ninety-Fourth, Ninety-Fifth, and Ninety-Sixth Congresses, and comments, suggestions, and amendments received during hearings, conferences, and markups on this proposal. The report includes a discussion of the provisions of each section of the bill as reported.

GENERAL STATEMENT

On September 17, 1981, Senator Thurmond (for himself and Senators Biden, Hatch, Kennedy, Denton, DeConcini, Dole, East, Laxalt, Simpson, and Specter)[2] introduced S. 1630, to be cited as the "Criminal Code Reform Act of 1981". Two days of hearings were held by the Senate Committee on the Judiciary to supplement prior extensive hearings on criminal code legislation.[3]

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[1] Final Report of the National Commission on Reform of Federal Criminal Laws (1971) (hereinafter in this report cited as Final Report and National Commission, respectively).

[2] Senators East and Denton withdrew their cosponsorship of the bill on November 18, 1981.

Bipartisan and so-called liberal-conservative cooperation in attaining a new Federal Criminal Code has a long tradition in the Senate Committee on the Judiciary, dating at least from the mid-1960's with Senators John McClellan, Sam Ervin, and Roman Hruska, to the efforts in recent years of Senators Thurmond, Biden, Hatch, Kennedy, Laxalt, DeConcini, and others. In the long history of this measure, the Senate passed a criminal code bill (S. 1437) on January 30, 1978, by a vote of 72 to 15,[4] but the House failed to act. In the 96th Congress, both the Senate and the House Committees on the Judiciary reported criminal code bills; however, insufficient time remained in the press of the election year to complete the process.[5]

The bill reported here can be regarded as a continuation of the commitment of all of these diverse elements and as a truly momentous advance toward fulfillment of one of the most basic demands of our society, *viz,* justice in the administration of the criminal law, Senator Thurmond set the tone for consideration of this legislation this Congress during Committee markup of the bill as follows:[6]

> The Committee is considering today a bill that may well be the most important criminal law legislation in this century—the Criminal Code Reform Act of 1981. This year marks the fifteenth anniversary of the beginning of the work of the National Commission on Reform of the Federal Criminal Laws. It is the tenth anniversary of the first congressional hearings on modernizing the Federal criminal code. Every administration has from the outset recognized the need and has strongly supported this effort, including the current Administration.
>
> The current bill—S. 1630—has evolved from all of these past efforts and has been subjected to closer scrutiny and criticisms than any bill in my memory. . . . [I]n my judgment the bill represents a giant step forward from almost every perspective—whether it be law enforcement or a sound respect for the civil liberties of our people.
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> * * * * *
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> [I]n my opinion this is the most important piece of legislation promoting criminal justice which has been considered in my twenty seven years in the Senate.

Similarly, Senator Biden reaffirmed his strong support for this effort at the time S. 1630 was introduced:[7]

> I wish to express my enthusiastic support of this effort to reorganize and streamline the administration of Federal criminal justice. This is one of the most important pieces

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[3] See *Reform of the Federal Criminal Laws,* Hearing before the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess. (1981) (hereinafter cited as Hearings, Part XVI).

[4] 124 Cong. Rec. S. 860 (January 30, 1978 (daily ed.)).

[5] See S. 1722 as reported on January 17, 1980 (S. Rept. No. 96-553); H.R. 6915 as reported on September 25, 1980 (H. Rept. No. 96-1396).

[6] Transcript, Executive Session of the Senate Committee on the Judiciary, November 18, 1981.

[7] 127 Cong. Rec. p. S. 9776 (September 17, 1981 (daily ed.)).

> of legislation before us this Congress. It brings order and reason to a confusing, and in some instances illogical, mass of criminal laws enacted over the past 200 years. It follows the example of those States, including Delaware, which have modernized their criminal laws in recent years.

Senator Kennedy stated his commitment to this arduous task at the beginning of the effort in the Ninety-Fifth Congress:[8]

> The Criminal Code Reform Act . . . constitutes the most important attempt in 200 years to reorganize and streamline the administration of Federal criminal justice. It is a major undertaking, of critical importance to our people. As I have repeatedly stated in recent months, I view this legislation as the cornerstone of the Federal Government's commitment to the critical problem of crime in America. I believe it is the key to progress on every other front, and that is why I have made this effort one of my principal legislative goals in the current Congress.
>
> This legislation follows in the wake of various State code recodifications. Since 1970, well over half the States have either reformed their criminal laws or are currently doing so. The Federal Government has a similar responsibility to act. Public attitudes reflect a growing sense of frustration at the inability of Government to deal with crime and the inequities of our criminal justice system. We owe it to the public to put our Federal house in order and to restore the confidence of the people that we are making progress once again.

In a similar vein, Attorney General William French Smith testifying on behalf of the Reagan Administration and the Department of Justice stated in hearings before the Committee:[9]

> The proposed Federal Criminal Code now pending before this Committee, S. 1630, is a product shaped both by many members of this Committee who have long perceived the need for reform and by those of us operating within the criminal justice system who are faced with the day-to-day problems of attempting to enforce the existing laws. I would like not only to acknowledge but to stress that point—this bill is a joint product of an extraordinarily close, harmonious, and productive working relationship between the sponsoring Senators and the Department of Justice. . . . I am gratified by the product. You may be assured that this effort has my strong personal support as well as the support of the administration as a whole.

Commenting on the merits of S. 1630, the Attorney General concluded that "as a whole, it represents the most significant series of law enforcement improvements ever considered by the Congress."[10]

The need for extensive reform of the Federal criminal laws is apparent. Present statutory criminal law on the Federal level is often a hodgepodge of conflicting, contradictory, and imprecise laws with little relevance to each other or to the state of the criminal law as a whole.[11] It unnecessarily burdens the responsibility of assuring every man of knowing what he may do and what he may not do.

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[8] 123 Cong. Rec. S. 6838 (May 2, 1977 (daily ed.)).

[9] Hearings, Part XVI, p. 11761.

[10] *Id.* at 11760.

In his discussion of the need for penal code reform throughout the nation, Professor Herbert Wechsler aptly expressed the profound impact that the penal law has on our daily lives:[12]

> Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.
>
> If penal law is weak or ineffective, basic human interests are in jeopardy. if it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.

The criminal justice system does not, of course, depend on substantive law alone. The administration of the law, the character of the people dealing with it, and other fundamental aspects of the criminal justice process are all important elements. But each of these elements is highly dependent upon the existence of rationally conceived and clearly formulated criminal statutes. It is the substantive law that is at the core of efforts to foster widespread belief that the government and the social order deserve credence, respect, and loyalty.

Need for reform

Unlike several of the States,[13] and unlike most of the other countries of the world, the United States has never enacted a true "criminal code." True, there have been several consolidations and revisions. The criminal statutes have been consolidated, reordered, and revised technically in 1877 (Revised Statutes), 1909 (35 Stat. 1088), and 1948 (62 Stat. 683). However, corrections were, by and large, limited to eliminating gross inconsistencies. As a result, the Federal criminal law has always remained a consolidation—a body of law drafted by different groups to deal with diverse problems on an ad hoc basis—rather than a uniformly drafted, consistently organized code.

Not surprisingly, the absence of a general substantive reform has left us with complex, confusing and even conflicting laws and procedures that, all too frequently, have aggravated problems associated with rendering justice to the individual as well as to society. This neglect has posed a congeries of major problems.

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[11] See Statement of Hon. Richard II. Poff. Vice Chairman. National Commission on Reform of Federal Criminal Laws, *Reform of the Federal Criminal Laws*, Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 92d-95th Cong., p. 102. (1971-1977) (hereinafter cited as Hearings).

[12] H. Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098-1099 (1952).

[13] For status of substantive law revision, see Hearings, Part XVI, pp. 12430-12431.

First and foremost is the uncertainty in the law that has developed. In certain areas, the courts of appeal are divided and enforce a different "Federal" law in various regions of the country. An example is the insanity defense. Because the Supreme Court has not chosen to rule on the matter, the circuit courts have been free to adopt an insanity test *sua sponte.* The National Commission found that, where the type of insanity test adopted by a court of appeals could be descerned, it was possible to discover at least five different formulas used in the eleven circuits.[14] Another example has been cited by Justice Richard H. Poff of the Virginia Supreme Court, formerly Vice Chairman of the National Commission:[15]

> [W]e have innumerable statutes dealing with such basic offenses as theft and fraud. They are scattered about hither and yon among various titles of the United States Code, and, although they may deal with essentially the same kind of misconduct, it is rare to find two that read alike. This results in conflicting court interpretations as the judiciary grapples with differing statutory formulations of the same underlying offense, and, of course, this makes for uncertainty in the law.

The uncertainty is not confined though to differing interpretations of the same statute. It runs throughout the Federal criminal code where one word is used in a number of statutes. For example, the term "willful" has been construed by the courts in a variety of ways, often inconsistent and contradictory. The courts have defined a "willful" act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purposes, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is lawful, and an act done with careless disregard whether or not one has the right so to act.[16]

Nothing has so distorted Federal criminal law as the legislative practice of defining Federal crimes in such a way as to make jurisdictional requirements an element of the offense. This confuses the conduct proscribed with the Federal power to prohibit the conduct. Questions inevitably arise as to whether the culpability element modifies the jurisdictional element, thereby causing confusion about what conduct is actually proscribed. For example, an individual may actually engage in a fraudulent scheme of national scope but because he did not know (the culpability element) of the transportation in interstate commerce (the jurisdictional element) he cannot be prosecuted under Federal law.[17] Because particular jurisdictional pegs have been adopted for each offesne to satisfy then perceived needs, the present approach also tends to leave irrational gaps and inconsistencies in the application of Federal criminal laws. Conviction for the commission of a fraudulent scheme may depend on whether the mails or the telephone is used.[18]

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[14] See Working Papers, National Commission on Reform of Federal Criminal Law, pp. 229-234 (1970) (hereinafter cited as Working Papers).

[15] Hearings, p. 102.

[16] See, e.g., *Screws* v. *United States,* 325 U.S. 91 (1945): *Spies* v. *United States.* 317 U.S. 492 (1943); *United States* v. *Murdock,* 290 U.S. 389 (1933) and cases cited therein: Working Papers, pp. 148-151.

[17] Compare *United States* v. *Tannuzzo,* 174 F.2d 177 (2d Cir.), cert, denied 338 U.S. 815 (1949), and *United States* v. *Sherman,* 171 F.2d 619 (2d Cir. 1948), cert, denied 337 U.S. 931 (1949), with *Wilkerson* v. *United States,* 41 F.2d 654 (7th Cir. 1930), cert. denied, 282 U.S. 894 (1931).

Like a prism, present law also diffracts one offense into a spectrum of offenses, one distinguished from another only by differeent jurisdictional qualities, and then scatters them throughout the various provisions of Federal law. Thus, theft is currently split into theft of government property, theft of the mails, theft from interstate commerce, etc. The interpretation and application of multiple statutes inevitably result in inconsistencies, loopholes, and hypertechnicalities.

The sentencing structure of present Federal criminal law also cannot escape criticism. Indeed, it is riddled with irrationality and inconsistency. In title 18 alone, there are no fewer than seventeen different maximum terms, apart from the death penalty, and fourteen different fine levels. Only occasionally, as if by accident, are fines related to the amount of injury inflicted or gain realized by the offender, and then the ratio of fine to amount involved may be one-to-one, two-to-one, or three-to-one. Grading of offenses is also erratic. Similar conduct is often treated with gross disparity. For example, robbery of a Federally insured bank carries a maximum term of 20 years while robbery of a Post Office carries a 10 year maximum sentence.[19] In plain terms, the present penalty structure offends the precept of equality before the law.

The shortcomings of the present Federal criminal law do not cease with a consideration of statutory law. Many of the most important sections of the law do not appear at all in statutory form. Such areas as the definition of presumptions, the requisite states of mind for culpability, the substantive law of conspiracy, and other areas have never been fully codified. As a result, the understanding of the law is made more burdensome, the law is often unclear, and in some cases it is inconsistent. Furthermore, while these issues are often central to the determination of criminality, the elected representatives of the people have never effectively participated in the fundamental choices of penal policy posed by these issues.

In short, the Federal penal law as a whole reflects the neglect with which it has been treated for so long. Because of its lack of clarity, consistency, and comprehensiveness, it tends to undermine the very system of justice of which it is the foundation.

The proposed Criminal Code

The Committee strongly believes that the time has come to create, for the first time since the founding of our nation, a systematic, consistent and comprehensive Federal criminal code to replace the hodgepodge that now exists. The bill, as reported, is designed to fulfill this purpose. The Committee makes no pretense that enactment of this bill as the Federal Criminal Code will be a panacea. In an undertaking of this size, there are bound to be some flaws. But as Mr. Justice Cardozo once remarked:[20]

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[18] See Working Papers, pp. 40–41.

[19] 18 U.S.C. 2113(d); 18 U.S.C. 2114. For a partial catalogue of other inconsistencies, see Working Papers, pp. 1246–1249.

> The flaws . . . [are] in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. . . . The tide rises and falls, but the sands of error crumble.

The Committee is convinced that the bill, as reported, will be a rational, integrated code which is both workable and responsive to the demands of our highly complex twentieth-century society. It will be a systematic, sensible, and comprehensive penal policy for the United States.

The bill is divided into seven titles. Title I would amend title 18 of the United States Code by replacing it with a new Code. Title I is the heart of the bill and consists of a thorough revision of substantive Federal criminal law and its codification into an integrated Federal Criminal Code, and a reorganization and revision of the administrative and procedural sections in present title 18 of the United States Code. Titles II and III of the bill consist of amendments to the Federal Rules of Criminal Procedure and to title 28 of the United States Code, respectively. Title IV of the bill contains general provisions including those dealing with severability and the effective date of the legislation. The effective date is delayed for thirty months to afford Federal judges, other officials, defense counsel, legal scholars, and the community at large ample time to prepare for a facilitated conversion to the new Code. Titles V, VI, and VII are essentially conforming amendments preserving certain provisions of current title 18 in other places in the United States Code and conforming nontitle 18 titles to the new Criminal Code.

Among the basic features of the Code as embodied in the bill, as reported, are the following:

(1) Unlike existing title 18, the Code is comprehensive as to felonies. All Federal felonies, many of which are presently codified outside title 18, will be integrated into the new Code. Obsolete or unuseable sections are eliminated.

(2) The proposed Code provides an integrated system for Federal criminal law. As such, definitions of offenses in one part are considered in relation to general provisions and definitions of terms in relation to the sentencing system that appear in other parts. Where terms recur throughout the Code, they are defined in order to avoid inconsistent and confusing interpretations. The Code thus provides a common dictionary to make it understandable on its face. The bill's treatment of culpability, the mental element of an offense, is a striking example. Instead of 79 undefined different terms, or combinations of terms, presently found in title 18, the Code uses four defined terms—intentional, knowing, reckless, and negligent—to describe the state of mind. This treatment is used throughout the Code.

(3) Every effort has been made to draft offenses simply, uniformly, and precisely. Verbose or technical language and endless exam-

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[20] *The Nature of the Judicial Process,* at 177 (1921).

ples have been avoided. Instead, a conscious effort was made to speak in common English. To avoid the temptations to appellate litigation that can flow from different linguistic patterns, a standard and uniform format was developed for all of the specific offenses in the proposed title 18.

(4) The question of what criminal behavior triggers Federal jurisdiction is entirely divorced from the question of what is criminal conduct. Among the numerous advantages to this approach are clarity of drafting, uniformity of interpretation, and consolidation of numerous existing offenses consisting of basically the same type of conduct. For example, over 130 theft offenses under current law—each written in a different fashion to cover the taking of various kinds of property in different jurisdictional situations—have been replaced by a single section. Almost 90 forgery, counterfeiting, and related offenses have been replaced by five sections. Over 150 statutes involving perjury and false statements have been consolidated into four sections, and over 80 arson and property destruction offenses have been reduced to four. In addition to the elimination of the multiplication of offenses, this change in the treatment of jurisdiction allows the tailoring of punishment to the specific conduct engaged in because the focus of the statutes is on the criminal misconduct instead of the breach of a jurisdictional factor.

(5) The sentencing system is entirely revamped. The chaotic variety of existing terms of imprisonment and penalties is replaced by a modern system under which offenses are classified into nine categories for sentencing purposes, and under which the range of penalties more accurately reflects the range of conduct covered by the offenses. The uncertainty and inequity of the current sentencing-parole process is supplanted by a carefully interrelated sentencing package incorporating guidelines, determinate sentences, and appellate review. As a result, existing anomalies can be obviated and penal sanctions can appropriately reflect the seriousness of the offense according to contemporary standards.

While each of these features basically results from the effort at codification and revision, the proposed Code is more than that. It is an effort at reform as well, and, in this respect, some new offenses are created and some existing offenses drafted in a way to make them more effective. In brief, some of these reforms include the following:

Federal jurisdiction

The proposed Code takes a discriminating approach to jurisdiction. Rather than draft general jurisdictional bases made applicable to an offense by reference, the bill, as reported, drafts the jurisdictional base for each offense separately in order to insure that the jurisdictional reach of the offense extends only as far as necessary.

The jurisdictional bases are drafted in recognition of the need to limit criminal jurisdiction to the specific needs and areas delineated by the Constitution and our traditions of federalism. The Final Report of the National Commission[21] was greeted by substantial criticism with respect to its jurisdictional provisions, particularly its adoption of the so-called "piggyback jurisdiction" concept under which Federal jurisdiction over one offense carries on its back jurisdiction over other offenses committed by the defendant. It was suggested in the subcommittee's hearings that the Final Report's approach to jurisdiction could result in the Federal Government usurping the role of the States in enforcing criminal law. In response to that concern, this bill, as reported, rejects general piggyback jurisdiction. It emphatically rejects the notion of drastic encroachment on areas of State sovereignty, whether by proliferating the number of jurisdictional bases or by radically expanding their applicability. As reported, the bill is carefully drafted so that there is little significant expansion over present law of the reach of the Federal power to investigate and prosecute crime and criminals, and where an expansion necessarily occurs, it is carefully circumscribed. Moreover, a new series of provisions is introduced into the law to help insure a rational, cooperative division of law enforcement responsibilities between the Federal Government and the State and local governments.

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[21] A recent article by the former Director of the National Commission reviews the jurisdictional and other major issues raised by the Final Report and its progeny. L. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects,* 1977 Duke L.J. 171.

White collar crimes

In order to combat white collar crime, several innovations are employed. A consumer protection offense is created to allow more effective prosectution of pyramid sales schemes. Frauds and briberies involving Government programs are covered directly. The mail and wire fraud statutes are strengthened. Jurisdiction for these offenses is extended to cover the use of instrumentalities of, or travel in, interstate commerce as well as the use of the mails, in order to ensure that fraud on a national scale is subject to Federal prosecution. Furthermore, these, as well as other provisions of the Code, have been made measurably more effective by raising fines to the degree that they can no longer be written off by an offender as simply a cost of doing business.

Civil rights statutes

The civil rights statutes are modernized and made more effective in recognition of the legitimate interest of the Federal Government in vindicating the civil rights of its citizens. Discrimination on the basis of sex is added to other forms of discrimination probibited under current criminal law.

Organized crime offenses

Two new offenses have been created in the organized crime area. The first makes it unlawful to operate a racketeering syndicate, that is, to lead organized crime. In this way, those who are the leaders of organized crime will subject themselves to criminal liability by that very fact.

The second new offense in this area is called "Washing Racketeering Proceeds." It makes it an offense to "launder" the proceeds of organized crime by investing the gains of organized crime in other business. All too often the phrase, "crime does not pay," is belied by organized criminals. Through their racketeering activities they mulct funds from their victims and then launder these proceeds through so-called "legitimate" businesses. By making the laundering of these proceeds a crime, this offense is designed to strip away the financial fabric of organized crime.

Other modifications in this area include broadening the existing loansharking offense in order to allow the more effective prosecution of those who prey upon the financial difficulties of others, including coverage of murder by organized crime "hit men", and adding coverage of high stakes "arson for profit".

The rape offense

The proposed Code takes a more enlightened approach toward the offense of rape. The sex offenses apply without discrimination to both men and women. Rape and related offenses are defined to cover the non-intercourse so-called "crimes against nature" to permit prosecution for rape for compelling another to engage in such acts by force or threats. The Code rejects the requirements that the victim's testimony must be corroborated before the offender can be convicted except where the offense is committed between spouses. In this sense, it treats a rape victim like any other victim. In order to eliminate the situation where the rapist feels that he—or she—has nothing more to lose by killing his victim, the Code lowers the penalty for the basic rape offense to a grade less than that provided for murder.

Campaign practices

A new offense is created in the wake of the 1972 Presidential campaign to prohibit sabotage of political campaigns. The offense confers Federal jurisdiction over a crime if it occurs during a Federal campaign with the intent to influence the outcome of the Federal election. Federal jurisdiction over the break-in of the Democratic headquarters in the Watergate Hotel was purely fortuitous. Federal jurisdiction existed because the hotel is in the District of Columbia. If the same break-in had occurred in a party's headquarters in a State, the Federal Government would not have had jurisdiction. The proposed Code cures this defect by vesting jurisdiction in the Federal Government over any felony committed for the purpose of affecting a Federal election.

The sentencing system

The sentencing provisions of the Code represent a complete revision and reformation of sentencing law to assure that sentences are fair both to defendants and to the public. The provisions are designed to achieve a rationality, uniformity, and fairness that simply have not existed before.

The Code creates a Sentencing Commission within the judicial branch of the Federal Government which is directed to establish sentencing guidelines to govern the imposition of sentences for all Federal offenses. In drafting the guidelines, the Commission is directed to take into consideration factors relating to the purposes of sentencing, the characteristics of offenders, and the aggravating and mitigating circumstances under which specific offenses may be committed. For each Federal offense, the guidelines are to specify a variety of appropriate sentencing ranges, depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense is committed.

The judge will be expected to sentence a defendant within the range specified in the guideline covering the specific situation in the case before him, although, if he considers the guideline range inappropriate because of factors not taken into consideration by the Sentencing Commission, he is free to sentence the defendant above or below the guideline range as long as he explains his reasons for doing so. If an offender is sentenced above the range specified in the guidelines he may obtain a review of his sentence—new to Federal law—by the Federal court of appeals for the circuit; if he is sentenced below the range specified in the guidelines the government, with the Attorney General's or the Solicitor General's personal approval, may obtain a review of the sentence on behalf of the public. The system is designed to promote general uniformity and fairness while retaining necessary flexibility.

Within this framework, numerous improvements have been made to the sentencing statutes. Each offense in the Code is graded according to its relative seriousness. Maximum fines for most offenses have been substantially increased, with higher maximum fines provided for organizational offenders than for individuals, and with felony-level maximum fines provided for misdemeanors that result in death. Probation is designated a sentence, rather than a suspension of a sentence, and numerous possible conditions of probation are suggested in order to encourage judges to use probation rather than imprisonment whenever appropriate. Two new kinds of sanctions are added—an order of notice to victims of a fraudulent offense in order to permit the victims to pursue civil remedies, and an order of restitution to victims who have suffered bodily injury or property damage or loss as a result of an offense.

A particularly noteworthy improvement is made with regard to sentences to imprisonment. Such sentences under the Code are fully determinate—the sentence imposed by the judge is the sentence that will actually be served by the defendant, subject only to modest "good time" credits. The sentences to imprisonment imposed by judges under the Code will approximate average sentences actually served for similar offenses under current law, rather than being artificially inflated as they are today because of the current provisions for early release on parole. Accordingly, the Parole Commission is abolished, with its sentence leavening function being assumed by the guidelines system for imposing sentences, by the appellate review procedures, and by a provision for limited reconsideration of unusually long sentences. Post-release supervision by probation officers, however, is retained. The result is a "truth-in-sentencing" package that will lessen defendants' frustrations with unequal sentences and the public's cynicism that is prompted by the lack of candor in the current sentencing-parole process.

More effective bail statutes

The bill also recognizes the need for improvement in the procedures for bailing both suspects accused of crime and convicted offenders awaiting sentence or appealing their convictions. One important change is the recognition—concurred in by the Committee—that consideration of "community safety" should be taken into account by the courts in determining whether pretrial release is appropriate and in setting bail release conditions.[22] Today, Federal law required a judge to consider only risk of flight and the likelihood of the defendant's appearance at trial in determining whether or not bail should be granted and on what conditions. But recent statistics demonstrate that crimes committed by bailed offenders are a more serious problem than flight. Accordingly, the Committee has approved a proposal which would allow community safety to be taken into account for the first time in making pretrial release decisions.

A second critical change revolves around the recognition—again concurred in by the Committee—that the existing use of money bail is too often used as an unstated way to incarcerate defendants pending trial. The bill promotes candor and accountability in the bail decision by establishing a "means test" which limits imposition of financial conditions to an amount which the defendant can raise.

The bail also makes important changes in current law pertaining to the bailing of convicted offenders as well. The bill recognizes that the deterrent impact of the criminal law suffers when offenders convicted of a crime are allowed to remain out on bail for months and even years while their sentence is postponed or an appeal of their conviction is taken. The bill alters the present presumption in favor of bail in such cases and recognizes that bail should not be automatically granted, especially where the court concludes that the offender's appeal from this conviction is frivolous and unlikely to succeed.

The procedural part of the Code

The procedural part of the Code is more a consolidation and revision than a reform. This consolidation and revision of the existing provisions is designed to bring rationality and order to criminal procedure without, for the most part, making major changes. Several reforms are adopted, however. Significant improvements are made, for example, in the bail-release area to draw a more careful balance between the needs of the public and the rights of charged but unconvicted defendants. Major innovations are introduced in handling individuals with mental disease or defects, insuring them treatment at all stages of the criminal process. The Code reflects recent thinking of Congress in the juvenile criminal justice area by incorporating the provisions of Public Law 93-415, amended to make certain changes suggested by the Attorney General's Task Force on Violent Crime. The fine as a sanction for violation of Federal criminal law is made more effective through collection procedures designed to treat fines in a manner similar to tax liens.

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[22] The laws of several states recognize that dangerousness is an appropriate concern in bail determinations. States permitting some consideration of defendant dangerousness include Alabama, Alaska, Arkansas, Colorado, Delaware, Hawaii, Kentucky, Maryland, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, and Virginia, as well as the District of Columbia. See *Bail Reform*, Hearings before the Subcommittee on The Constitution, Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess., September 17 and October 21, 1981 (testimony of Jeffrey Harris, Deputy Associate Attorney General, Department of Justice).

Background of the proposed Federal Criminal Code

The bill, as reported, is the product of many years of hard work and careful thought by a large number of distinguished and concerned people. Indeed, it represents an example of the best kind of joint legislative development by private and public bodies and individuals.

In a real sense, the Federal criminal code proposed here has been in the germination stage for almost 30 years. The bill can trace its lineage to the work of the American Law Institute, which, in 1952, began the planning and drafting of a "Model Penal Code," and its chief reporter published the substance of the plan in a law review article, Wechsler, *The Challenge of a Model Penal Code.*[23]

The first concrete step leading to the introduction of the current bill then came in March of 1953, when the Council of the American Law Institute met and considered "Tentative Draft No. 1" of a Model Penal Code. In commenting on those early beginnings, the chief reporter for the Model Penal Code told the Subcommittee on Criminal Laws and Procedures in 1971:[24]

> Preliminary studies left no doubt to us that the central challenge of the penal law inhered in the state of our penal legislation. Viewing the country as a whole, criminal law consisted of an uneasy mixture of fragmentary and uneven and fortuitous statutory articulation, common law concepts of uncertain scope and a miscellany of modern enactments passed on an ad hoc basis and frequently producing gross disparities in liability or sentence.

The Institute labored for 10 years and in 1962, published the "Proposed Official Draft" of a Model Penal Code.

Several State legislatures during and, in the case of one State, before this same period were also considering enacting a modern criminal code. Louisiana broke the ground in 1942 by enacting the first modern American criminal code,[25] itself the product of over 100 years of effort. Immediately subsequent to the development of the Model Penal Code, modern criminal codes were passed in Illinois, 1962; Minnesota, 1963; New Mexico, 1963; and Wisconsin, 1965.[26]

The next major step in the lineal progression was the legislative creation in New York State in 1961 of a Temporary Commission on Revision of the Penal Law and Criminal Code. The New York Commission prepared a code which, while differing in some respects from the Model Penal Code, clearly traces its lineage to the Institute's brilliant work. In signing the New York Revised Penal Law, Gov. Nelson A. Rockefeller observed:[27]

> [The Code] reorganizes and modernizes penal provisions proscribing conduct which has traditionally been considered criminal in Anglo-Saxon jurisprudence. Related

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[23] Wechsler, *supra* note 12, at 1097.

[24] Hearings. p. 522.

[25] Act 43 of 1942.

[26] *Supra* note 13. The American Law Institute now lists 35 States and the Commonwealth of Puerto Rico as having revised their criminal codes, and notes that revision is underway in several other States.

[27] Governor's Memorandum of Approval, July 20, 1965.

> crimes are grouped together in logically related titles, definitions are more carefully prescribed, and a new scheme of sentencing is provided affording ample scope for both the rehabilitation of offenders and the protection of society. In line with the Commission's objective, a system of penal sanction is achieved which protects society against transgressors, balanced with safeguards for persons charged with crime.

A similar comment could be made of this bill.

The next key step was taken by the Congress itself in 1966. In that year Public Law 89-801 was enacted, creating a "National Commission on Reform of Federal Criminal Laws," commonly called, after its distinguished Chairman, former Governor Edmund G. "Pat" Brown of California, the "Brown Commission." The Commission was charged by the Congress to:

> Make a full and complete review and study of the statutory and case law of the United States which constitutes the Federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the Federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.

The Commission, on which Senators McClellan, Hruska, and Ervin of the Subcommittee on Criminal Laws and Procedure were privileged to serve, prepared its own draft recommendations, which also made important improvements, but followed lineally from the earlier works. The product of nearly three years of deliberation by the Commission, its advisory committee headed by then retired Justice Tom C. Clark, its able staff headed by Professor Louis B. Schwartz, and its consultants, the recommendations were submitted to the Congress and the President on January 7, 1971, in the form of a Final Report. The Report, some 364 pages in length, was tendered not as a final product but, as the Commission noted in its letter of transmittal, as a "work basis" to facilitate congressional choices. In fact, it served as just that for intensive and extensive hearings by the Subcommittee on Criminal Laws and Procedures. S. 1, as introduced on January 4, 1973, in the 93d Congress, by Senator McClellan, joined by Senators Hruska and Ervin, derived from the draft of the National Commission in much the same way that the National Commission draft derived from the New York Revised Penal Law and the Model Penal Code.

A welcome next step came when the President of the United States, on January 16, 1971, issued a statement commending the Brown Commission for its labors and directing the Department of Justice in a simultaneous memorandum to establish a special team of attorneys within the Department to work fulltime on the study of the draft and codification and to "work closely with appropriate congressional committees and their staffs through the evaluation and recommendation process." The President declared in his statement:[28]

> Over two centuries the Federal criminal law of the United States has evolved in a manner both sporadic and haphazard. Needs have been met as they have arisen. Ad hoc solutions have been utilized. Many areas of criminal law have been left to development by the courts on a case-by-case basis—a less than satisfactory means of developing broad governing legal principles.
>
> Not unexpectedly with such a process, gaps and loopholes in the structure of Federal law have appeared; worthwhile statutes have been found on the books side by side with the unusable and the obsolete. Complex, confusing and even conflicting, laws and procedures have all too often resulted in rendering justice neither to society nor to the accused.
>
> Laws that are not clear, procedures that are not understood, undermine the very system of justice of which they are the foundations.

In response to the President's directive to propose a thoroughgoing revision of the Federal criminal code, the Attorney General assembled a team of Department of Justice attorneys, most of whom had extensive trial and appellate experience in Federal courts, into a Criminal Code Revision Unit within the Department of Justice.

The Unit maintained close contact with the Judiciary Committees of both Houses of Congress, with other concerned agencies of the Federal government and with other divisions and offices within the Department of Justice. By early 1973, the Unit had drafted Senate Bill 1400, introduced by Senators Hruska and McClellan on March 27, 1973, as a bill to "reform, revise, and codify the substantive criminal law of the United States . . .". S. 1400, like S. 1 in the 93d Congress, owed its principal indebtedness to the work basis supplied by the National Commission and to those elements of current statutory and case law that have proved particularly effective.

Both S. 1 in the 93d Congress and S. 1400, along with the National Commission's Final Report, were the subject of extensive hearings and efforts of the Subcommittee on Criminal Laws and Procedure. In February of 1971, the subcommittee began its hearings and studies on the recommendations of the National Commission. The hearings and studies continued over the course of the 92d Congress and the 93d Congress. When the Final Report of the National Commission was released, the subcommittee sent out 6,000 letters to all State attorneys general, local and county district attorneys, professors of criminal law and related fields, criminal defense attorneys, and private groups, asking for comments on the recommendations of the National Commission. A hearing record was compiled which ran over 8,000 pages of testimony, statements, and exhibits in 14 volumes. There were weeks of public hearings on the work of the National Commission, State experience with criminal law revision, and various policy questions presented by the Draft

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[28] Hearings, p. 5.

Code prepared by the National Commission, and S. 1 and S. 1400. In all, scores of witnesses gave testimony before, or submitted prepared statements to the subcommittee during these hearings.

On January 15, 1975, Senator McClellan (for himself and Senators Hruska, Bayh,[29] Eastland, Fong, Griffin, Mansfield, Moss, Scott of Pennsylvania, Taft, and Tower) introduced a criminal code bill in the 94th Congress, again designated as S. 1, which brought together in a single bill a comprehensive criminal code drawn from the Brown Commission recommendations, S. 1 in the 93d Congress, S. 1400, and the extensive hearings and staff discussions in both the 92d and 93d Congresses. Following hearings on the measure, the Subcommittee on Criminal Laws and Procedures reported the bill, with amendments, to the full Committee on the Judiciary on October 21, 1975. The Committee did not act in the 94th Congress largely due to controversy surrounding a relatively small number of issues.

On May 2, 1977, Senators McClellan and Kennedy introduced S. 1437 in the Ninety-Fifth Congress—the Criminal Code Reform Act of 1977. S. 1437 was the result of efforts to identify and resolve in a spirit of give and take the conflicting views that surfaced in the previous Congress. Five days of hearings were held on this bill on June 7, 8, 9, 20, and 21, 1977, to supplement prior extensive hearings on criminal code legislation. Witnesses included a number of Senators, the Attorney General, former Governor Edmund G. Brown of California, former Senator Roman L. Hruska, Professor Louis B. Schwartz, members of the Judicial Conference of the United States, representatives from the Executive Branch of the Government, and other prominent authorities from the judiciary and academic fields on provisions relating to sentencing and codification generally.

On September 7, 1979, Senator Kennedy (for himself and Senator Thurmond, DeConcini, Hatch, and Simpson) introduced S. 1722 in the Ninety-Sixth Congress. Six additional days of hearings were held by the Senate Committee on the Judiciary.

Numbers alone do not do credit to the tremendous amount of study, discussion, and preparation that went into the presentations of a number of the organizations which appeared or submitted comments. The organizations include: the Association of the Bar of the City of New York, the American Civil Liberties Union, the National Legal Aid and Defender Association, the National Council on Crime and Delinquency, the New York County Lawyers Association, the National District Attorney's Association, the National Association for the Advancement of Colored People Legal Defense and Education Fund, the National Association of Attorneys General, the National Association of Manufacturers, the Committee for Economic Development, and the American Bar Association's Sections of Taxation, Antitrust, Corporation, Banking, and Business Law, and a Special Committee of the Section of Criminal Law of the American Bar Association.

In addition, a number of staff studies and surveys were undertaken by the former Subcommittee on Criminal Laws and Procedures which involved the sending of questionnaires to various groups requesting specialized information and suggestions. A mailing was made to district attorneys and public defenders in States having a bifurcated trial system in capital cases; a questionnaire was sent to all State and local wardens and correctional administrators on the utility of "good time" credits against prison sentences; a questionnaire was sent to all 92 United States chief probation officers—which drew an 80 percent response rate—on aspects of probation; a letter was sent to the mental health departments of each of the 50 States setting forth all the proposed approaches to the problem of the criminal defendant who may be mentally ill; letters were sent to groups involved with Indian affairs and to the attorneys general of the States which now have Indian country, requesting opinions on the scope of Federal criminal jurisdiction over Indians; a questionnaire was sent to each Federal executive department, agency, and commission with jurisdiction over one or more offenses in the United States Code requesting an analysis, comparison, and evaluation of the impact of the proposed code on their work; a letter-questionnaire was sent to each of the professors of comparative law in the United States and to each of the foreign law divisions of the Library of Congress requesting detailed information on the form and content of foreign criminal codes.

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[29] On September 10, 1975, Senator Bayh withdrew as a cosponsor. Cong. Rec., p. S15705 (daily ed.).

An additional word on the foreign law study, unique in depth and scope, may be in order, for the staff of the Law Library of the Library of Congress deserves special commendation for, in a relatively short period of time, preparing detailed studies on the criminal law and criminal codes of 25 foreign countries; the comparative law study, published as Part III–C—Comparative Law—of the hearings, has provided the Committee with an appreciation of other nations' approach to criminal law.

Further, the Administrative Office of the United States Courts prepared several volumes on the criminal business of the Federal courts and the impact of the proposed code. In return, this study has been the subject of extensive correspondence by the subcommittee with the Federal judiciary. An effort has also been made to enlist the aid and support of the relevant advisory committees of the Judicial Conference. In this connection, the assistance of Judges Albert B. Maris, of Philadelphia, and J. Edward Lumbard, of New York, deserves special mention. They have been most understanding and helpful. The National Institute of Law Enforcement and Criminal Justice also prepared several specific memoranda, and the Department of Justice has made a special effort to work closely with the Committee.

The Committee recognizes the monumental contribution of the late Senator John L. McClellan toward the goal of a modern Federal Criminal Code. His counsel in the past is just as applicable today:[30]

> Our people today are restless with the administration of justice, Federal and State. Reform is now timely. If we delay reform too long, we run the real risk that the price

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[30] 119 Cong. Rec. S. 567 (January 12, 1973 (daily ed.)).

> of delayed reform may be that the framework of civil liberty and federalism embodied in our Constitution and Bill of Rights will be condemned and demolished by those seeking to achieve only efficiency in the operation of our system of criminal justice. We cannot permit that to happen.
>
> Mr. President, we must recognize that there are those who would adopt any change that might promise relief from the ills that beset our system of criminal justice. Expediency, not sound judgment, is all that seems to occupy their minds. To them I would recall the words of Dean Pound:
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> [I]n criminal law, as everywhere else in law, the problem is one of compromise; of balancing conflicting interests and of securing as much as may be with the least sacrifice to other interests. (R. Pound, Criminal Justice in the American City, 18 (1922).)
>
> In my judgment, however, we can enact a new Code without sacrificing either our liberty or our security. The task will not be easy; the road will be hard. But with a spirit of good will, compromise, and cooperation on the part of all, it an be done.

The Committee also acknowledges with special appreciation the long labors of the former ranking minority member of the Committee and of the Subcommittee on Criminal Laws and Procedures, Senator Roman L. Hruska, to achieve a modern Federal Criminal Code. In the months of hearings and study conducted by the Subcommittee spanning Senator Hruska's last six years in the Senate, he was tireless in his dedication to the task. Although no longer in the Senate, his efforts made progress to this point possible and established him as a giant in the field of modern criminal law reform.

In the light of the many and detailed comments and criticisms that have arisen during the course of the hearings described above, the Committee is reporting a bill that reflects many of these comments and criticisms. The Committee believes that the bill, as reported, is an extension and improvement over the earlier proposals.

The bill, as reported, in conjunction with a similar effort in the House of Representatives, offers Congress a realistic opportunity to restructure Federal criminal law for the first time in 200 years so as to better serve the ends of justice in their broadest sense—justice to the individual and justice to society as a whole. Considering the vital issues of liberty and order involved, the Committee believes that it is long overdue for Congress to translate this proposal into reality.

TITLE I

CODIFICATION, REVISION, AND REFORM OF TITLE 18

PART I.—GENERAL PROVISIONS AND PRINCIPLES

Part I of the Federal Criminal Code is devoted to the general provisions and principles that are to be used primarily in enforcing the provisions on offenses in Part II. There are five chapters under Part I. Chapter 1 concerns general provisions; chapter 2 concerns jurisdiction; chapter 3 concerns culpable states of mind; chapter 4 concerns complicity; and chapter 5 concerns bars and defenses.

Part I codifies much more than what is currently codified in Federal law. This Part features a definition section that is much more conprehensive than the definition sections now found in title 18 and the Federal Rules of Criminal Procedure. In virtually every respect the subject matters dealt with in this Part are treated in much greater detail than can be found now in Federal statutes. Particular attention has been given to defining the cuplable states of mind elemental to criminal offenses, because, in the absence of any such precise definition, there has been considerable and frequently troublesome litigation over issues of criminal intent. Under this Code it will no longer happen that elements of criminal intent will be found to be implicit in criminal statues or that the courts will have to construe vague words of criminal intent such as "willfully."

The provisions in this Part on complicity and on jurisdiction have more of a counterpart in existing statutes than the other general subjects but are nonetheless innovative in certain respects. For example, the approach to jurisdiction in chapter 2 represents a substantial departure from the approach taken under existing law in that jurisdiction is not treated as an element of an offense.

CHAPTER 1.—GENERAL PROVISIONS

This chapter contains two subchapters, the first covering matters relating to purpose and application of the proposed Federal Criminal Code, and the second dealing with matters relating to construction of the provisions within it.

SUBCHAPTER A.—MATTERS RELATING TO PURPOSE AND APPLICATION

(Sections 101–104)

This subchapter opens with a section stating the general purpose of the proposed Federal Criminal Code. The subchapter also contains sections setting forth the general principle of criminal liability for the Code (section 102), the extent of application of the provisions within this proposed title (section 103), and a disclaimer to affect certain civil remedies and powers (section 104).

SECTION 101. GENERAL PURPOSE

This section stands as a preamble to the Federal Criminal Code, stating in brief the answer to the basic questions (1) what is the general purpose to be served by Federal criminal laws, (2) what are the objectives to be served by the imposition of criminal sanctions, and (3) what are the goals of the procedural provisions. In short, this section seeks to identify and enunciate the fundamental principles underlying a Federal criminal justice system.

There is no section like this one now in title 18. However, statements of purpose or legislative policy are not unusual in Federal statues[1] and are not without practical significance. As discussed more fully below, the section may serve as a measure for the three branches of government in discharging their responsibilities in the criminal justice system.

The general purpose of the Federal Criminal Code, as stated in this section, is to establish justice in the context of a Federal system. Government has no higher duty than to provide its citizens a safe and secure environment for the enjoyment of their lawful pursuits. The lesson of history has been that such security cannot be provided except under a system of laws and in the spirit of justice. Under our Federal system the several States bear the primary responsibility for exercising the police powers of government, while the Federal government bears a secondary but nonetheless essential responsibility.

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[1] See Working Papers, p. 4. Recent State penal legislation has contained statements of purpose. E.g., Del. Crim. Code Ann. § 11-201 (1973); Ill. Rev. Crim. Code, §§ 1-2 (1961); McKinney's N.Y. Rev. Pen. Law, § 1.05 (1967); 18 Consol. Pa. Stat. Ann. § 104 (1973).

The general purpose of establishing a Federal system of criminal justice is to be accomplished by certain means: (1) by defining the proscribed conduct that affects Federal interests; (2) by using appropriate penal sanctions to the extent necessary to vindicate the application of Federal law; and (3) by establishing a system of fair and expeditious procedures from the investigatory through the penal stages.

Subsection (a) of section 101 concerns the need for defining and providing notice[2] of that conduct which indefensibly causes or threatens harm to those individual or public interests for which Federal protection, through the criminal justice system, is appropriate.

Subsection (b) states the four objectives, representing the penal policy for the Federal system in imposing criminal sanctions.[3] Criminal sanctions must be made available and used: (1) to deter the defendant and others from committing crime; (2) to protect the public from the offender; (3) to assure just punishment for the conduct; and (4) to promote the correction and rehabilitation of the offender.

Subsection (c) concerns the need for establishing a system of fair and expeditious procedures (1) for investigating complaints or allegations of criminal conduct, by means that will lead to the identification of persons who have engaged in such conduct and that will safeguard persons who have not so engaged; (2) for determining who is guilty and for exonerating the innocent; and (3) for imposing merited sentences upon the guilty.

This section can serve as a touchstone in the Federal criminal justice system. In its brief compass are to be found principles of wide application. It declares standards by which to measure future legislation, reminding that the measures must be definitive and that the subject matter must warrant Federal attention. It implicitly offers a rationale for the exercise of prosecutive discretion where a Federal violation occurs under such circumstances that the Federal interest is slight and the case is better left for State cognizance. It focuses the consideration of sentencing courts on the four generally recognized aims in sentencing. And it enjoins fairness and dispatch at every stage in the criminal justice process. In sum, the section fixes the ultimate goals of the Federal Criminal Code and the outline of the system to be used in achieving those goals. The workings of government under this title should be made to reflect the emphases laid down in this section

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[2] "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). See also *United States* v. *Vuitch*, 402 U.S. 62 (1971); *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947).

[3] See Working Papers, p. 4.

SECTION 102. GENERAL PRINCIPLE OF CRIMINAL LIABILITY

This section lists all the constituent elements that may possibly be involved in a Federal crime under title 18 of the United States Code. A title 18 offense is committed only if: (1) a person engages directly or indirectly in or is responsible for conduct described as an offense in a section of Part II of the title; (2) the circumstances, if any, described in the section exist at the time of the conduct; (3) the results, if any, described in the section are caused by the conduct, in that such a result would not have occurred if the conduct had not occurred, or that the conduct substantially contributed to, or would have independently caused, the occurrence of such a result; (4) the states of mind described in the section, or required under chapter 3 of this title, exist at the time of the conduct with respect to the described conduct, circumstances, and results; and (5) no defense or affirmative defense that is properly raised exists as described either in the section or in an applicable general-provisions section, or as otherwise recognized by law. This section simply brings together recognized principles of law[4] and provides a general checklist for determining criminal liability. The phrase "directly or indirectly" is designed to underscore the concept that indirect conduct (e.g., lending money through a "straw man") is covered by the offenses throughout this Code. The phrase currently appears in a number of Federal criminal statutes, usually in connection with prohibitions on various types of financial transactions.[5]

SECTION 103. APPLICATION

The bill, as reported, will create the single title in the United States Code under which the great bulk of Federal criminal prosecutions will be instituted and maintained. The title is not, however, co-extensive with the need for congressional enactment of criminal laws, and the Committee recognizes that application of the provisions in this title to certain places or in certain contexts would be inappropriate as compared with existing sets of laws governing such areas or contexts. Accordingly, this section states that, except as may otherwise be specifically provided, the provisions of the proposed Federal Criminal Code do not apply to prosecutions under any Act of Congress applicable exclusively in the District of Columbia or under the Uniform Code of Military Justice.

SECTION 104. CIVIL REMEDIES AND POWERS UNIMPAIRED

This section provides that, except as otherwise provided, nothing in this title shall affect either (1) the availability or terms of any civil or administrative remedy, (2) the power of a court to compel compliance with its order, decree, process, writ, or rule by means of civil proceedings, or (3) the authority of a court to direct the compensation of a complainant for loss. It may be noted that the section specifically preserves the civil remedy for contempt of court (incarceration until the individual is willing to obey the court's order). Otherwise the section makes clear that, while the criminal laws are enforced primarily to vindicate the interests of the people as a whole, the interests of the individual victims of crime are also to be served, and the victims of crime, including the government, may be entitled to civil forms of redress for conduct that has been punished under the criminal law.

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[4] For an extended discussion of the principle of legality, see Working Papers, pp. 4, 6–7. "Conduct" is defined in section 111 to include "any act, any omission, and any possession. . . ." "Act" is defined in the same section to mean "a bodily movement or activity. . . ." The latter definition is intended to include speech and all other bodily movements and activities.

[5] E.g., 18 U.S.C. 201, 495, 500, 600, 601, 608, 794, 893, 1082, 1461, 1462; 29 U.S.C. 503. See also, *United States* v. *Ferrara*, 451 F.2d 91 (2d Cir. 1971).

SUBCHAPTER B.—MATTERS RELATING TO CONSTRUCTION

(Section 111-112)

This subchapter consists of two significant sections, one containing general definitions and the other setting forth certain general principles of construction.

SECTION 111. GENERAL DEFINITIONS

This section defines about one hundred words and phrases for the general purposes of this title and the Federal Rules of Criminal Procedure and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.[1] The definitions are made applicable unless a different meaning is plainly required. In some instances, there has been no attempt to give the full meaning of a term; rather the ordinary meaning has been implicitly adopted and the definition states that the term "includes" particular matter. The various terms contained in this section are explained, where necessary, in relation to the sections where they apply, but in many instances the definitions are self explanatory in light of the common dictionary meanings of the defining terms.

SECTION 112. GENERAL PRICIPLES OF CONSTRUCTION

This section contains five subsections. Subsection (a) sets down, as a general principle of construction, that the "provisions of this title shall be construed in accordance with the fair import of their terms to effectuate the general purposes of this title, particularly to assure definition and notice of the conduct prohibited in accordance with the rule of strict construction as applied by the federal courts." This language carries forward what the Committee perceives to be the current Federal rule that provisions of a criminal statute will, within the context of providing clear definition and notice of the conduct prohibited, be construed to reach conduct within scope or coverage intended by the legislature as determined by reading the provisions according to the fair import of their terms.

The National Commission recommended a similar provision, and comparable statements are to be found in several State penal codes.[2]

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[1] Present title 18 contains no definition section that is nearly so comprehensive, but a number of the chapters of the title contain sections devoted to definition of terms.

[2] See Final Report. § 102; Working Papers. pp. 5-6: Ariz. Rev. Stats. Ann., § 1-211 (1956); Ark. Stats. Ann., § 1-203, 1-204 (1947); Cal. Penal Code, § 4 (1957); Colo. Rev. Stats. Ann., § 2-4-212 (1973); Del. Code Ann., § 11-203 (1974); Idaho Code Ann., § 73-102 (1947); Ill. Rev. Stats., § 131, § 1 (Smith-Hurd 1933); Iowa Code Ann., § 4.2 (1946); Ky. Rev. Stats., § 500.030 (1974); La. Rev. Stats.,

The rule would not adopt the artificial canon of "strict construction" under which a court is obligated to adopt the narrowest possible view of the language used by Congress in a criminal statute. As observed by the National Commission, application of the "strict" rule in the past has occasionally resulted in the acquittal of persons who were clearly within the letter and spirit of the law.[3] A more serious consequence, however, "is that Federal criminal law has been made intolerably cumbersome, as the legislative draftsman has sought to anticipate every possible narrow construction." [4]

In its origins the rule of strict construction was an outgrowth of the fact that at common law the main responsibility for formulating English criminal law resided in the judiciary. "In those circumstances legislation could be regarded as an exceptional intrusion into the main body of judge-made law. There was no systematic Code. But when the legislature has assumed responsibility for a comprehensive, integrated Criminal Code, it is not appropriate for the courts to presume that only the least possible alteration of a body of nonstatutory law was intended." [5]

In this country, the Supreme Court has generlly not interpreted the rule of strict construction as mandating that the narrowest reading be given to a penal enactment.[6] As stated in *United States* v. *Cook:*[7]

> We are mindful of the maxim that penal statutes should be strictly construed. But that canon "is not an inexorable command to override common sense and evident statutory purpose," *United States* v. *Brown*, 333 U.S. 18, 25, and does not "require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress" *United States* v. *Raynor*, 302 U.S. 540, 552.

A similar declaration was made in *United States* v. *Hartwell,*[8] where the Court said:

> The object in construing penal, as well as other statutes, is to ascertain the legislative intent.
> . . . The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject . . . The rule of strict construction is not violated by permitting the words of the statute to have their full

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§RS 14-3 (1951); Mich. Stats. Ann., §28.192 (1962); Minn. Stats. Ann., §609.01 (1946); Mont. Rev. Code Ann., §94-101 (Choate 1947); Neb. Rev. Stats., §29-106 (1943); Nev. Rev. Stats., §193.030 (1957); N.Y. Rev. Pen. Law, §5 (McKinney's 1967); N. Dak. Century Code, §29-01-29 (1960); Ore. Rev. Stats., §161.025 (1953); Pa. Crim. Code, §105 (1973); S. Dak. Comp. Laws, §22-1-1 (1967); Tex. Pen. Code, §1.05 (Vernon's 1952); Utah Code Ann., §76-1-2 (1953); Wash. Rev. Code Ann., §9A.04.20 (1967).

[3] See, e.g., *McBoyle* v. *United States*, 283 U.S. 25 (1931), in which the Supreme Court held that an aircraft was not a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act.

[4] Working Papers, p. 5.

[5] *Ibid.*

[6] But see, for some examples of the apparent implementation of such a rule, *id.* at 8.

[7] 384 U.S. 257, 262-263 (1966). See also *United States* v. *Powell*, 423 U.S. 87 (1975).

[8] 73 U.S. (6 Wall.) 385-396 (1867).

> meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

In modern times, the Court has reduced the impact of the so-called "strict" rule more or less to a rule of lenity, requiring that the narrower or less harsh construction of a criminal statute be adopted only when the language and history of the enactment together do not dispel an ambiguity.[9] As recently enunicated in *United States* v. *Bass*[10] (footnote and some citations omitted):

> [A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States,* 401 U.S. 808, 812 (1971). See also *Ladner* v. *United States,* 358 U.S. 169 (1958). . . . In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

Subsection (a) of section 112 would not purport to modify the rule of lenity, which is based primarily on considerations, rooted in constitutional due process, of affording fair notice of what conduct is prohibited. It does, however, make clear the automatic niggardly interpretations are to be avoided and that the search is to be directed at discovering the "fair import" of the statutory language in accordance with the general purpose of this title as set forth in section 101, discussed above. The Committee believes this to be a proper general precept, in accordance with the contemporary attitude and modern judicial decisions, that legislation (whether penal or otherwise) is enacted "as a working instrument of government and not merely as a collection of English words."[11]

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[9] See *United States* v. *Campos-Serrano,* 404 U.S. 293 (1971).

[10] 404 U.S. 336, 347-348 (1971).

[11] *United States* v. *Dotterweich,* 320 U.S. 277, 280 (1943). See generally, Hall, *Strict or Liberal Construction of Criminal Statutes,* 48 Harv. L. Rev. 748 (1935). See also the letter of October 31,

Subsection (b) of section 112 provides that titles, headings, and parenthetical explanations have been used simply as shorthand expressions and are not to be taken as indices of the meaning of any provisions of the Code.

Subsection (c) of section 112 provides that terms used in titles to sections and which are commonly used in a generic sense (e.g.,

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1977, from Attorney General Griffin B. Bell to Senator Edward M. Kennedy, responding to the Senator's request for the views of the Department of Justice on a proposed amendment (later offered and rejected during the Committee's consideration of S. 1437) to amend section 112(a) to restore the so-called "rule" of strict construction. In opposing the amendment, the Attorney General wrote as follows:

DEAR SENATOR KENNEDY: This is in response to your letter of last Friday requesting the views of the Department of Justice with respect to an amendment that may be offered to section 112(a) of S. 1437, the proposed Federal Criminal Code, to require that criminal statutes be given a "strict construction."

Such an amendment, contrary to common misconception, would not be consistent with current case law. If offered and adopted it could have serious adverse consequences for the implementation of the Code.

The old common law rule of "strict construction" was developed by the English courts as a means of preserving judicial primacy over Parliament's efforts to enact a body of criminal law "in former times when the main responsibility for formulating [such] law lay in the judiciary." Working papers of the National Commission on Reform of Federal Criminal Law (the "Brown Commission"), p. 5. Under the doctrine as then applied, the words of parliamentary acts were interpreted in the narrowest possible fashion, despite the fact that their common English usage may have been considerably broader. Over a period of centuries, however, as the authority of the legislature to enact criminal statutes became accepted, the rule in practice became less one of "strict" construction and more one of "fair" construction. Today, although courts on occasion continue to refer loosely to the so-called rule of "strict construction" of criminal statutes, their holdings make it clear that the courts examine statutes not to determine if their application in the case at hand would accord with the narrowest possible construction of a statute, but to determine whether the application to the case would fairly accord with clear English usage and would raise no question as to the statutory language providing fair notice of what conduct is proscribed. See Sutherland *Statutory Construction,* §§ 59.03-59.07. In summing up the cases, Sutherland states that "they evince a widespread emergent sentiment that the historic rule of strict construction . . . is no longer justified or desirable." Sutherland, *supra* § 59.07.

The language now in S. 1437, which mandates that the Code's provisions be "construed in accordance with the fair import of their terms to effectuate the general purposes" of the Code (section 112(a)), accurately reflects the holdings of the Supreme Court cases interpreting the appropriate current-day version of the so-called rule of "strict construction." See, e.g. *United States* v. *Bass,* 404 U.S. 336 (1971); *United States* v. *Cook,* 384 U.S. 257 (1966).

The consequences of legislating a return to the old common law version of the rule of "strict construction" would be very troublesome. I am concerned that such a provision would be understood as mandating that henceforth federal criminal statutes must be given their narrowest possible construction, irrespective of the plain meaning and fair notice imparted by the language used and irrespective of the intent of Congress. As the Brown Commission observed, such a doctrine not only would bring about the occasional acquittal of offenders who were clearly within the letter and spirit of the law and who had plain notice as to the intended application of the law, but also would have the serious result of making the criminal law more complicated and cumbersome by "suggesting the necessity of literally covering all conceivable applications of the law" through strings of synonyms and use of largely redundant language. Brown Commission Comment to section 102 of the Commission's Final Report. Moreover, such a rule would render any gloss of legislative history, such as this Committee's Report, ineffectual and irrelevant since only the narrowest possible reading—not a reasonably narrow, fair reading—of the words of the statute itself would be permitted.

In light of these considerations, both the Model Penal Code and the Brown Commission in recent years, as you know, have recommended a rejection of the old common law version of the rule of "strict construction." They have recommended, instead, the codificaiton of the contemporary case law through a provision very similar to the one now in S. 1437. A number of modern State criminal codes—including those of Arizona, Arkansas, California, Delaware, Illinois, Iowa, Louisiana, Nevada, New York, South Carolina, South Dakota, and Texas, among others—contain similar sections; the Delaware Criminal Code, for example, provides:

"The general rule that a penal statute is to be strictly construed does not apply to this Criminal Code, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the purposes of the law, as stated in § 201 of this Criminal Code."[11 Delaware Code § 203.]

Section 112(a) of S. 1437, as it now appears, codifies current federal case holdings. To substitute instead a requirement that the courts resurrect and follow a rule of genuinely "strict construction" would in my judgment represent a serious setback for the rational application of Acts of Congress in the criminal law field. I would hope that such an amendment would not be offered during the Committee's consideration of S. 1437, and, if offered, that it would not be adopted.

"smuggling") are, when used outside their sections, to be recognized as being generic rather than restrictive.

Subsection (d) provides that the use of the disjunctive term "or" or the conjunctive term "and" between the next to last and last items in a list of items should be read as if the term appeared after each of the preceding items in the list.

Subsection (e) provides general rules of construction for title 18 for number, gender, and tense. This provision is similar to section 1 of title 1, United States Code.

CHAPTER 2.—JURISDICTION

(Sections 201–206)

Jurisdiction is a word used in the law in a number of contexts with various meanings. Jurisdiction as used in this Code refers to the power of the United States Government to make and enforce laws. This power has two distinct origins. First, the basic source of power concerns the authority of the United States, as a sovereign nation, over its own territory and citizens and as otherwise recognized under international law. This is the jurisdiction dealt with directly under this chapter.

The second origin deals with the allocation of power between the central government and the states in a Federal system. Questions arise much more frequently about the power of the Federal government to legislate in this area than in the sovereign nation sphere. The Constitution of the United States circumscribes the legislative powers of the Federal government; certain powers that might otherwise be exercised on a territorial basis are given to the States or the people to exercise. In general, this chapter does not discuss the particularities of jurisdiction in a Federal system. Those are dealt with throughout the proposed Code in the sections describing offenses. The approach taken there is, on the whole, mechanically different from the approach taken under existing law, and it would not be practical to deal in detail at this point with the particularities of Federal jurisdiction under each of the offense-creating sections.

The discussion here is divided into two distinct parts. Part I concerns the power of the Federal government to make laws in the national interest as authorized by the Constitution of the United States. It discusses the proposed Code's basic approach to jurisdiction and the relationship between the Federal and State governments in enforcing this nation's criminal laws. Part II concerns those powers of the Federal government that support the application of Federal criminal legislation on a territorial and extraterritorial basis and the discussion will be directed to the specific provisions of this chapter.

PART I.—JURISDICTION UNDER THE SECTIONS DESCRIBING OFFENSES

For many years of the early history of the United States the federal government enacted relatively little criminal legislation. As Federal regulation expanded, the courts were required to construe the provisions of the Constitution that limit the law-making powers of the Congress. By now, the scope of Federal law-making powers *vis-a-vis* those of the States is well defined. But the advisability of the Federal government's exercising its legislative powers over cases traditionally prosecuted by the States is a question of the most serious dimensions. The crux of the problem is to preserve the vitality of our Federal system while achieving the optimum of effectiveness in law enforcement and making the optimum utilization of local resources in order to maintain the viability of State law enforcement agencies.

Underlying the extent to which this proposed Code confers jurisdiction upon the Federal government with respect to the offenses decsribed herein is the fundamental assumption that the basic responsibility for maintaining the order of our society day-by-day rests with the several States under our system of government. The proposed Code reflects the view that the States must retain this vital role and must remain viable bodies in enforcing our criminal laws. Accordingly a conscious effort has been made to review the need for Federal jurisdiction as to each offense desired and to confer such jurisdiction only when necessary to protect a substantial Federal interest.

The proposed Code must be perused in its entirety to appreciate the particularities of Federal jurisdiction—the extent to which the full or a less full measure of Federal law-making power has been used to proscribe conduct. General approaches have been taken here that differ from approaches commonly taken in the past in shaping Federal criminal legislation. Some of these are discussed below.

1. General Scope of Present Federal Jurisdiction

Current Federal criminal jurisdiction encompasses (1) offenses directly affecting the institutions or operations of the Federal government, and (2) offenses falling within the general police powers of State governments but over which the Federal government has, for various reasons, assumed auxiliary jurisdiction.

Continued jurisdiction over the first category of offenses is obviously necessary to the operation of the Federal government. It is not to be expected, nor would it be desirable, that the State governments should make punishable, e.g., the bribing of a Federal official or the falsification of a Federal record. But, with regard to the second category, where the Federal jurisdiction is auxiliary to that of the States, it is appropriate to consider the alternative approaches available.[1] These include the following:

A. *Limit Federal jurisdiction to offenses directly affecting the institutions or operations of the Federal government; no auxiliary Federal jurisdiction*

This approach would require increased Federal bolstering of State and local investigative, prosecutive, and correctional agencies through monetary grants and collateral support programs such as training services, investigative assistance, and development of legislative solutions to difficulties caused by the limited geographical jurisdiction of individual States. A considerable period of time would be required to augment State law enforcement capacities before a transfer of current Federal responsibilities could be undertaken.

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[1] See Final Report, Comment, pp. 12-16; Working Papers, pp. 33-67. For a general discussion of the jurisdictional approach followed in this bill as reported see R. Pauley, *An Analysis of Some Aspects of Jurisdiction Under S. 1437, the Proposed Federal Criminal Code,* 47 Geo. Wash. L. Rev. 475 (1979), reprinted in Hearings, Part V, pp. 11072-11089.

B. *Provide auxiliary Federal jurisdiction over particular offenses that may warrant Federal intervention*

While this is usually viewed as the traditional approach, the general trend has been to interpret the Federal interest broadly, to extend Federal jurisdiction over a wide range of offenses, and to permit virtually plenary Federal jurisdiction over certain offenses, e.g., bank robbery. This approach hence presupposes a reexamination of the propriety of the existing reach of auxiliary Federal jurisdiction.

C. *Provide auxiliary Federal jurisdiction over all offenses*

This approach would involve a major departure from the historical division of Federal-State responsibilities and would be of questionable constitutionality because of its failure to recognize the basic tenets of Federalism.

The approach taken in the reported bill, as under prior bills in the 93d, 94th, 95th, and 96th Congresses, and the Final Report, is to provide auxiliary Federal jurisdiction on a selective basis, with prosecution also made possible for a limited number of other, common crimes, normally punishable solely by the State, when such crimes are committed in association with Federal offenses.[2]

2. Separation of Matters Relating to Federal Jurisdiction From the Elements of the Offense

In most Federal criminal statutes the basis for exercising Federal criminal jurisdiction is stated together with the basic criminal misconduct as an element of the offense. Very frequently, in fact, the jurisdiction is cast as the gravamen of the offense with the underlying misconduct seeming to be only a matter of secondary importance. For example, what would be cast in a State statute simply as receiving stolen property is defined in one corresponding Federal statute as knowingly receiving a stolen vehicle "moving as, or which is a part of, or which constitutes interstate or foreign commerce;"[3] and what would be cast in State statutes as "robbery" or "extortion" has been dealt with in one of the equivalent Federal statutes as "obstruct[ing] commerce . . . by robbery or extortion."[4] A departure from this approach is seen, however, in the 1972 revision of the Federal Kidnaping Statute,[5] which divorces the gravamen of the offense from the jurisdictional bases in a fashion precursory of the proposed Code.

The historical reason for the current approach to the drafting of Federal criminal laws is, of course, the recognition of the limited nature of the powers granted the Federal government by the Constitution. The philosophical rationale for such a formulation of offenses is that the Federal government should take cognizance only of the harm to its integrity, imposing criminal sanctions only to the extent that misconduct obstructs a specific Federal function and leaving punishment for the misconduct itself to State and local governments.

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[2] See Final Report, Comment, p. 13. See also suheading (4) *infra* for a discussion of this ancillary jurisdictional concept.

[3] 18 U.S.C. 2313.

[4] 18 U.S.C. 1951.

[5] 18 U.S.C. 1201.

There are certain advantages in the current approach to the drafting of the jurisdictional aspect of Federal offenses. First, it permits tailoring the Federal jurisdictional reach over specific forms of misconduct to the precise extent deemed necessary by the Congress on an offense-by-offense basis. Second, it makes manifest the Federal interest in the misconduct and tends to keep essentially local crimes out of Federal courts. Third, it affords each investigative and administrative agency its own self-contained statute covering given misconduct, thereby clearly defining each agency's area of responsibility.

However, the current approach also has several important disadvantages. First, it tends to result in formulations of offenses which, by design or by interpretation, unnecessarily require proof that the defendant knew or intended that his conduct would violate a Federal interest (e.g., that the mails would be used in the commission of the offense). Second, it requires considerable redundancy because the definition of the underlying misconduct must be repeated for every jurisdictional base. Third, it engenders troublesome variations in defining misconduct which may interfere with more than one jurisdictional interest since a separate offense must be written be different draftsman at a different time when an expansion of jurisdiction becomes necessary.[6] Fourth, it permits the multiplication of criminal charges in cases where, although only a single act of criminal misconduct is involved, several jurisdictional breaches occur. Fifth, it tends to scale penalties to a lower level than for comparable State offenses in those situations where the reach of the jurisdictional factor is made the gravamen of the offense. Sixth, it occasionally frustrates international extradition since the applicable treaties often enumerate the extraditable crimes in terms of the underlying misconduct and condition extradition on a principle of mutuality so that extradition is possible only if both countries prescribe penal sanctions for the same conduct. This has resulted in rulings by some foreign nations that they will not extradite persons charged here with mail fraud or kidnapping since those crimes as defined in our criminal code, with its emphasis on breach of the jurisdictional interest, have no counterpart in those countries. Seventh, it leads toward the imposition of criminal liability for low levels of inchoateness and incipiency (e.g., for conspiracy to travel in interstate commerce with intent to aid and abet any person in inciting a riot, under 18 U.S.C. 2101(a)(1)(D) and 18 U.S.C. 371).

The alternative to the current approach is to draft Federal offenses in terms of the underlying misconduct alone, and to detail separately the circumstances giving rise to Federal jurisdiction to prosecute for such underlying offenses. The justification for such an alternative approach rests on the theory that the integrity of the Federal interest can be preserved as readily by prosecuting for the underlying misconduct as by prosecuting for the breach of the Federal interest itself, and that, in fact, this may be the only means by which the Federal sovereign may take cognizance of the full gravity of the harm to the Federal interest. There is certainly no more affront to the basic concepts of Federalism in defining, for example, the crime of kidnapping *per se* and adding that the Federal government may prosecute if the victim is transported in interstate commerce, than there is in defining an offense of transporting in interstate commerce the victim of a kidnapping as in former 18 U.S.C. 1201.

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[6] Compare, for example, the following formulations of robbery:

"Whoever, within the special maritime and territorial jurisdiction for the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value * * *" (18 U.S.C. 2111).

"Whoever, (obstructs commerce by) * * * the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property * * *" (18 U.S.C. 1951).

"Whoever robs another of any kind or description of personal property belonging to the United States * * *" (18 U.S.C. 2112).

This alternative to the usual approach of current law may, through a variety of drafting techniques, permit the retention of the advantages of the current approach while eliminating the disadvantages. The Federal character of the offense can still be emphasized to the same degree; the jurisdictional reach can be drafted with the same specificity; and the division of responsibilities between various Federal agencies can be made equally clear. At the same time, definitions of offenses can be clarified and the number of offenses can be standardized and dramatically consolidated. For example this technique permits the reduction of 173 existing perjury and false statement offenses, 134 existing theft offenses, and 89 existing counterfeiting and forgery offenses to a mere five offenses.[7] This approach can also lead to uniformity of judicial interpretation, the grouping of offenses in a more logical arrangement, and the other collateral benefits discussed above.

Significantly, all four of the principal proposals to revise the Federal Criminal Code adopted the approach of separating the jurisdictional factors from the elements of offenses. Senator McClellan described this concept of the National Commission's proposed Code as "the keystone of the (the Code's) . . . suggested reform," the rejection of which "would require forsaking the present form of the Code as even a work basis for a new Code." [8] This Committee likewise believes that the reasons for separating jurisdictional factors from the elements of the offenses are compelling. A Federal criminal code with the jurisdictional factors and elements of the offenses set distinctly apart will work remarkably better than has the current title 18.

3. Drafting of Matters Giving Rise to Federal Jurisdiction

Once the decision is made to sever the circumstances giving rise to Federal jurisdiction from the elements of the various Federal offenses, there are several alternatives that can be taken in setting forth the applicable jurisdictional limitations.[9] Under one principal alternative, adopted by the National Commission, the jurisdictional subsection includes a cross-reference to one or more of several generally stated jurisdictional concepts appearing elsewhere in the Code. Under the other principal alternative, adopted by S. 1400 in the 93d Congress, the jurisdictional subsection itself explicated the particular circumstances permitting Federal prosecution for the stated offense.[10]

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[7] See House Subcommittee on Criminal Justice of the Committee on the Judiciary, *Impact of S. 1437 upon Present Federal Criminal Laws*, H. Doc. No. 17, 95th Cong., 2d Sess. 503–515, 531–704, 1153–1223, 1265–1302 (1978); proposed sections 1341 (perjury), 1343 (Making a False Statement), 1731 (Theft), 1741 (Counterfeiting), and 1742 (Forgery).

[8] Hearings, pp. 35, 43.

[9] See Working Papers, pp. 42–51.

A problem with the approach of cross-referencing to common jurisdictional bases is that the terminology employed in the general jurisdictional provisions must be sufficiently broad to apply to numerous and disparate offenses—a breadth that may be appropriate to some, but not to others. For example, section 201(h) of the Final Report, relating to interstate travel, refers to "movement of any person across a state or United State boundary" in the course of the offense. This accurately reflects the jurisdictional scope of some current offenses involving interstate travel (e.g., 18 U.S.C. 2314—executing a scheme to defraud), but not of others which may be prosecuted only if the persons who moves in interstate commerce is the victim (e.g., 18 U.S.C. 1201—kidnapping) or is the defendant (e.g., 18 U.S.C. 2101—rioting). Although there may be good reason to extend the scope of existing Federal jurisdiction over the latter kinds of offenses, the National Commission approach would automatically and indiscriminately extend such jurisdiction wherever the interstate travel base is employed. The combined effect of stating common jurisdictional bases in such general language is one of the principal reasons the National Commission draft was criticized for unnecessarily expanding the scope of existing Federal jurisdiction.

One of the best critical analyses of the National Commission's approach is found in the report by the Committee on Reform of Federal Criminal Laws of the American Bar Association:[11]

> Section 201 has occasioned the most serious criticism of any portion of the proposed Code. The thrust of the criticism has been that the section represents a bold attempt to expand the scope of federal criminal jurisdiction beyond its present limits, establishing for the first time a plenary federal police power at the expense of traditionally state and local prerogatives. This criticism has been fostered in part by the last sentence of the section. There, what was intended as a simple description of a drafting technique, that no explicit jurisdictional base would be stated for substantive offenses which were clearly within the inherent jurisdiction of the federal government (see, e.g., § 1101. Treason.), has been read as a declaration of the most sweeping jurisdiction possible. (It is recommended that the last sentence be stricken and a new jurisdictional base, "anywhere in the United States," be added which would be specifically incorporated into the substantive provision

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[10] An exception to this rule exists with respect to extraterritorial jurisdiction.

[11] Reprinted in Hearings, pp. 5796-5797. See also accompanying statement of Prof. Livingston Hall on behalf of the ABA Committee on Reform of Federal Criminal Laws, *id.* at 5818-5819: Report of the National Association of Attorneys General on Proposals for Revision of the Federal Criminal Code, *id.* at 6010.

> when the inherent jurisdiction of the United States is intended.)
>
> But the criticism has other sources also. First, there is considerable confusion over what the effect of § 201 is intended to be—a confusion fostered in part by such ambiguous phraseology as discused above. The section, unfortunately, is too often read to provide that there is federal jurisdiction over each and every substantive offsense anytime that one of the enumerated bases is present. This, of course, misreads the section as well as the basic structure of the proposed Code. The section merely compiles in one place the variety of possible bases which (with the exception of the inherent jurisdiction noted above) must be explicitly made applicable to a given offense. This is usually done by a reference in the substantive statute itself.
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> Second, there seems to be considerable shock generated by the mere cataloging of the various jurisdictional bases currently employed in federal law. The growth of federal jurisdiction over the years has apparently gone unnoticed each time a new basis for federal jurisdiction would appear in a discrete statute. Much of the criticism seems to stem from a shock of recognition over what is today the actual scope of federal jurisdiction. It is more appropriate to focus attention on the specific instances in which the exercise of federal jurisdiction should be questioned instead of attacking the bases for the jurisdiction in the abstract.

The approach taken by the Committee, by contrast, is to set forth fully, in the jurisdictional subsection of each section defining the offense, the particular circumstances (when less than plenary jurisdiction is intended) permitting Federal prosecution for that offense, thereby avoiding the necessity of cross-referencing to a catalog of common jurisdictional provisions.[12] This circumvents the problems in formulating generalized jurisdictional concepts since the jurisdictional bases for each offense are drafted with that offense alone in mind and without concern that the stated bases might be too narrow or too broad for use in regard to other offenses. This approach has the further benefit of enabling the reach of Federal jurisdiction for any offense to be immediately apparent from the face of the section.

Moreover, since each jurisdictional base is tailored to the specific offense to which it is made applicable, the precise reach of current Federal jurisdiction may be maintained if deemed appropriate. In the case of kidnapping, for example, the Committee has provided in the jurisdictional subsection the "[t]here is federal jurisdiction over an offense described in this section if . . . (3) movement of the victim across a state or United States boundary occurs in the commission of the offense . . ."[13] In other offenses, such as robbery or extortion, movement of *any* person across a State or United States boundary is provided as a basis for Federal jurisdiction.[14] In sum, using this approach, the subject bill is able effectively to parallel the existing range of Federal jurisdiction for all offenses except in those limited situations where good reason was found to extend or retract the present jurisdictional reach.

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[12] Extraterritorial jurisdiction is separately defined in section 204 because of the necessity of defining certain broad categories of offenses to which such jurisdiction will attach.

[13] See section 1621 (c).

[14] See sections 1721 and 1722.

4. Federal Jurisdiction Over Common-Law Offenses Committed in the Course of Federal Offenses

Current Federal law permits, in the course of a prosecution for certain Federal offenses, prosecution of particular common-law offenses[15] which were committed by the defendant in the course of committing the Federal offense. For example, in the present statute concerning damaging a government building by explosion (18 U.S.C. 844), the basic offense carries a maximum penalty of ten years, but "if personal injury results" the maximum penalty is twenty years, and "it death results" the maximum penalty is life imprisonment or death. Certain other Federal offenses, however, particularly some more recently enacted offenses in the firearms area, provide such coverage by stating the common-law offense as a separate Federal offense which may be charged and punished if it occurs in the course of another Federal .offense (e.g., 18 U.S.C. 844(h); 18 U.S.C. 924(c)). This latter approach has several advantages. First, it is easier to work with, being more logical conceptually (since there really are involved two separate, but related, offenses). Second, it permits the clarity, and the certainty for plea agreement purposes, of separate counts. Third, it permits individual jury charges using standard instructions for the separate offenses. Fourth, it permits separate judgments of convictions and separate sentences, a material advantage if the conviction for one of the offenses is later overturned.

A critical question to which the Committee addressed itself was the extent to which this device of ancillary or "piggyback" (as the National Commission called it) jurisdiction should be employed. Clearly, the concept has the advantages of permitting a unitary adjudication and punishment of a defendant's entire course of criminal behavior, when a series of offenses is committed in the course of a Federal crime. Other factors also support the concept. The Attorney General's Task Force on Violent Crime strongly endorsed the creation of ancillary jurisdiction over crimes committed in the course of attacks on Federal officials, pointing out that: "If the recent shooting of the District of Columbia police officer in the course of the assassination attempt on President Reagan has occurred in any jurisdiction other than the District of Columbia, both federal and state or local authorities would have been investigating and prosecuting what in essence is the same case. This could result in jurisdictional and political disputes; conflicts in investigation and seizing, testing, and maintaining evidence; pretrial publicity problems; much greater pretrial discovery than is afforded under the federal rules; multiple trials; different evidentiary rulings; and ultimately greatly weakened cases."[16] However, indiscriminate application of this jurisdictional notion could also drastically impinge upon the traditional prerogatives of the States by permitting Federal prosecution for offenses where there exists only a tenuous Federal nexus at best.

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[15] The characterization "common-law offenses" is here used simply as a convenient means of reference to those offenses against persons or property that are usually considered *malum in se.*

[16] Final Report, Attorney General's Task Force on Violent Crime, p. 35 (Aug. 17, 1981).

An example of unduly expansive utilization of this jurisdictional base, in the opinion of the Committee, is found in the recommendations of the National Commission. Its Final Report contains, as one of its general jurisdictional bases, a provision permitting Federal prosecution if "the offense is committed in the course of committing or in immediate flight from the commission of any other offense defined in this Code over which Federal jurisdiction exists."[17] This provision was incorporated as the jurisdictional base for most of the offenses against the person and offenses against property. The application of this concept of ancillary jurisdiction would result in a considerable expansion of Federal jurisdiction, permitting prosecution for over 7,500 combinations of offenses. It was principally for this reason that, of all the innovations proposed by the National Commission, the concept of "piggyback" jurisdiction was the one that provoked the most critical comment.[18]

The concern over the expansion of Federal jurisdiction contemplated by the National Commission was aptly expressed by the National Association of Attorneys General. Speaking on behalf of the Association, Attorney General Israel of Rhode Island testified that each of the State attorneys general "had arrived at almost the same conclusions independently, namely that the Brown Commission report had represented an unwarranted expansion of Federal criminal jurisdiction at the expense of State criminal jurisdiction."[19]

The Report of the Association of Attorneys General traced the treatment of Federal jurisdiction in each of the proposed codes—the Final Report, S. 1 and S. 1400—and concluded:[20]

> The most important concept, of course, is the treatment of Federal jurisdiction and its potential for expansion. In the Brown Commission Report, a long string of jurisdictional bases were set forth in a separate section (§ 201) and jurisdiction over each offense was stated by reference to one or more of these bases. Of course, the base most frequently used was the "piggyback" base previously referred to. In S.1, the piggyback language was removed and a concept of jurisdiction adopted in which each offense was described in terms of a type of jurisdiction which was in turn defined in a separate section (§ 1-A4). Due to the broadness of the definitions of such terms as "receiving Federal financial assistance jurisdiction", "commerce jurisdiction", and "affects commerce jurisdiction", together with the application of the "compound grading" concept (although a more limited one than that found in the Brown Report), the effect on expansion of jurisdiction was almost the same as that of the Brown Commission. In S. 1400, on the other

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[17] See section 201(b).

[18] See, e.g., Hearings, pp. 927-934, 944-952, 1166-1178, 3030-3034, 3328-3361; but see Note, *Piggyback Jurisdiction in the Proposed Criminal Code,* 81 Yale L.J. 1209 (1972).

[19] Hearings, p. 6013.

[20] *Id.* at 6011.

> hand, while the ancillary jurisdiction concept is retained, the actual expansion is minimized by defining in *each* offense the limits of Federal jurisdiction as well as the specific crimes over which ancillary jurisdiction exists (e.g., Tampering With A Public Servant, Interfering With Civil Rights) which are in turn specifically limited, in nearly all cases, to traditional Federal offenses. It is the feeling of the Association, therefore, that S. 1400 presents a generally acceptable approach to the jurisdiction concept. . . .

As reported, the bill adopts the approach taken by S. 1400. This approach accepts the National Commission's concept of ancillary jurisdiction,[21] but materially restricts the application of the concept. Since the bill lists in the jurisdictional subsection of each offense all of the jurisdictional bases permitting Federal prosecution for that offense, it is possible to specify as one of the jurisdictional bases for a common-law offense the occurrence of the offense during the commission of (or during the immediate flight from the commission of) one or more enumerated offenses over which independent Federal jurisdiction exists. This results in a listing within the jurisdictional subsection of all the particular Federal offenses with which the common-law offense may be prosecuted. For example, in one part of the jurisdictional subsection of the murder section, twenty-nine specific offenses are enumerated the commission of which will permit prosecution for a murder, not otherwise Federally cognizable, which occurs in the course of one of those offenses.[22] As compared with the National Commission approach, this approach, although expanding somewhat on the irregular coverage of existing law, results in a limited application of the ancillary jurisdiction technique to reach only the more important common-law offenses and, of those, to reach only the ones that are most likely to be encountered in the commission of the particular Federal offenses involved. Under the subject bill, the number of combinations of offenses is about 350, as compared to the more than 7500 under the National Commission's approach.

In its view that the National Commission's approach to ancillary jurisdiction is unacceptable and must yield to a much less expansive approach of the kind adopted, the Committee has been supported in the past by the National District Attorneys Association,[23] by a committee of the Judicial Conference of the United States[24] and by the National Association of States Attorneys General, an Ad Hoc Committee of which concluded in 1973 that the approach here being taken represents "a generally acceptable approach to the jurisdictional concept."[25]

Notwithstanding its decision to accord more limited application to the concept than did the National Commission, the Committee believes that this approach to ancillary jurisdiction represents one of the most significant contributions to be made by the new codification, a judgment shared by the Attorney General in his comments on S. 1630 submitted in the course of the Committee's hearings.[26] In addition to the advantages noted previously, this jurisdiction base concept will provide several other benefits. By utilizing such an approach, the time, expense, and uncertainties of multiple trials can be avoided. A burden will be lifted from witnesses who would otherwise have to testify at both Federal and State trials; there will be no problems at a second trial of adverse publicity caused by the first trial; and the right of speedy trial will not be jeopardized. In addition, where it may happen now that a State will forego the prosecution of a defendant after his conviction upon related Federal charges, considering substantial justice to have been accomplished in the one conviction, more complete justice can be attained through employment of the ancillary jurisdictional provisions permitting prosecution for all of an individual's offenses committed as part of a single course of conduct. Of course, the Federal government can and should still forego prosecution in appropriate cases, deferring to State action.[27]

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[21] S. 1, as introduced in the 93d Congress, had treated the commission of ancillary offenses as a matter warranting aggravation of the penalty. See, e.g., section 2-6E3.

[22] See section 1601(e)(6).

[23] *Supra* note 18; letter to the Honorable James O. Eastland, Committee on the Judiciary dated June 13, 1973.

[24] Report of the Committee on the Administration of the Criminal Law to the Judicial Conference of the United States, dated April 1973, pp. 4, 6, 7, 8.

[25] Report of June 11, 1973. Hearings, pp. 6010–6011. In their latest statement, however, NAAG appeared to oppose the concept of ancillary jurisdiction out of concern that it might be misused. See Hearings, Part XVI, pp. 11932–11934.

5. Restraints on the Exercise of Federal Jurisdiction

As previously noted, current Federal law generally does not provide statutory restraints upon the prosecutorial exercise of Federal jurisdiction in those areas where the Federal government has concurrent jurisdiction with State and local governments. Such congressional control as now exists is ordinarily accomplished through limiting the grant of Federal jurisdiction. A few particular statutes, however, do provide a specific restraint upon the exercise of Federal jurisdiction by requiring certification or approval by the Attorney General prior to initiating a prosecution (e.g., U.S.C. 245(a)(1)[28] civil rights—and 18 U.S.C. 1073[29]—interstate flight to avoid local prosecution).

The National Commission, presumably because it proposed to do away in large measure with the most effective of the current restraints—the absence of a grant of jurisdiction by Congress[30]—incorporated a statutory approach of a hortatory, but potentially effective, nature. Section 207 of the Final Report stated the Federal law enforcement agencies are "authorized" to decline or discontinue Federal prosecution whenever the offense can effectively be prosecuted by State agencies if there is no substantial Federal interest or if there is a primary State interest. A "substantial Federal interest" in an offense would be found where, *inter alia,* the State law enforcement agencies were corrupted or where organized crime is involved. The National Commission included a provision that the existence of a "substantial Federal interest" would not be subject to litigation. The bill, as reported, adopts a similar approach, but one that is worded to avoid some potentially troublesome interpretations. It also incorporates some additional concepts to help make a rational division of Federal State law enforcement responsibilities. The bill's approach is contained in section 205 of the Code, and is discussed herein in relation to that section.

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[26] Hearings, Part XVI, pp. 11782–11783.

[27] See section 205.

[28] This statute requires the Attorney General to certify that in his judgment a prosecution by the United States is "in the public interest and necessary to secure substantial justice."

[29] This statute requires that the Attorney General grant "formal approval in writing" prior to the commencement of a prosecution.

[30] See Working Papers, p. 1403.

Part II.—Jurisdiction Under this Chapter

This chapter is concerned with the legislative power of the Federal government to the extent that such power is or is not limited geographically. Legislative jurisdiction is the power in the abstract to regulate, i.e., to fix the content of the law; to say as to whom, where, and in regard to what acts or events a rule applies.

The bases for the exercise of the legislative jurisdiction of nations have been categorized as being (1) territorial, (2) personal (i.e., nationality of the offender), (3) protective (i.e., the national interest injured by the offender), (4) passive personality (i.e., nationality of the victim), and (5) universal.[31]

Most basic to the exercise of legislative jurisdiction is territory. Every nation is considered in international law to possess an absolute and exclusive power over everything within its territorial boundaries.[32]

It is also a generally recognized principle of international law that a State may punish acts, wherever they are committed, simply because the person who committed them is a citizen of, or bears some other special relationship to, the State.[33] Jurisdiction thus exercised rests upon a personal base. It does not conflict with territorial jurisdiction, since its exercise in no way affects the legal quality of the conduct in the eyes of the territorial sovereign.[34]

The protective theory of jurisdiction permits a nation, under the general acceptance of international law, to make acts punishable no matter where committed, and even when committed by non-citizens, if such acts were directed against the safety or the functioning of the government of the state. While this theory of jurisdiction is well recognized, its limits in international law are far from settled. Examples of Federal legislation resting upon a protective base are 22 U.S.C. 1203 and 18 U.S.C. 1546, which make punishable perjury or false statements committed by an alien before an American consular officer in a foreign country in applying for a visa.[35]

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[31] See *Harvard Research in International Law on Jurisdiction with Respect of Crime*, 29 Am. J. Int'l. L. Supp. 435 (July 1935); Working Papers, p. 72. These jurisdictional bases are widely discussed elsewhere as well, but under varying terms of description.

[32] See *Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch.) 116 (1812). Diplomatic immunity represents a consensual departure from the norm of territorial jurisdiction.

[33] The Uniform Code of Military Justice, e.g., applies to United States servicemen, including aliens serving with the armed forces, everywhere in the world. This is explicable on the basis of personal jurisdiction.

[34] See generally I Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 802–804 (2d rev. ed., 1945): Brierly, *The Law of Nations*, p. 223 (5th ed., 1955); *Skiriotes* v. *Florida*, 313 U.S. 69 (1941); *Blackmer* v. *United States*, 284 U.S. 421 (1932); *United States* v. *Bowman*, 260 U.S. 94 (1922); *In re Ross*, 140 U.S. 453 (1891).

[35] See generally *United States* v. *Rodriquez*, 182 F. Supp. 479 (S.D. Cal. 1960), aff'd. *sub nom Rocha* v. *United States*, 288 F.2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961); *United States* v. *Pizzarusso*, 388 F.2d 8 (2d Cir.), cert, denied, 392 U.S. 936 (1968). See also *United States* v. *Birch*, 470 F.2d 808, 811–812 (4th Cir. 1972), cert. denied, 411 U.S. 931 (1973), upholding extraterritorial jurisdiction under 18 U.S.C. 499 (forgery or false use of official pass or permit); I Hyde *supra* note 34, at 777–800, 804–807.

The so-called "passive personality" theory of jurisdiction is that states may legislate to protect their citizens anywhere in the world from the nationals of other states, at least where common types of crimes are involved. This theory has an uncertain status in international law and was challenged by the United States in an 1886 incident arising out of an extraterritorial provision of the Mexican Penal Code.[36] However, part of 18 U.S.C. 1653 is in form at least based upon the passive personality theory.[37] The theory is asserted as a way of protecting individual citizens (not national interests) and is therefore clearly distinguishable from the protective theory of legislative jurisdiction.[38]

The universal theory of jurisdiction fills a vacuum. It is based upon custody of the offender and an absence of territorial jurisdiction or any substantial interest in the exertion of jurisdiction by a state other then the one having custody.[39] Piracy is the archetypal crime evoking the universal theory of jurisdiction. Being committed of old upon the high seas (and more recently in airspace), piracy has been considered punishable by any state that apprehends the pirate no matter where the acts occurred, who the victims were, or what interests of the state may have been injured.[40] The view has been taken that the crime of piracy depends, not upon provisions of any municipal code of any state, but upon the law of nations, both for its definition and punishment.[41]

Besides the above five categories of jurisdiction, there is an important principle of international law that has not yet been discussed. That principle is that the setting into motion outside a state of a force or course of events which produces as a direct consequence an actual injurious effect within the state justifies that state in prosecuting the actor, if crime was involved, when he enters its domain.[42] Both in theory and as a practical matter the occasions for applying Federal criminal laws extraterritorially often involve just such a situation—the materialization of injurious effects (e.g. from a fraudulent scheme) within the United States.

The subject of legislative jurisdiction in international law is, of course, considerably more complex than appears above. This brief introduction, however, should serve particularly to explain the extraterritorial provisions of section 204 of this chapter and should cast light upon the design of this chapter in its relation to the substantive sections.

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[36] For a discussion of this case see I Hyde, *supra* note 34, at 807–809; II Moore, *Digest of International Law,* 231 (1960): Scott and Jaeger, *Cases on International Law,* pp. 384–391 (1937). The cited material also discusses the celebrated *Lotus Case.* In that case a Turkish statute based upon the "passive personality" theory of jurisdiction was before the Permanent Court of International Justice but the Court refrained from passing upon the statute's validity.

[37] See Working Papers, p. 73. The section may simply be comprehended within the crime of piracy. In any event, these bases for jurisdiction are generalizations and not governing tests of international law.

[38] The enforcement by a state of its extraterritorial laws may depend entirely upon its apprehending the violator within its own territorial jurisdiction. That the enforceability of such laws may be limited, however, does not impugn the jurisdictional bases for the extraterritorial laws.

[39] See Brierly, *supra* note 34, at 232.

[40] See I Hyde, *supra* note 34, at 767–777; Brierly, *supra* note 34, at 240, 241; II Hackworth, *Digest of International Laws,* p. 681 (1941).

[41] See *United States* v. *Smith,* 18 U.S. (5 Wheat.) 153 (1820); *United States* v. *The Pirates,* 18 U.S. (5 Wheat.) 184 (1820); *United States* v. *Holmes,* 18 U.S. (5 Wheat.) 412 (1820): II Moore, *supra* note 36 at 954–959. From the earliest times Federal legislation on piracy has been construed in the light of international law, and the present Federal statute (18 U.S.C. 1651) refers specifically to "the law of nations" for the definition of piracy.

[42] I Hyde, *supra* note 34, at 798–799, 806.

Although a primary support for Federal penal legislation, territorial jurisdiction is generally subsumed in existing law in statements reflecting the limited powers of Congress granted under Article I, section 8, of the Constitution. On the matter of extraterritoriality, most Federal laws are silent, and there is limited case law on the subject.[43] The reason for the limited case law is principally that extraterritorial laws are not regularly enforceable, because there are no extraterritorial police powers.

The individual sections of this chapter have been drafted with these general principles in mind. They represent the considerable additional attention given by the Committee to this important subject (compare sections 1-1A6 and 1-1A7 of S. 1 in the 93d Congress).

SECTION 201. FEDERAL JURISDICTION

Subsection (a) is simply introductory. It categorizes all Federal jurisdiction as being either general, special, or extraterritorial. Offenses in this title must be committed within one of these three geographic categories (defined respectively in sections 202, 203, and 204) in order to be punishable under this proposed Code.

Subsection (b) explains the methods used by this Code for determining the jurisdiction, both geographic and subject matter, over specific offenses.

Paragraph (1) provides that if, in a section describing an offense, there is a separate subsection in which one or more circumstances are specified as giving rise to Federal jurisdiction over the offense, there is Federal jurisdiction over the offense if: (A) such a circumstance exists or has occurred and the offense is committed within (i) the general jurisdiction of the United States or (ii) the special jurisdiction of the United States to the extent that such jurisdiction is specified as such a circumstance in the separate subsection; or (B) whether or not such a circumstance exists or has occurred if the offense is committed within the extraterritorial jurisdiction of the United States to the extent applicable under section 204. An exception is where the offense is described as a violation of, or involves conduct required by a statute outside this title or a regulation, rule, or order issued pursuant thereto. In such a case, Federal jurisdiction is governed by the provisions of the nontitle 18 statute. This same paragraph states the rather obvious principles that Federal jurisdiction may be alleged to rest upon more than one of such circumstances, but that proof of any of them is sufficient to establish the existence of Federal jurisdiction, and that the number of offenses does not increase merely because more than one of such jurisdictional circumstances is proved.

Paragraph (2) provides that if, in a section describing an offense, there is no separate subsection in which one or more circumstances are specified as giving rise to Federal jurisdiction, there is Federal jurisdiction over the offense if it is committed within (a) the general jurisdiction of the United States, (b) the special jurisdiction of the United States, or (c) the extraterritorial jurisdiction of the United States to the extent applicable under section 204; unless the offense is described as a violation of, or involves conduct required by, a statute, regulation, etc., outside this title, in which case Federal jurisdiction exists to the extent applicable under the statute.

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[43] See Working Papers, pp. 69-73.

A significant point regarding this jurisdictional scheme is that, once the principles of this section are understood, the general scope of jurisdiction over any offense can be readily ascertained by reference to the offense-defining section itself, save only for the issue of extraterritorial jurisdiction, which must be determined in each instance by reference to section 204.

Paragraph (3) provides that in a case in which Federal jurisdiction over an offense exists solely by virtue of its commission during another offense over which Federal jurisdiction exists, Federal jurisdiction over the ancillary offense continues to exist, notwithstanding that the prosecution for the other offense is terminated in favor of the defendant, unless the court finds that there was not a substantial basis for the prosecution for the other offense. Paragraph (3) does not establish or create Federal jurisdiction. For example, it does not extend Federal jurisdiction over any offense which is a violation of, or involves conduct required by, a Federal statute outside title 18, or a regulation, rule, or order issued pursuant to such a statute. Nor does it extend Federal jurisdiction over any offense defined in non-Federal sources, such as State and municipal statutes and ordinances. Indeed, paragraph (3) addresses only the question of Federal jurisdiction over an offense defined in title 18 when that jurisdiction exists solely by virtue of its commission during another Federal offense defined in title 18 and in which prosecution for the latter federally-defined offense terminates, in favor of the defendant. It merely clarifies that jurisdiction over an "ancillary" offense is not ousted because the prosecution for the underlying offense terminates favorably to the government. The term "ancillary offense " in paragraph (3) refers only to the offense over which Federal jurisdiction "exists solely by virtue of its commission during another offense over which federal jurisdiction exists" in the preceding clause of the sentence. This situation may arise only under jurisdictional sections such as section 1601(e)(6), (1611(c)(6), 1621(c)(4), 1641(c)(3), 1642(c)(3), 1643(d)(2), and 1701(c)(11).

It is appropriate and sensible from the standpoint of promoting "judicial economy, convenience, and fairness", which underlie the doctrine of pendent jurisdiction over State claims in Federal civil cases,[44] that the jury retain the ability to convict, and the court to sentence, for the ancillary offense even though the prosecution for the "parent" charge has terminated in favor of the defendant. If the result were otherwise, not only would inconvenience occur and resources be unnecessarily squandered but some defendants would unjustifiably escape prosecution and punishment altogether, since several States have statutes that preclude prosecution for an offense once the defendant has been placed in jeopardy by the United States in a criminal trial based on the same conduct.

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[44] See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

The principle in this paragraph is not a novel one. Rather it sets forth the result which the Federal courts would likely reach without legislative guidance. Thus in the analogous situation of pendent jurisdiction in civil law, the Federal courts have determined that the pendent State claim survives and may be adjudicated even though the underlying claim is determined in favor of the defendant, provided the underlying claim is found to have been "substantial".[45] It is anticipated that the courts will utilize similar and related principles of civil pendent jurisdiction in considering the ancillary jurisdiction issues contained in title 18. For example, where the Federal offense which is the basis for jurisdiction over the "ancillary" offense is disposed of before jeopardy attaches, it is inappropriate to continue with a trial on the "ancillary" offense.[46] Similarly, dismissal of the ancillary offense is appropriate if the prosecution of the other offense is terminated before trial even though the basis for prosecution of the other offense is substantial enough to confer jurisdiction.

The qualification that jurisdiction over an ancillary offense continues unless the court determines that the basis for prosecuting the underlying offense was not "substantial" is taken from the pendent jurisdiction cases. It is not designed to confer on the courts the authority to second-guess whether there has been compliance with section 205 (if applicable), or whether, as a matter of prosecutorial discretion, prosecution for the underlying offense should have been brought. Instead, it is designed to prevent Federal prosecutors from misusing the ancillary jurisdiction concept to acquire jurisdiction over an offense based solely on the fact that a title 18 provision provides for Federal jurisdiction where the offense is committed in the course of another Federal offense by bringing a baseless or pretextual underlying charge. Consistent with this purpose, the Committee intends that a prosecution be deemed "not substantial" only when the court concludes that the government's evidence was not or would not have been sufficient to withstand a motion for judgment of acquittal.

Subsection (c) states that the existence of Federal jurisdiction is not an element of an offense. The provision is included purely for emphasis, since each of the offense-defining sections distinguishes between the elements of the offense and the question of jurisdiction. Although not considered an element of the offense, the question whether Federal jurisdiction has been proved is, upon the defendant's motion, a matter for the jury.[47] The National Commission included an identical sentence in its proposed Code.[48] As it aptly observed: "Jurisdiction is not an element of an offense . . . because jurisdiction goes only to the power of a government to prosecute. Whether or not it is proper for the Federal government to prosecute is a separate question from whether or not the defendant has done something criminal."[49] Although current Federal statutes are almost all written so as to commingle the issue of jurisdiction with the elements of the offense,[50] some courts have recognized that jurisdiction is a severable issue which is no part of the crime.[51] Indeed, Federal courts have taken judicial notice of the existence of Federal jurisdiction.[52]

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[45] See, e.g., *id.* at 721–729 (1966); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 370–373 (1978); *Hudak* v. *Economic Research Analysts, Inc.*, 499 F. 2d, 996, 1001 (5th Cor. 1974), cert. denied, 419 U.S. 1122 (1975).

[46] Cf., *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424, 427 (2d Cir. 1965).

[47] New Rule 25.1. F.R. Crim. P.

[48] See Final Report, § 103(1)

[49] See *id.*, Comment, p. 4.

SECTION 202. GENERAL JURISDICTION OF THE UNITED STATES

This section provides that an offense is committed within the general jurisdiction of the United States if it is committed within the United States. The term "United States" is defined in section 111, in a geographic sense, to include all States, all places which are subject to the special territorial jurisdiction of the United States that are described in section 203 (a)(4) and (a)(5), all waters subject to the admiralty and maritime jurisdiction of the United States, and the airspace overlying such States, places, and waters. This generally corresponds to the definition of "United States" in 18 U.S.C. 5.

SECTION 203. SPECIAL JURISDICTION OF THE UNITED STATES

This section provides for the special jurisdiction of the United States.

The special jurisdiction of the United States is divided into three categories (the details of which are set forth in subsections (a), (b), and (c)); the special territorial jurisdiction, the special maritime jurisdiction, and the special aircraft jurisdiction of the United States.

1. The Special Territorial Jurisdiction

Subsection (a) of the section specifies five localities that comprise the special territorial jurisdiction of the United States.

Special territorial jurisdiction includes, under paragraph (1), any real property reserved or acquired for the use of the United States which is under the exclusive or concurrent jurisdiction of the United States, and any place purchased or otherwise acquired by the United States with the consent of the legislature of the State in which such places are located for the construction of a building or other facility.[53] This essentially restates 18 U.S.C. 7(3), which is based in part upon clause 17 of section 8, Article I of the Constitution. The paragraph is intended to follow existing law.[54] The phrase "any building or other facility" is entitled to the broadest possible interpretation in accordance with the Supreme Court's construction of the related Constitutional provision in *James* v. *Dravo Contracting Company.*[55]

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[50] E.g., 18 U.S.C. 1951 ("Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion," etc.).

[51] See, e.g., *United States* v. *LeFaivre*, 507 F.2d 1288, 1297 n. 14 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975): *United States* v. *Blassingame*, 427 F.2d 329, 330. (2d Cir.), cert. denied, 402 U.S. 945 (1971).

[52] See *United States* v. *Miller*, 499 F.2 736, 739–740 (10th Cir. 1974), and cases cited therein.

[53] This does not include the District of Columbia. *Johnson* v. *United States*, 225 U.S. 405 (1912). The Committee endorses and intends to carry forward the interpretation of the "any real property" clause to include a United States embassy or consulate leased from a private citizen abroad. See *United States* v. *Erdos*, 474 F.2d 157 (4th Cir. 1973), cert. denied, 414 U.S. 876 (1973). See also *United States* v. *Holmes*, 414 F. Supp. 831, 836–837 (D. Md. 1976), holding that 18 U.S.C. 7(3) includes subsequent lands.

[54] Important cases in this area, especially on the matter of State cession of jurisdiction to the Federal government, include: *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885); *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938); *Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Adams* v. *United States*, 319 U.S. (1943); *Paul* v. *United States*, 371 U.S. 245 (1963); *Petersen* v. *United States*, 191 F.2d 154 (9th Cir.), cert. denied, 342 U.S. 885 (1951); *United States* v. *Lovely*, 319 F.2d 673 (4th Cir.), cert. denied, 375 U.S. 913 (1963).

Special territorial jurisdiction also includes, under paragraph (2), any unorganized territory or unorganized possession of the United States. This is based upon paragraph 2 of section 3, Article IV of the Constitution, and achieves essentially the same result as present 48 U.S.C. 644a, which provides that a crime committed in certain Federal territories or possessions on which there are no local laws shall be deemed to have been committed on board a United States vessel on the high seas. The inclusion of this provision follows the recommendation of the National Commission in section 210(d) of the Final Report.

Special territorial jurisdiction under paragraph (3) likewise included the Indian country as defined in section 161 of this Act (the Criminal Code Reform Act of 1981). This paragraph, like the previous one, is inserted merely for clarity, since it is settled that unorganized territories or possessions, and the Indian country, are within the scope of 18 U.S.C. 7(3), which is carried forward in paragraph (1), discussed above.[56]

In section 161 of the bill, the Committee has continued the definition of Indian country found in 18 U.S.C. 1151, as well as the various provisions in current law (18 U.S.C. 1162, 3243; 25 U.S.C. 232) that grant State jurisdiction over offenses committed in Indian country by or against Indians. In addition, the Committee has retained the basic structure of 18 U.S.C. 1152 and 1153 (the Major Crimes Act), while making modifications to improve and clarify those statutes.

Currently, under 18 U.S.C. 1152 the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, are made to extend to the Indian country. However, the section does not "extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe." Notwithstanding its apparently plain language the Supreme Court has held that 18 U.S.C. 1152 also does not apply to offenses committed by a non-Indian against a non-Indian victim in Indian country.[57] Such offenses are triable in the States under State law.[58] This means, in general, that section 1152 applies only when the offense is by a non-Indian against an Indian or when an Indian has not been punished by the tribe.[59] Section 1152 incorporates those specific Federal statutes that apply only in the special territorial jurisdiction of the United States, e.g., assault (18 U.S.C. 113), theft (18 U.S.C. 661), rape (18 U.S.C. 2031), homicide (18 U.S.C. 1111-1112). Significant gaps in Federal coverage of criminal offenses exist in such statutes (for example, there is no Federal burglary statute), and offenses not specifically covered are incorporated by the provisions of the Assimilated Crimes Act, 18 U.S.C. 13, which "borrows" the applicable State definition of the offense and penalty.

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[55] 302 U.S. 134 (1937).

[56] See e.g., *Williams* v. *United States,* 327 U.S. 711, 713 (1946); *United States* v. *Marcyes,* 557 F.2d 1361, 1365 (9th Cir. 1977).

[57] E.g., *New York ex rel Ray* v. *Martin,* 326 U.S. 496, 499-500 (1946).

[58] *United States* v. *Burland,* 441 F. 2d 1199 (9th Cir.). cert. denied, 404 U.S. 842 (1971). In *United States* v. *Antelope,* 430 U.S. 641 (1977) the Supreme Court unanimously rejected a claim that this scheme constituted an unconstitutional discrimination against Indian defendants charged with a crime involving a non-Indian victim.

[59] It must also be recognized, however, that the general laws of the United States, as opposed to the laws of the United States applicable in places under the sole and exclusive jurisdiction thereof, apply to both Indians and non-Indians in Indian country. See *Walks on Top* v. *United States,* 372 F. 2d 422 (9th Cir.), cert. denied, 389 U.S. 879 (1967); *United States* v. *McGrady,* 508 F. 2d 13 (8th Cir. 1974).

Serious offenses by Indians against "the person or property"[60] of an Indian or another person in Indian country are governed by 18 U.S.C. 1153, the Major Crimes Act. As recently amended by P.L. 94-297, this statute lists fourteen major offenses that apply in such circumstances.[61] As to twelve of these offenses, Federal statutes exist that prescribe the definition and penalty; as to two offenses, however (burglary and incest), no Federal definition or penalty exists, and the Major Crimes Act provides for the adoption of the laws of the State in which the offense is committed that are in force at the time of such offense.

Although the Major Crimes Act reaches most serious offenses against the person or property, some gaps in coverage remain. For example, maiming (18 U.S.C. 114) and forcible sodomy[62] are not within the statute and as a consequence are punishable today (if committed in Indian country by or against an Indian) only by a tribal court, which can impose a maximum prison sentence of only six months.[63]

At the same time, the Major Crimes Act belies its title in at least one respect, extending to misdemeanor (i.e. under $100) as well as serious "larcen[ies]".[64] The term "larceny", moreover, is ambiguous. While it has been held to refer to the offense described in 18 U.S.C. 661, there is a division of judicial viewpoint whether that statute reaches a taking of property in the nature of embezzlement rather than larceny at common law.[65]

Under the proposed new Federal Criminal Code, 18 U.S.C. 1152 is carried forward virtually verbatim in subsections (c) and (d)(1) of section 161 of the bill. 18 U.S.C. 1153 has, however, been recast in subsection (d)(2). In place of the fourteen offenses listed in section 1153, the Code lists twenty "felony" offenses against the person or property contained in chapters 16 and 17 of the Code that include as a jurisdictional base the special jurisdiction of the United States.[66] The offenses are: murder, manslaughter, and negligent homicide (sections 1601-1603); maiming and aggravated battery (sections 1611-1612); terrorizing (section 1615); kidnapping and aggravated criminal restraint (sections 1621-1622); aggravated rape, rape, and sexual abuse of a minor (sections 1641-1643); arson and aggravated property destruction (sections 1701-1702); burglary and criminal entry (sections 1711-1712); robbery and extortion (sections 1721-1722); theft, trafficking in stolen property, and receiving stolen property (sections 1731-1733);[67] and incest. Although on balance the twenty offenses enumerated may somewhat enlarge the scope of this section as compared to current law, the Committee perceives no reason not to permit Federal prosecution of all serious crimes against the person or property when committed by an Indian in Indian country. Such a decision indeed is consistent with the congressional policy inherent in the Major Crimes Act.

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[60] It has been held that gambling is an offense that is not "against the person or property" of another, so that 18 U.S.C. 1152, rather than the Major Crimes Act or tribal law, is applicable, *United States* v. *Sosseur*, 181 F. 2d 873 (7th Cir. 1950).

[61] Murder, manslaughter, kidnaping, rape, carnal knowledge of any female (not the accused's wife) who has not attained sixteen years of age, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. Where the offense is enumerated in section 1153 and is committed by an Indian against a non-Indian, it has been held that the prosecution must be brought under section 1153, notwithstanding that section 1152 also would seem to reach the conduct, *Henry* v. *United States*, 432 F. 2d 114 (9th Cir. 1970), modified on rehearing, 434 F. 2d 1283, cert. denied, 400 U.S. 1011 (1971).

[62] The lack of coverage for forcible sodomy (sodomy is not included as a form of rape) has created a serious enforcement problem in some instances. In one recent case in Utah, prosecution of an Indian for sodomizing his three-year old grandson had to be declined. Plainly, in a case such as this where the victim and the offender are in the same family, such a result may have tragic consequences since there may be no other practicable way to remove the offender from the situation and to protect the victim from his unwanted sexual attention.

[63] 25 U.S.C. 1302 (7).

[64] *United States* v. *Gilbert*, 373 F. Supp. 32, 89-93 (D. S. Dak. 1974).

[65] Compare, in this regard *United States* v. *Armata*, 193 F. Supp. 624 (D. Mass. 1961) (embezzlement is included in 18 U.S.C. 661) with *United States* v. *Beard*, 436 F.2d 1084, 1088-1090 (5th Cir. 1971) (doubting the correctness of *Armata*).

Unlike the Major Crimes Act, the sole instance in section 161 where it is stated that recourse shall be had to State law occurs with respect to the crime of incest, since that crime is not defined in the Code.[68] Subsection (d) also contains a sentence which makes it clear that, in the event of a criminal prosecution of an Indian for one or more of the offenses listed therein, nothing in the subsection shall be deemed to preclude a conviction for a lesser included offense, whether or not such lesser offense is enumerated in the subsection. This carries forward the interpretation of the present Major Crimes Act in *Keeble* v. *United States.*[69]

It should be noted that the provisions of section 161 and indeed of the Criminal Code Reform Act in general, take no position with respect to the scope of jurisdiction possessed by tribal courts; for example, there is no attempt in this bill to alter the recent determination that tribal courts may not exercise jurisdiction over non-Indians accused of offenses in Indian country.[70] It is the Committee's intention to preserve the extent of concurrent tribal court jurisdiction as it now exists. To that end, section 206(a)(2) makes clear that the existence of Federal jurisdiction over an offense does not in itself preclude an Indian tribe, band, community, group, or pueblo from exercising its jurisdiction in Indian country to enforce its laws applicable to the conduct involved.[71] Moreover, subsection (b) of section 161 reinforces this policy by envincing a plain legislative intent that nothing in this Act (except to the extent specifically set forth) is intended to diminish, expand, or otherwise alter in any manner or to any extent State of tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

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[66] Offenses having general jursidictional applicability will continue to be prosecutable without regard to the provisions of section 161. See the cases cited in note 59 *supra.*

[67] The grading of the theft series of offenses varies from felony to misdemeanor status depending on the type or value of property involved. Section 161 is worded so as to reach only a felonious violation of these provisions, thus narrowing the scope in this respect of the Major Crimes Act but reflecting the policy adhered to generally in that Act that only serious offenses by Indians should be federally prosecutable.

[68] See 18 U.S.C. 1153; and see *Acunia* v. *United States,* 404 F.2d 140 (9th Cir. 1968).

[69] 412 U.S. 205 (1973).

[70] See *Oliphant* v. *Suquamish Indian Tribe,* 35 U.S. 191 (1978).

[71] See also, holding that the double jeopardy clause is not a bar to successive tribal and Federal court prosecutions of the same defendant for the same act, *United States* v. *Wheeler,* 435 U.S. 313 (1978).

Finally, as stated above, the Supreme Court has ruled that 18 U.S.C. 1152 does not apply to offenses committed by a non-Indian against a non-Indian in Indian country and that such offenses are triable by State courts in accordance with State law. The Committee believes that there is Federal power under the Constitution to punish such offenses.[72] In redrafting the provisions of current 18 U.S.C. 1152 in section 161 of the bill in conjunction with the definition of the special territorial jurisdiction in the Code, it is not the intention of the committee that current law with respect to Federal jurisdiction of offenses by non-Indians against non-Indians be changed.

The special territorial jurisdiction also includes, under subparagraph (a)(4), any island, rock, or key which may, at the discretion of the President, be considered as appertaining to the United States. This carries forward the provisions of 18 U.S.C. 7(4).[73] Currently crimes committed on such places are treated as if committed on the high seas on board a United States vessel.[74]

Finally, the special territorial jurisdiction includes any facility for exploration or exploitation of natural resources constructed or operated on or above the outer continental shelf as defined in section 2(a) of the Outer Continental Shelf Lands Act.[75]

2. Special maritime jurisdiction

Subsection (b) of section 203 specifies four localities that comprise the special maritime jurisdiction of the United States.

Paragraph (1) states that the special maritime jurisdiction includes the high seas. This and the following two paragraphs carry forward the provisions of 18 U.S.C. 7(1). The term "high seas" is difficult to define except by exclusion. During the sixteenth and seventeenth centuries especially, nations claimed authority over vast areas of the oceans and seas,[76] but international law came to recognize a broad principle of freedom of the seas,[77] and these claims were gradually reduced until municipal authority became limited to a coastal belt of territorial waters. Disputes, however, persist as to where coastal authority ends and the high seas begin.

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[72] See *United States* v. *Mazurie,* 419 U.S. 544 (1975). Regardless of the Indian status of the perpetrator or victim, offenses in Indian country frequently constitute a breach of the peace and security of the enclave sufficient to invoke the exercise of Federal jurisdiction. Cf. *Relford* v. *Commandant,* 401 U.S. 355, 367–369 (1971). The Committee intends and anticipates, however, that the Federal government's new jurisdiction under section 161 of the bill over non-Indian versus non-Indian offenses, which is concurrent (see section 206 of (1) and (2)) with that of the States and tribes, will be exercised sparingly to vindicate a distinct interest or to insure against an apparent failure of justice. Cf. the Department of Justice policy in *Petite* v. *United States,* 361 U.S. 529 (1960); see also section 205.

[73] The constitutionality of this statute is established by *Jones* v. *United States,* 137 U.S. 202 (1890). The limitations to keys "containing deposits of guano" has been eliminated.

[74] See 48 U.S.C. 1417: *Jones* v. *United States, supra* note 73.

[75] 43 U.S.C. 1331(a). By including such facilities, the Committee accepts the recommendation of the American Bar Association. See statement of Prof. Livingston Hall on behalf of the ABA, Hearings, p. 5784.

[76] See *United States* v. *Rodgers,* 150 U.S. 249 (1893); Colombos, *International Law of the Sea,* pp. 45, 46, 58 (5th ed., 1962).

[77] It was declared in the celebrated *Lotus Case,* that, apart from "certain special cases" allowed for under international law, vessels on the high seas are "subject to no authority except that of the State whose flag they fly." Publications, Permanent Court of International Justice, Series A, No. 10. 25.

For this reason, section 111 defines the "high seas" as, in effect, those parts of the sea that are, in accordance with international law, not included within the territorial sea or internal waters of any nation or state.[78]

Paragraph (2) places within the special maritime jurisdiction any other waters (not the high seas) within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.[79]

Under paragraph (3), the special maritime jurisdiction also attaches to any vessel within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, which vessel belongs in whole or part to the United States, any State or local government, a citizen of the United States, or an organization created under the law of any State or of the United States.[80] This tracks the provisions of 18 U.S.C. 7(1), except for the addition of vessels owned by State or local governments. Jurisdiction under this provision is broad enough to include crimes committed upon vessels while in the territorial waters of foreign nations, as under current law.[81]

Finally, under paragraph (4), special maritime jurisdiction includes any vessel registered, licensed, or enrolled under the laws of the United States, which is upon the waters of any of the Great Lakes or the waters connecting them, or upon the Saint Lawrence River where it constitutes the international boundary. This restates the jurisdiction now provided under 18 U.S.C. 7(2).[82]

3. Special Aircraft Jurisdiction

Subsection (c) of section 203 sets out five circumstances under which aircraft are within the special aircraft jurisdiction of the United States.

Paragraph (1) includes within such jurisdiction aircraft belonging in whole or in part to the United States, a State or local government, or an organization created by or under the laws of the United States or any State. This follows closely the provisions of 18 U.S.C. 7(5).

Paragraph (2) brings within the special aircraft jurisdiction any "civil aircraft of the United States," as defined in section 101 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (15)). This continues the jurisdictional scope of this same section 101.[83]

Paragraph (3) brings within the special aircraft jurisdiction "any other aircraft within the United States," again following a provision of section 101 of the Federal Aviation Act.[84]

Paragraph (4) states that special aircraft jurisdiction further includes "any other aircraft outside the United States," which (1) has its next scheduled stop or its last point of departure in the United States and which next lands in the United States; or (2) aboard which has been committed an "offense," as defined in the recently ratified Convention for the Suppression of Unlawful Seizure of Aircraft, and which lands in the United States with the alleged offender still aboard. This paragraph reflects existing law set out in section 101 of the Federal Aviation Act enacted to implement the Convention for the Suppression of the Unlawful Seizure of Aircraft.[85]

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[78] See I Hyde, *supra* note 34 at 751.

[79] For a discussion of this jurisdiction, see *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336 (1818)); *Wynne* v. *United States*, 217 U.S. 234 (1910); compare *Hoopengarner* v. *United States*, 270 F.2d 465, 470–471 (6th Cir. 1959), with *United States* v. *Tanner*, 471 F.2d 128, 141 (7th Cir.), cert. denied, 409 U.S. 949 (1972).

[80] The term "organization" is defined in section 111.

[81] See *United States* v. *Flores*, 289 U.S. 137 (1932); *United States* v. *Ross*, 439 F.2d 1355 (9th Cir. 1971), cert. denied, 404 U.S. 1015 (1972).

[82] See *United States* v. *Rodgers*, *supra* note 76; *United States* v. *Ross*, *supra* note 81; *United States* v. *Gill*, 204 F.2d 740 (7th Cir.), cert. denied, 346 U.S. 825 (1953).

[83] See 49 U.S.C. 1301(34)(a).

[84] 49 U.S.C. 1301(34)(c).

Finally, paragraph (5) provides that the special aircraft jurisdiction includes any other aircraft leased without crew to a lessee who has his principal place of business in the United States or is without any principal place of business but has his permanent residence in the United States. This also carrier forward existing law.[86]

In all the situations enumerated in subsection (c), jurisdiction attaches to the aircraft only "during the period that such aircraft is in flight." The quoted clause is defined to mean from the moment all the external doors of the aircraft are closed after embarkation until the moment any such door is opened for disembarkation or, if a forced landing has occurred, until competent authorities have taken over the responsibility for the aircraft and the persons and property aboard.

This is also in accordance with existing law,[87] which was drafted to implement the Convention for the Suppression of Unlawful Seizure of Aircraft. In addition, through the definition of "aircraft" in section 111 as including any craft used or designed for use for flight or navigation in space, this subsection brings forward the scope of the recent amendment to 18 U.S.C. 7 to add certain space vehicles to the special jurisdiction of the United States, implementing the Outer Space Treaty of the Convention on Registration of Objects Launched into Outer Space.[88]

SECTION 204. EXTRATERRITORIAL JURISDICTION OF THE UNITED STATES

Currently Federal law contains no general provisions on extraterritorial jurisdiction. Certain statutes contain explicit provision for extraterritoriality.[89] As to others, courts have had to determine whether, from the nature of the offense, Congress intended that extraterritorial jurisdiction should attach.[90] Section 204 is designed to provide additional clarity in this area and to obviate, at least in large part, the need for courts to consider the extraterritorial implications of legislation.

Section 204 states that, except as otherwise expressly provided by statute, treaty, or other international agreement, there shall be Federal extraterritorial jurisdiction over offenses defined in this proposed Code committed, wholly or partly, outside the general or special jurisdiction of the United States, in eleven circumstances

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[85] 49 U.S.C. 1301(34)(d)(ii).

[86] 49 U.S.C. 1301(34)(e).

[87] 49 U.S.C. 1301(34).

[88] See also section 204(j).

[89] For example, 18 U.S.C. 2381, concerning treason, provides that the offense may be committed "within the United States or elsewhere."

[90] See *United States* v. *Bowman, supra* note 34.

The first of these is if the offense is a crime of violence and the victim or intended victim is (1) a United States official, (2) a Federal public servant outside the United States for the purpose of performing his official duties or (3) a national of the United States, or an invitee of a national of the United States, on the premises of a United States embassy or consulate. The terms "crime of violence," "federal public servant," and "United States official" are defined in section 111. This provision, like the four that follow it, is primarily based on the protective theory of jurisdiction, discussed *supra*.

The second circumstance arises if the offense is treason or sabotage against the United States. This is generally consistent with present law and accords with the recommendations of the National Commission.[91]

The third circumstance under which there is extraterritorial jurisdiction exists where the offense consists of (1) counterfeiting or forging, or uttering such copies of, or issuing without authority, seals, securities, currency, instruments of credit, stamps, passports, or public documents which are or purport to be issued by the United States; (2) perjury or false swearing in any Federal official proceeding; (3) making a false statement in a Federal government record or matter; (4) bribery or graft involving a Federal public official; (5) fraud against the Federal government or theft of property in which it has an interest; (6) the impersonation of Federal public servant; or (7) any obstruction of or interference with a Federal governmental function if committed by a national or resident of the United States. This paragraph, which follows closely the recommendations of the National Commission,[92] is thus a safeguard against the major offenses affecting operations of government, and also guards against all punishable forms of interfering with or obstructing governmental functions by nationals and residents of the United States abroad.[93]

The fourth circumstance occurs when the offense involves the manufacture or distribution of narcotics of other drugs for import into, or eventual sale or distribution within, the United States. 21 U.S.C. 959 presently makes punishable the manufacture aboard of certain controlled substances by any person knowing or intending that such substance shall be unlawfully imported into the United States. The Committee believes that the dangers international drug trafficking pose to the well-being of the United States mandates this jurisdictional provision. It thus adopts the views previously endorsed at least in part by the Congress, that illegal drug trafficking which may affect the United States should be cognizable irrespective of where the offense was committed.[94]

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[91] See e.g., *Kawakita* v. *United States*, 343 U.S. 717 (1952); Working Papers, p. 74. It should be noted that extraterritorial jurisdiction also may exist (and if it does, is preserved in the Code; see section 201(b)(2)) with respect to espionage offenses. See sections 1121-1124, *Scarbeck* v. *United States*, 217 F.2d 546 (D.C. Cir. 1962), cert. denied, 374 U.S. 856 (1963), upholding the conviction of a United States diplomat for communicating classified information to a foreign government in Poland. The exercise of extraterritorial jurisdiction is deemed especially fitting when the acts complained of are directed against the safety of the State. I Hyde *supra* note 34 at 805.

[92] See Final Report, § 208(c).

[93] In accordance with the recommendation of the New York City Bar Association's Special Committee, the language of section 204(c) was adopted for the bill, as reported. Hearings, p. 7702. The latter part of the paragraph clearly reflects the personal (or nationality) principle of jurisdiction.

[94] See Restatement (Second), Foreign Relations Law of the United States, pp. 94, 97 (1965).

The fifth circumstance arises when the offense involves entry of persons or property into the United States. This is in accord with existing law and largely reflects the protective principle of jurisdiction.[95]

The sixth circumstance is if the offense consists of possessing an explosive in a building owned by, or under the care, custody, or control of, the United States. Although such buildings are probably within the special territorial jurisdiction of the United States, pursuant to the rationale in a recent court of appeals decision,[96] the Committee has included this provision in order to insure that such offenses will be Federally prosecutable even though the government building is located outside the United States.

The seventh circumstance exists when the offense causes or threatens harm, of the type sought to be prevented in describing the offense—(1) within the United States; or (2) outside the United States to: (A) an individual who is a citizen, national, or resident of the United States; (B) an organization established under the laws of a State or having its principal place of business in the United States; or (C) the United States.[97]

The eighth circumstance exists where the offense is an attempt, conspiracy, or solicitation to commit a crime within the United States. This and the previous base reflect both the protective principle and the discrete principle discussed above as to offenses taking actual effect within the United States.[98] The National Commission included similar provisions in section 208(d) of its Final Report.

The ninth circumstance under which there is extra-territorial jurisdiction occurs when the offense is committed by a Federal public servant, other than a member of the armed forces who is subject, at the time charged, to court-martial jurisdiction for the offense, who is outside the United States because of his official duties, or by a member of his household residing abroad because of such public servant's official duties, or by a person accompanying the armed forces of the United States. The National Commission recommended a nearly identical provision.[99] As regards crimes committed by civilians whose presence abroad is associated with the presence there of our military forces, this provision fills a gap in present law which arises because the exercise of court-martial jurisdiction over such civilians has been held, at least in peacetime, to be violative of the United States Constitution.[100] In addition to the explicit coverage of persons "accompanying" the military forces, the broad definition of "federal public servant" in section 111 extends the coverage to persons "serving with" or "employed by" the armed forces, the other categories of persons referred to in the Uniform Code of Military Justice.[101]

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[95] *See Martin* v. *United States.* 352 F.2d 174 (5th Cir. 1965); Final Report, § 208(c).

[96] See *United States* v. *Erdos,* 474 F.2d 157 (4th Cir. 1973), cert. denied, 414 U.S. 876 (1973).

[97] This formulation is a significant clarification of the comparable provision contained in S. 1722, as reported, of the 96th Congress. The language employed is based on suggestions received by the Committee from business groups and the American Bar Association. See hearings, Part XVI, pp. 11836–11838.

[98] See Working Papers, pp. 73–75.

[99] See Final Report, § 208(f). See also Hearings on H.R. 763 before the House Subcommittee on Immigration, Citizenship and International Law, 95th Cong., 1st Sess., in which the Departments of Defense, Justice, and State all supported a similar provision. And see, commenting on an earlier version of this proposal, Horbaly and Mullin, *Extraterritorial Jurisdiction and its Effect on the Administration of Military Criminal Justice Overseas,* 71 Ml L. Rev. 1 (1976).

[100] *Kinsella* v. *Singleton,* 361 U.S. 234 (1960); *Gorsham* v. *Hagan,* 361 U.S. 278 (1961); *McElroy* v. *Guagleardo,* 361 U.S. 281 (1961). Explicit staturoty coverage of such persons has recently been urged by the General Accounting Office in its 1979 Report entitled "Some Criminal Offenses Committed by DOD Civilians Overseas Are Not Being Prosecuted: Legislation is Needed."

Likewise the coverage of crimes by members of the armed forces who are abroad because of their official duties, and who are not subject to court-martial jurisdiction for the offense, is designed to fill a gap in our existing law, since the Supreme Court in *Toth* v. *Quarles*[102] held that court-martial jurisdiction could not be asserted over an exserviceman for a crime committed while stationed outside this country, and instead was limited to persons who are, at the time of the prosecution, members of the armed forces. The purpose of subsection (h) is to close the loophole by which former members of the armed forces, whose crimes are not discovered until after they have ceased to be subject to court-martial jurisdiction, wholly escape prosecution, by providing for extra-territorial civilian court jurisdiction over such persons under this Code. As drafted by the National Commission, subsection (h) went much farther and would have created concurrent Federal civilian court jurisdiction over all offenses committed by servicemen who are outside the United States because of their official duties. This would create perplexing problems of jurisdiction between the Departments of Defense and Justice both as to the investigation and prosecution of offenses, as well as a potentially severe burden upon the Federal district courts. The Committee is unaware of any evidence or rationale indicating the need for such concurrent jurisdiction, and believes that court-martial jurisdiction is both adequate and appropriate to deal with such offenses.[103] Accordingly, the subsection was narrowed so as to confer Federal civilian court jurisdiction only in the situation where the alleged offender is not subject to court-martial jurisdiction for the offense at the time charged.

It is not believed that this solution gives rise to any constitutional problems. Although Federal jurisdiction under subsection (h) will attach only after the individual is no longer a member of the armed forces, jurisdiction under this Code is not an element of the offense.[104] A member of the armed forces abroad will be on notice that if he engages in conduct that constitutes an offense under this Code, he will be liable to prosecution in a Federal civilian court when the authority of the military to assert jurisdiction over it (and him) has ceased.[105] Of course, the double jeopardy clause will protect any such person from being prosecuted both in the military courts and the Federal civilian courts for the same offense.[106]

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[101] 10 U.S.C. 802(11).

[102] 350 U.S. 11 (1955).

[103] This is consistent with the position espoused by the Administration at the hearings on H.R. 763, *supra* note 99.

[104] See section 201(c).

[105] Some people will of course escape prosecution by virtue of the running of the statute of limitations, but that is merely to recognize the force of the policies underlying such statutes, and does not result from the lack of a forum in which to try the offender. Note that under section 511(g) the statute of limitations is tolled for so long as the person is outside the United States.

[106] *Grafton* v. *United States,* 206 U.S. 333 (1907). Where the conduct only constitutes an offense under this Code and not under the Uniform Code of Military Justice, there will be immediate Federal civilian court jurisdiction and no ex post facto or double jeopardy issue will arise.

The tenth circumstance exists when the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation. This reflects both the personal principle and the passive personality principle, discussed above, conditioned by an absence of jurisdiction such as might obtain, e.g., in Antarctica or on an unclaimed island or the moon.[107]

The final circumstance arises when the offense is committed within the generic terms of, and is committed under circumstances specified by, a treaty or international agreement to which the United States is a party and which provides for or requires the United states to provide for Federal jurisdiction over such offenses. This section incorporates all civilian court jurisdiction as provided by treaty,[108] and enables the specific offenses of piracy (chapter 81 of title 18 of the United States Code) to be omitted from this Code. Under this jurisdictional base the various crimes against person and property set out in this Code that may be involved in piratical actions will be punishable as such and not under a generic concept of piracy. Other examples of such treaties are the "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance" and the "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons".

SECTION 205. EXERCISE OF CONCURRENT FEDERAL JURISDICTION

Although prosecutorial discretion is probably the single foremost factor in assuring restrained and consistent exercise of Federal concurrent jurisdiction,[109] at present no statute recognizes generally the fundamental principle that "establishment of federal jurisdiction by Congress does not mean that it must be exercised to its fullest extent."[110] The National Commission proposed to rectify this omission with a provision explicity authorizing Federal law enforcement agencies to decline or discontinue enforcement efforts whenever the offense can effectively be prosecuted by nonfederal agencies and it appears that there is no substantial Federal interest in the prosecution.[111] The National Commission's proposed statute also undertook, inter alia, to partially define the concept of "substantial federal interest", to mandate to the extent practicable the furnishing of evidence to State and local authorities, and to make clear that the presence or absence of a Federal interest and any other question relating to the exercise of the discretion whether or not to bring a Federal prosecution are not subject to litigation and are exclusively committed (as is the case today) to Federal prosecuting authorities.

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[107] See Final Report, § 208(h): Working Papers, p. 76. See also *United States* v. *Escamilla,* 467 F.2d 341 (4th Cir. 1972). The ninth and tenth circumstances, sections 204(i) and (j) of the bill, encompass the views of the New York City Bar Association's Special Committee. Hearings, p. 7702.

[108] See Final Report, § 208(g); Working Papers, pp. 75–76.

[109] See generally, United States Department of Justice, *United States Attorney's Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws; A Report to the United States Congress* (November 1979).

[110] Comment to Final Report § 207. One statute, 18 U.S.C. 5001, does state that Federal prosecutors may defer to State jurisdiction as to persons under twenty-one who are charged with a Federal crime, but 28 U.S.C. 547, describing the general duties of United States attorneys, indicates that they "*shall* prosecute for *all* offenses against the United States." (emphasis added).

[111] Final Report, § 207.

The advantages of including such a provision are considerable. Perhaps most importantly, a statutory command that Federal prosecutors satisfy themselves as to the existence of a substantial Federal interest before instituting a Federal prosecution with respect to a concurrent jurisdiction crime could act to inhibit the bringing of marginal Federal cases and to guard against the excessive use of some necessarily broad jurisdictional grants, such as the "affecting commerce" or use of the mails jurisdictional bases, that are clearly not designed to mandate Federal prosecution in the normal instance but are intended to make Federal jurisdiction available in the event State or local jurisdiction cannot effectively be asserted. As the Department of Justice noted in its presentation of views to a House Subcommittee in 1978, a provision like that suggested by the National Commission "could serve as a useful reminder that in some situations the broad scope of Federal jurisdiction has been legislated for the unusual, not the routine, case and that routine violations should normally be left to state or local law enforcement authorities."[112] Such a provision could also operate to allay concerns as to the necessary breadth of certain Federal cognizance over concurrent jurisdiction offenses (e.g., narcotics and loansharking) and, as the National Commission observed, could provide a basis of inquiry in congressional oversight or appropriation hearings as to the rationality of the allocation of Federal law enforcement resources.[113]

Notwithstanding these benefits, S. 1437, as passed by the Senate in the Ninety-Fifth Congress, and all prior versions of Federal criminal code reform legislation, did not contain such a provision. The reason was the concern of the Department of Justice and the Committee that inclusion of such a provision could spawn significant litigation as to the exercise by the Federal prosecutors, pursuant to guidelines or otherwise, of discretion whether or not to institute prosecutions and that some courts might see fit to entertain such actions and review such determinations, regardless of the nonlitigability proviso. Recently, however, the Department of Justice changed its position; it now believes that an express nonlitigability is sufficient to insure against such a result, and it accordingly favors including the kind of provision set forth in this section.[114] The Committee, upon its own review of the law and weighing of the policy considerations, likewise has come to the conclusion that the provisions in this section, while not a guarantee against an occasional abuse of concurrent Federal jurisdiction, nontheless are helpful and desirable. This provision would supply more protection against incursion into the States' proper domain than do current Federal statutes which, as noted previously, embody no recognition of a philosophy of restraint in the exercise of concurrent Federal jurisdiction.[115]

Subsection (a) provides that where Federal jurisdiction over an offense exists concurrently with State or local jurisdiction, the existence of Federal jurisdiction does not, in itself, require its exercise nor does the initial exercise of Federal jurisdiction preclude its discontinuation. This simply places into "black letter" statutory form the long basic principle, acknowledged in practice, that there is no congressional purpose in conferring Federal jurisdiction necessarily to encourage its exercise as to offenses over which a State or local government also has cognizance. Unlike the formulation recommended by the National Commission, which applied also to cases of concurrent Federal and foreign jurisdiction, this section is limited to concurrent Federal-State situations, on the theory that the concurrent jurisdiction issues posed by a foreign nation's also having jurisdiction over the offense are of a different nature (not involving considerations of federalism under the United States Constitution), and arise far less frequently, making it appropriate that only the concurrent Federal-State jurisdiction situation be addressed in this legislation.

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[112] Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, Legislation to Revise and Recodify Federal Criminal Laws, 95th Cong., 1st and 2d Sess. (1977-1978), p. 59.

[113] Final Report, Comment, p. 20.

[114] Hearings, *supra* note 112 at 58-59.

[115] See also, endorsing a provision of the type included here, R. Pauley, *supra* Note 1.

Subsection (b) directs Federal law enforcement officers to determine whether there is a sufficient Federal interest in a concurrent jurisdiction case to warrant the exercise of Federal jurisiction, and lists some of the considerations or circumstances that indicate the presence of a sufficient Federal interest. These include generally applicable considerations that would ordinarily influence a prosecutor in deciding whether to exercise Federal jurisdiction: the gravity of the Federal offense as compared to the State or local offense, the relationship of the offense to another Federal offense committed by the accused, and the relative likelihood of prompt and effective investigation and prosecution by Federal, State, or local authorities in light of available resources and the nature and scope of the criminal activity involved. There is also included a catch-all provision reflecting the fact that there may be relevant considerations not encompassed by the foregoing list.[116]

Subsection (c) mandates three actions that the Attorney General is to take in furtherance of the section's purpose of focusing greater attention on the exercise of Federal jurisdiction over concurrent jurisdiction crimes. The first is a requirement that the Attorney General consult periodically with representatives of State and local governments concerning the exercise of Federal jurisdiction over concurrent jurisdiction offenses. This requirement designed to assure that the Federal government takes into account State and local views in setting its prosecutive priorities. Moreover, it would be consistent with the spirit of this provision for the Department of Justice to give notice to State and local authorities of any intended major shifts in policy or priority regarding concurrent jurisdiction offenses so that such authorities could have an adequate opportunity to comment and to prepare for the situation of either an increased or decreased Federal role. The Committee notes that the Attorney General has already taken steps to improve coordination of law enforcement activities with his State and local counterparts by moving to establish Federal-State Law Enforcement Coordinating Committees in all Federal districts.

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[116] For example, the National Commission referred to the possibility that State or local law enforcement might have been so corrupted as to undermine its effectiveness.

The second requirement is that the Attorney General provide written guidelines and other general direction to Federal law enforcement officers concerning the appropriate exercise of Federal concurrent jurisdiction. The Committee is aware that there currently exist some Department of Justice policy statements regarding the exercise of Federal jurisdiction over specific concurrent jurisdiction crimes, and that the Department has recently formulated a uniform and comprehensive set of national guidelines to Federal investigators and prosecutors "concerning the appropriate exercise" of concurrent Federal jurisdiction, among other matters.[117] The Committee believes that these policy statements and guidelines, together with other forms of guidance provided by the Department to Federal law enforcement officers, are sufficient to satisfy the requirements of this provision.

The final requirement is that the Attorney General submit an annual report to the Congress concerning the extent of the exercise of concurrent Federal jurisdiction in the preceding fiscal year. This report requirement should be read in the context of a broader requirement, added by the bill to section 522 of title 28, for annual reports setting forth for each offense the number of prosecutions commenced during the preceding year, and identifying the number prosecuted under each particular circumstance giving rise to Federal jurisdiction. This is designed to provide the Congress with information that will flag any material increase or decrease in Federal prosecutions in particular areas, thereby permitting inquiry to be made into the reasons for such increase or decrease and prompting periodic evaluation of the proper scope of Federal jurisdiction in such areas.[118] The Committee is confident that, by utilizing a computerized management information system, the Department of Justice will be able to supply the Congress the necessary statistical data quite readily. The requirement should help serve both as an effective restraint on the exercise of concurrent Federal jurisdiction and as a useful tool for regularized review by the Congress.

Subsection (d) is not mandatory but hortatory. It states that, except as otherwise prohibited by law, information or material obtained pursuant to the exercise of Federal jurisdiction "may" be made available to State and local law enforcement officers or authorities having jurisdiction or responsibility over the conduct constituting the offense. While not mandating such disclosure, the Committee expects that Federal law enforcement authorities will not withhold relevant information from State or local investigative or prosecutive agencies absent a clear reason, e.g., the need to protect the identity of a confidential informant.

Subsection (e) states that an issue relating to the priority of the exercise of, or of the failure to exercise, Federal jurisdiction over an offense, or otherwise relating to the compliance or to the failure to comply, with this section or with guidelines or other direction concerning the appropriate exercise of Federal jurisdiction provided Federal law enforcement authorities, may not be litigated except as may be necessary in the course of granting leave to file a dismissal of an indictment or information or a complaint.

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[117] See, *Principles of Federal Prosecution*, U.S. Department of Justice, July 25, 1980, reprinted at 9-27.00 of the United States Attorneys' Manual.

[118] In support of such a provision, see the statement of Richard J. Israel, Attorney General of Rhode Island, Hearings, pp. 6015–16.

This provision of nonlitigability is vital to the purpose of the entire section. Courts today have no role reviewing decisions whether or not to institute a Federal prosecution, and to provide judicial review of such determinations might well conflict with the constitutional doctrine of separation of powers under which the Supreme Court has recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." [119] Indeed, notwithstanding a general rule that Federal courts may review and penalize a Federal agency for failure to comply with its own regulations, no Federal court has allowed review of a claim against the Department of Justice for noncompliance with one of its published policies relating to the exercise of prosecutorial discretion.[120] Moreover, quite apart from constitutional considerations, the Federal courts are ill equipped to review a determination to commence or not to commence a prosecution. It is difficult to conceive a judicial hearing on the issue whether the government permissibly and correctly determined that, weighing all relevant considerations, there was a sufficient Federal interest to warrant a prosecution. Given the plethora of intangible factors and subjective judgments involved, the issue is simply not susceptible to judicial review. For similar reasons, Congress has disallowed judicial review of determinations by Federal prosecutors that a grant of immunity is in the "public interest." [121] In addition, opening up the exercise of prosecutorial discretion to judicial scrutiny would prompt a rash of litigation; it would become routine for a defendant in a criminal case to file a motion challenging the exercise of discretion underlying the determination to seek an indictment or to file an information or complaint against him.

For all these reasons the Committee emphatically does not desire to alter the present state of the law under which prosecutive determinations are not reviewable. The sole purpose of this section is to cause the Executive Branch to focus greater attention on the exercise of jurisdiction over offenses cognizable by other authorities in the Nation's criminal justice system, not to inject the Federal courts into the prosecutorial decision-making process. To underscore this limitation on the thrust of the section, the Committee has deemed it prudent not only to include the instant provision expressly stating that issues relating to the exercise of Federal jurisdiction or to compliance with this section, or with guidelines or other direction from the Attorney General, are not litigable, but also to provide explicitly that the Federal courts do not have jurisdiction to entertain or resolve such issues. As noted earlier, the National Commission included a similar provision in its corresponding section.[122]

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[119] *United States* v. *Nixon,* 418 U.S. 683, 693 (1974). The only exception is that the judiciary can intervene to dismiss a prosecution if selective enforcement occurs on a constitutionally forbidden basis such as race or a desire to chill First Amendment protected speech. See e.g., *Oyler* v. *Boles,* 368 U.S. 448, 456 (1962).

[120] See, e.g., *Rinaldi* v. *United States,* 434 U.S. 22 (1977); *United States* v. *Thompson,* 579 F.2d 1184 (10th Cir. 1978) (*en banc*)); *United States* v. *Wallace,* 578 F.2d 251, 255 (5th Cir. 1978); *Spillman* v. *United States,* 413 F.2d 527 (9th Cir.), cert. denied, 396 U.S. 930 (1969).

[121] 18 U.S.C. 6003. See *United States* v. *Merman,* 59 F.2d 1191, 1200–1205 (3d Cir. 1978).

[122] See Final Report, § 207. The exception allowing such litigation "as may be necessary in the course of granting leave to file a dismissal of an indictment" or other charge is designed to

SECTION 206. CONCURRENT FEDERAL JURISDICTION GENERALLY NOT PREEMPTIVE

This section addresses a problem that the courts have had to confront at times without any clear basis for resolution. A general principle is laid down that Federal criminal legislation does not operate preemptively. Subsection (a) states that, unless otherwise expressly provided, the existence of Federal jurisdiction over an offense does not, in itself, prevent: (1) a State or local government from exercising its concurrent jurisdiction to enforce applicable laws; (2) an Indian tribe, band, community, group, or pueblo from exercising its concurrent jurisdiction in Indian country, as defined by applicable treaties and statutes, to enforce applicable laws;[123] or (3) a court-martial, military commission, court of inquiry, provost court, or other military tribunal of the United States from exercising its concurrent jurisdiction to enforce the law applicable to the conduct involved pursuant to the Uniform Code of Military Justice,[124] and other Federal statutes, or the law of war.[125]

Paragraph (1) sets forth the general proposition, found in a number of criminal enactments, that the existence of Federal jurisdiction over an offense does not "in itself" prevent prosecution by a State or local government.[126] The purpose of the "in itself" language is to preserve the prevailing doctrine permitting a court to conclude, even in the absence of explicit congressonal language, that Congress has so "occupied the field" in a particular area as to preclude State or local prosecution. But such a conclusion, as at present, will be conditioned on a rigorous showing of dominant Federal interest, pervasiveness of the Federal legislative scheme, and serious danger that enforcement of State or local laws will conflict with the administration of the Federal program.[127]

Similarly, the Committee intends no change in existing practice enabling a State or locality to prosecute a person notwithstanding the fact that he has been previously tried by the United States for the same conduct.[128]

Paragraph (2) states present Federal law. Although Congress in the Major Crimes Act, 18 U.S.C. 1153, has specified certain offenses committed by Indians in Indian country which are prosecutable in

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carry forward current case law permitting or requiring the Federal courts to dismiss a prosecution *upon the request of the government* because of failure of the prosecution to comport with the Department of Justice policy. See, e.g., *Rinaldi* v. *United States, supra* note 120.

[123] See Statement of Joe Lawrence, Jr., Chairman Makah Tribal Counsel, Hearings, p. 5898; Statement of Robert L. Pirtle, Hearings, p. 5888, *et seq.*; Report of the New York City Bar Association's Special Comittee, Hearings, p. 7702.

[124] 10 U.S.C. 801, *et seq.*

[125] See Final Report, § 206.

[126] In support of this provision, see the Report of the National Association of Attorneys General on Proposals for Revision of the Federal Criminal Code, reprinted in Hearings, pp. 6010, 6011.

[127] See *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956) (State sedition laws cannot be enforced because Federal legislation has occupied the field).

[128] See *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). The National Commission had included provisions purporting to deal with the double jeopardy problems arising, *inter alia*, from independent prosecutions of a defendant for the same conduct by different sovereign entities (e.g., a State and the United States). These provisions cut back substantially on current constitutional doctrine and practice. They would have rendered it virtually impossible for a State to prosecute following an acquittal or conviction in a prosecution by the Federal government for the same conduct, and only slightly less difficult for the Federal government to prosecute in the converse situation. See Final Report, §§ 707-709. The Committee considered that these matters and others covered in chapter 7 of the Final Report should be left to existing law and prosecutive policies. See *Petite* v. *United States, supra* note 72.

a Federal court, it has apparently not precluded a tribe from exercising its sovereign power[129] to try the perpetrator for the same offense, although it has limited the penalty that may be imposed by tribal courts to no more than six months imprisonment.[130]

Paragraph (3) also states present law.[131] While most offenses cognizable by military courts are uniquely military in nature, the Supreme Court has recently confirmed that court-martial jurisdiction is available with respect to civilian-type offenses committed by a serviceman in circumstances where they are "service-connected."[132] Thus there exists an area where civilian and military jurisdiction overlap. Unlike with State and probably tribal courts, it has been held that military courts are arms of the same sovereign as Federal civilian courts for purposes of the double jeopardy clause so that successive prosecutions of the same offense are barred.[133]

Subsection (b)(1) sets forth a further exception to the principle that the assertion of Federal jurisdiction is generally not preemptive. It provides that, upon order of the Attorney General, the assertion of Federal jurisdiction over an offense (1) that has as a victim or intended victim a United States official, a foreign official or a member of his immediate family, or an official guest of the United States, and (2) that is described in section 1601 (Murder), 1602 (Manslaughter), 1603 (Negligent Homicide), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1614 (Menacing), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), or 1623 (Criminal Restraint), or in chapter 10 (Criminal Attempt, Criminal Conspiracy, or Criminal Solicitation), if the crime that was an object of the attempt, conspiring, or solicitation was one of the other offenses set forth above, shall suspend, to the extent indicated in the order, the exercise of jurisdiction by a State or local government, under any State or local law applicable to the conduct involved, until the order is rescinded by the Attorney General.

Subsection (b)(2) sets forth an identical exception for other offenses. These offenses are (1) those contained in subchapter B (Offenses Involving Political Rights) of chapter 15, (2) section 1355 (Trading in Public Office), and (3) section 1503 (Interfering with a Federal Benefit), 1504 (Unlawful Discrimination), and 1616 (Communicating a Threat), to the extent that they involve conduct proscribed by the Federal Election Campaign Act of 1971, as amended. These provisions essentially carry forward the provisions of Public Law 94-443 which made various offenses relating to Federal elections preemptive of State law. Since the election offenses in this Code apply in part to mixed Federal-State elections, the Committee believed it would be inappropriate to make such offenses absolutely preemptive of State law. The device chosen of permitting the Attorney General to confer priority to any Federal prosecution in this area is considered to be sufficient recognition of the Federal interest in vindicating such violations. The Committee's solution adopts the recommendation of the Criminal Justice Section of the American Bar Association.

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[129] The power of Indian tribes to punish for offenses is an inherent aspect of their sovereignty which can only be ousted or overcome by explicit congressional enactment. See *Talton* v. *Mayes*, 163 U.S. 376 (1896): *United States* v. *Antelope, supra* note 58.

[130] See 25 U.S.C. 1301, 1302. The Supreme Court has held that tribal courts represent a sufficiently separate sovereignty from courts of the United States so that successive prosecutions for the same conduct in a tribal and a United States court do not offend the double jeopardy clause. See *United States* v. *Wheeler, supra* note 72.

[131] See *United States* v. *Hodges*, 487 F.2d 945 (5th Cir. 1973).

[132] See *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Relford* v. *Commandant*, 401 U.S. 355 (1971); see also *Gosa* v. *Mayden*, 413 U.S. 665 (1973).

[133] See *Grafton* v. *United States, supra* note 106.

The terms "United States official," "foreign official," "immediate family," and "official guest of the United States" are defined in section 111. "United States official" means a Federal public servant who is the President, the President-elect, the Vice President, the Vice President-elect, a member of Congress, a member-elect of Congress, a delegate or a commissioner of Congress, a delegate-elect or a commissioner-elect of Congress, a judge, a member of the executive branch who is the head of a department listed in section 101 of title 5, United States Code, or the second ranking official in such department, or a person employed in the Executive Office of the President or in the Office of the Vice President authorized to receive an annual rate of pay equal to that which applies for positions at level II of the Executive Schedule. With respect to United States officials, the above subsection carries forward, with modifications, the current provisions of 18 U.S.C. 351(f) and 1751(h). Those statutes contain similar coverage (including attempt and conspiracy) for the offenses of assault, homicide, and kidnapping. These offenses are translatable under the proposed Code to the offenses listed in this subsection, except that other degrees of the basic offense have been added (e.g., criminal restraint to kidnapping). The class of officials covered is the same, except that this subsection has added (as is done in the jurisdiction provisions of the offenses themselves) judges, members of the cabinet and their deputies, and certain high-ranking officials in the White House, to the classes of persons to whom the corresponding provisions apply under 18 U.S.C. 351 and 1751. The Committee considers such additions to be appropriate. Moreover, because of the obvious foreign relations impact of such offenses when the victim is a foreign official, a member of his immediate family, or an official guest of the United States, the Committee has added these classes of persons to the list of those as to whom the Attorney General is authorized to insure that Federal prosecution and investigation may go forward without possible hindrance caused by a concurrent State or local proceeding.

CHAPTER 3.—CULPABLE STATES OF MIND

(Section 301-303)

The purpose of this chapter is to state and define the mental states ("*mens rea*" elements) that are used throughout the Code in defining an offense, and to make it clear that these are the only mental states that must be established in prosecutions under the Code. Because these mental states are of general application, they can be defined without reference to the particular conduct proscribed. The chapter also provides rules of construction with respect to proof of the requisite state of mind.

There are no provisions comparable to those contained in this chapter in title 18 or elsewhere in the United States Code. The Model Penal Code and other codifications that have followed its plan, including the National Commission Code, include definitions of mental states and rules of construction relating thereto in order to provide a uniform, clear manner of expression. These efforts in criminal law codification have been in substantial agreement on both the number and basic content of culpability terms. This chapter follows the example set by those efforts.

Present Federal law

Present Federal criminal law is composed of a bewildering array of terms used to describe the mental element of an offense. The National Commission's consultant on this subject identified 78 different terms used in present law. These range from the traditional "knowingly," "willfully," and "maliciously," to the redundant "willful, deliberate, malicious, and premeditated," and "knowingly and willfully," to the conclusory "unlawfully," "improperly," and "feloniously," to the self-contradictory "willfully neglects." No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a particular statute, or to be inferred from a particular statute, has been left to the courts.

Not surprisingly, the proliferation of these terms has left the criminal justice system with confusing and even conflicting laws. Justice Jackson characterized the mental element concepts in Federal law as being "elusive" because of "the variety, disparity and confusion" of judicial definitions.[1] For example, the term "willful" has been construed by the courts in a variety of ways, often inconsistent and contradictory. The courts have defined a "willful" act as an act done voluntarily as distinguished from accidentally, an act done with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is lawful, and an act done with careless disregard whether or not one has the right so to act.[2]

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[1] *Morrisette* v. *United States*, 342 U.S. 246, 252 (1952). For a comprehensive analysis of the problems surrounding culpable states of mind in existing law and the important reforms advanced in this chapter, see K. Feinberg, *Toward a New Approach to Proving Culpability: Mens rea and the proposed federal criminal code*, 18 AM.CR.L.REV. 123 (1980).

The term "knowingly," which is often used in conjunction with "willfully," has been defined in terms of awareness;[3] in terms of a defendant's inference from the circumstances or belief that something is probably true;[4] in terms of a defendant's awareness of a "high probability" that a circumstance exists; in terms of intentional or purposeful or "studied ignorance" as to the existence of a fact;[5] and in terms of "gross indifference to" or "willful neglect of" a duty in respect to ascertainment of particular facts.[6]

Similarly, the concept of "malicious," which in some contexts has been defined to mean little more than intentionally or knowingly engaging in prohibited conduct without legal justification,[7] in other contexts has meant doing a harm malevolently, for the sake of the harm as an end in itself.[8] "Wanton" has appeared to serve as an equivalent of "reckless" or "with gross negligence."[9]

As Professor Weinreb, consultant to the National Commission, summarized the state of Federal law with respect to the "mental element":[10]

> Unsurprisingly, the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale

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[2] See, e.g., *Screws* v. *United States,* 325 U.S. 91 (1945); *Spies* v. *United States,* 317 U.S. 492 (1943); *United States* v. *Murdock,* 290 U.S. 389 (1933), and cases cited therein; Working Papers, pp. 148–151.

[3] *United States* v. *Werner,* 160 F.2d 438, 441–442 (2d Cir. 1947).

[4] See *United States* v. *International Min'ls Corp.,* 402 U.S. 558 (1971); *Boyce Motor Lines, Inc.* v. *United States,* 342 U.S., 342 (1952); *Rubin* v. *United States,* 414 F.2d 473, 475 n.8 (5th Cir. 1969).

[5] *Turner* v. *United States,* 396 U.S. 398, 416 (1970).

[6] See *Boyce Motor Lines, Inc.* v. *United States, supra* note 4; *Spurr* v. *United States,* 174 U.S. 728 (1899); *Griego* v. *United States,* 298 F.2d 845 (10th Cir. 1962); *United States* v. *General Motors Corp.* 226 F.2d 745, 749 (3d Cir. 1955). "Knowing" in fraud and false statement offenses is satisfied when the defendant makes representations with a reckless indifference as to whether they are true or false. See *Sparrow* v. *United States,* 402 F.2d 826 (10th Cir. 1968); *Elbel* v. *United States,* 364 F.2d 127, 134 (10th Cir. 1966), cert. denied, 385 U.S. 1014 (1967); *Gusow* v. *United States,* 347 F.2d 755 (10th Cir.), cert. denied, 382 U.S. 906 (1965); *Irwin* v. *United States,* 338 F.2d 770, 774 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965). This standard is probably an application of the rule holding a defendant to knowledge where he has been grossly indifferent to a duty to ascertain facts. See *United States* v. *Andreadis,* 366 F.2d 423, 430 (2d Cir. 1966), cert. denied, 385 U.S. 1001 (1967).

[7] See *Stephenson* v. *Duriron Co.,* 292 F. Supp. 66, 88–89 (S.D. Ohio 1968), aff'd, 428 F.2d 387 (6th Cir.), cert, denied, 400 U.S. 943 (1970), *Heard* v. *Rizzo,* 281 F. Supp. 720, 738 (E.D. Pa.), aff'd, 392 U.S. 646 (1968).

[8] See *Aikens* v. *Wisconson,* 195 U.S. 194, 195 (1904).

[9] See e.g., *Western Constructors, Inc.* v. *Southern Pacific Co.,* 381 F.2d 573, 576 (9th Cir. 1967); *United States* v. *Pardee,* 368, F.2d 368, 374 (4th Cir. 1966); *Baltimore & O. R. R. Co.* v. *Felgenhauer,* 168 F.2d 12, 16 (8th Cir. 1948); *Nestlerode* v. *United States,* 122 F.2d 56, 59 (D.C. Cir. 1941); *Dixon* v. *Switzenerg,* 262 F. Supp. 535, 537 (D. Del. 1967).

[10] Working Papers, p. 120.

which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.

Culpability—the Code's approach

The Federal Criminal Code, as reported, discards the confused and inconsistent *ad hoc* approach to culpability that now characterizes Federal criminal law. Instead it reduces the number of terms used to describe the requisite mental state to four: *intentional, knowing, reckless, or negligent.* All other statutory formulations within title 18, United States Code, are eliminated. The four degrees of culpability that are retained express the significant distinctions found by the courts and are sufficient for all the distinctions in defining offenses.

In adopting this approach, the bill reflects the analysis of the traditional *mens rea* concept and the translation of that concept into four carefully defined terms introduced yb the Model Penal Code and followed by all of the recent penal code revisions, both proposed and enacted.

SECTION 301. STATE OF MIND GENERALLY

1. In General

The purpose of this section is to describe the techniques that are used by the draftsmen of the Code in stating the degree of culpability required by a particular penal statute. The section does not prescribe any rules of construction nor does it define any crimes or defenses to any crimes.

2. Subsection (a). State of Mind Defined

This subsection adopts the analytical aid embraced in the Model Penal Code approach of defining culpability terms in relation to the individual component parts of an offense, the traditional *actus reus* elements. It defines state of mind, the traditional *mens rea* concept, to mean the mental attitude required with respect to conduct, an existing circumstance, or a result described in a section defining an offense.

By classifying the offense elements into three types, *viz.*, the nature of conduct, the circumstances surrounding the conduct and the results of the conduct, and by considering the state of mind required in relation to each component offense element, the Code avoids confusing the proof required with respect to each element. Although many offenses prescribe the same state of mind for each type of element, some do not. Clear analysis therefore requires that the question of the kind of culpability required to establish the commission of an offense be considered separately with respect to each of the elements of the offense. For example, section 1714 provides that a person is guilty of an offense "if, with intent to obtain transportation, he secretes himself aboard a vessel or aircraft that is the property of another and . . .is aboard when it leaves the point of embarkation." The culpability level for the conduct, i.e., secreting oneself aboard a vessel or aircraft, is "knowing";[11] the culpability level attaching to the existing circumstances that the vessel or aircraft is the property of another and that the actor is aboard at the time of its departure is, by contrast, set at the lower level of "reckless".[12] The phrase "with intent to obtain transportation" does not describe a general state of mind, but rather a specific purpose for which the conduct is done.

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[11] See section 303(b)(1).

3. Subsection (b). Terms Used to Describe State of Mind

This subsection states the culpability terms used throughout the Code. It consolidates a congeries of ambiguous and sometimes contradictory terms found in present Federal criminal law into four specific terms or their variants: intentional, knowing, reckless, and negligent.

4. Subsection (c). State of mind applicable to conduct, an existing circumstance, and a result

This subsection builds on the analysis provided in subsection (a) and uses the terms provided in subsection (b) to indicate the states of mind that may be employed in the Code with respect to the three basic offense elements. It provides that the state of mind that may be specified as applicable to (1) conduct is intentional or knowing; (2) an existing circumstance is knowing, reckless, or negligent; and (3) a result of the conduct is intentional, knowing, reckless, or negligent.[13] It is these elements and mental attitudes that are used in various correlations to define the offenses in the proposed Federal criminal code. In this sense, they are the draftsmen's analytical tools.

SECTION 302. "INTENTIONAL", "KNOWING", "RECKLESS", AND "NEGLIGENT" STATES OF MIND

1. In General

This section attempts the extremely difficult task of defining the four terms used to denote the mental element of an offense set forth in this title. It uses Model Penal Code section 2.02(2) as the basis for the terms and definitions and also incorporates certain improvements in language and other ideas appearing in the Final Report and the recent State codifications and proposed codifications, all of which are derived from the Model Penal Code. The definitions are intended to be clear enough to stand on their own without substantial comment. It was found by the Committee to be important to the goal of clarity that the definition of each term be related directly—through tabulated paragraphs—to every element of an offense that it may affect.

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[12] See section 303(b)(2).

[13] The reasons for the difference in application result from the definitions of the state of mind elements. A reckless or negligent state of mind, both of which involve risk situations, can only apply to circumstances surrounding conduct or to the result of the conduct because it is the circumstances or result that poses the risk. Likewise, the absence of the mental state "intentional" in reference to an existing circumstance is based on the definition of intentional. One can intend or determine t[illegible] conduct or to cause a result but cannot "intend" a circumstance.

2. Intentional

The highest degree of culpability is present if a person engages in conduct (or causes a result) *intentionally,* that is, "if it is his conscious objective or desire to engage in the conduct (or cause the result)." A common means to describe conduct as intentional, or to say that one caused a result intentionally, is to state that it is done or accomplished "on purpose." [14]

The term "intentional" is not meant to connote the existence of a motive. Liability for intentionally engaging in prohibited conduct is not dependent on an assessment of the merit of the motive that led the person to disregard the law. To use the example posed in the Commission Working Papers, "(t)he man who steals because he likes to steal, the man who steals to fill his wallet, and the man" (like Robin Hood) "who steals to feed the poor commit the same crime." [15] In short, the word "intentional" describes the mental attitude associated with an act to connote the meaning that the act is being done on purpose; it does not suggest that the act was committed for a particular purpose, evil in nature.[16]

3. Knowing

The second highest degree of culpability is present if a person's state of mind with respect to conduct, circumstances, or a result is *knowing*; that is, respectively, he is aware of the nature of his conduct, he is aware or believes that requisite circumstances exist, or he is aware or believes that his conduct is substantially certain to cause the result.

The distinction between acting intentionally and acting knowingly is a narrow one. Both involve a conscious undertaking. But action is not intentional with respect to the nature of the conduct or the result of the actor's conduct unless it was his conscious object or desire to perform an act of that nature or to cause such a result. As the National Commission's consultant on this subject put it, "it seems reasonable that the law should distinguish between a man who wills that a particular act or result take place and another who is merely willing that it should take place. The distinction is drawn between the main direction of a man's conduct and the (anticipated) side effects of his conduct." [17] For example, the owner who burns down his tenement for the purpose of collecting insurance proceeds does not desire the death of his tenants, but he is substantially certain (i.e., knows) it will occur.

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[14] The bill, as reported, uses the term "intentional" rather than the word "purposely" (which is used in the Model Penal Code to describe the same mental attitude) for the same reasons underlying the National Commission's adoption of the word "intentional" and rejection of "purposely." As the Commission Working Papers point out, the word "intentional" rather than "purposely" is chosen because the former is more familiar to the law and because the latter word "may too easily suggest a requirement of a particular purpose rather than simply that conduct be purposive." Working Papers, p. 123.

[15] *Ibid.*

[16] In certain cases, a special motive can be made an element of an offense by specifying that the conduct is not criminal unless a person engages in it for a particular purpose. Commonly known as "specific intent," such a requirement is an element of certain offenses under existing law. See, e.g., *Screws* v. *United States, supra* note 2. In the absence of such a requirement specifically required in the definition of an offense, the motive underlying the conduct is immaterial. See Working Papers, pp. 123–24.

[17] Working Papers, p. 124.

For most purposes of culpability, the distinction is inconsequential. Many offenses may be committed either intentionally or knowingly. Certain offenses commonly and awkwardly referred to as "specific intent" offenses have, however, required proof of a purpose. Treason, which requires proof of a purpose to aid the enemy,[18] is one example.

The use of the word "believes" is to codify the inference of "knowledge" of an existing fact or result that will occur which is traditionally drawn from proof of notice of substantial probability of its existence or occurrence, unless the defendant establishes an honest, contrary belief. It should make no difference with respect to liability whether the apartment owner knows that some dwellers will die in a fire or has little doubt that a tenant will be killed.[19] In short, a belief that is correct is deemed to be "knowledge."[20] By using the word "believes" in the definition, the subsection clarifies this point.

The belief that the actor must hold for the mental element to be "knowing" must be firm. That is, with respect to a circumstance, the actor must be without sustantial doubt as to its existence. Regarding the result of conduct, the belief that the conduct will cause the result must be "substantially certain."

The use of the word "belief" in defining "knowing" is also intended to codify the present concepts of "willful blindness" or "connivance," which describe the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not exist in fact.[21]

4. *Reckless*

A different order of culpability is present if a person's state of mind is *reckless* with respect to an existing circumstance or the occurrence of a result. As defined in the proposed Code, a person is reckless if he is aware of but disregards a substantial risk that a circumstance exists or that a result will occur. A substantial risk is defined as a risk the disregard of which constitutes a gross deviation from the standard of care a reasonable person would exercise under the circumstances, except that awareness of the risk is not required if the lack of awareness is due to self-induced intoxication.[22]

The term "reckless" differs markedly from the mental states "knowing" or "intentional." Recklessness involves conscious risk creation. It does not encompass any desire that the risk occur nor an awareness that it is practically certain to occur. Acting recklessly does resemble acting knowingly insofar as a state of awareness is involved, but the awareness is of risk, that is, of probability, rather than substantial certainty. Thus, the distinction, with respect to circumstances surrounding the conduct, is between awareness (knowledge) of the existence of those circumstances and indifference (recklessness) as to whether they actually exist or not; and with respect to the result of conduct, the distinction is between substantial certainty that the result will occur and indifference as to whether it will occur or not.[23]

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[18] See *Haupt* v. *United States*, 330 U.S. 631, 641 (1947).

[19] See Model Penal Code. §2.02, Comment, p. 130 (Tent. Draft No. 4, 1955); Perkins, *Criminal Law*, p. 684 (1957).

[20] Perkins, *supra* note 19 at 684.

[21] See Model Penal Code, §2.02, Comment, pp. 129-30 (Tent. Draft No. 4, 1955).

[22] See the discussion of the intoxication defense in connection with chapter 5, *infra*. The term "self-induced intoxication" is defined in section 111.

As the proposed Code uses the term "reckless," the risk consciously disregarded must be substantial and unjustifiable. The Final Report and the Model Penal Code both use these adjectives in their respective draft provisions to modify the risk involved. The Committee believes that use of the term "substantial" in conjunction with the last sentence in subsection (c), requiring the risk to be of "such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation," encompasses this concept.

The requirement that disregard of the risk must constitute "a gross deviation" from the proper standard of care is admittedly imprecise and judgmental but necessary to require the factfinder to evaluate whether the act of the defendant in disregarding the risk—or in the case of negligence, to be discussed *infra*, failing to perceive the risk—is serious enough to merit the condemnation of the criminal law. As candidly stated by the Model Penal Code reporter:[24]

> Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. . . . This formulation is designed to avoid the difficulty inherent in defining culpability in terms of culpabiltiy, but the accomplishment seems hardly more than verbal; it does not really avoid the tautology or beg the question less. . . .
>
> . . . The jury must find fault and find it was substantial; that is all that either formulation says or, we believe, that can be said in legislative terms. . . .

The standard under which this value judgment is made invites consideration of the "care that a reasonable person would exercise in such a situation." There is an inevitable ambiguity in "situation." If the actor were blind or had just experienced a blow or heart attack, these facts would certainly be considered, as they are under current law. But the heredity, intelligence or temperament of the actor would not be material in judging recklessness or negligence, else the criterion would be deprived of all objectivity.[25] Because there are a variety of reasonable bases for discriminating among various "situations," the Committee intends to leave this issue to the courts.

5. *Negligence*

The culpable mental state of lowest degree is negligence. A person's state of mind is negligent if he ought to be aware of a substantial risk that a circumstance exists or that a result will occur. A substantial risk is defined as a risk the disregard of which constitutes a gross deviation from the standard of care a reasonable person would exercise in the situation.

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[23] See Committee Comment to Texas Penal Code, Section 6.05; Model Penal Code §2.02, Comment, p. 125 (Tent. Draft No. 4, 1955).

[24] Model Penal Code §2.02, Comment, pp. 125–126 (Tent. Draft No. 4, 1955).

[25] See *id.* at 126; Williams. *Criminal Law*, §28 (1953).

Unlike an intentional, knowing or reckless act, a negligent act does not involve a state of awareness. It is the case where the actor ought to be aware of a risk, considering its nature and degree, the nature and the purpose of his conduct and the care that would be exercised by a reasonable person in such a situation.[26] As in the case of recklessness, the risk must be substantial and unjustifiable in the sense that failure to perceive it constitutes a gross deviation from the standard of care a reasonable person would exercise in such a situation.[27] And, as previously discussed with respect to recklessness, the jury must evaluate the actor's failure of perception and determine whether, under all the circumstances, it constitutes a "gross deviation" from the proper standard of care so as to warrant the criminal sanction. Finally, it should be noted that in requiring a "gross deviation," the standard for criminal negligence is stricter than that for ordinary tort negligence.

The desirability of including negligence as a basis for the imposition of criminal responsibility has been a subject of debate for years in the criminal law field. The Model Penal Code and every jurisdiction which has recently revised its penal code, however, include criminal negligence apparently on the theory that "[k]nowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their facilities and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control."[28] The Committee believes that, while negligence ought to be viewed as an exceptional basis of liability, there is a place for this degree of culpability in a Federal criminal code. Where negligence is the required state of mind, it must be specifically stated in the definition of the offense (see section 303(b)). Where specified, the rationale underlying its requirement is discussed in the comment to the chapter in which the offense appears.

SECTION 303. PROOF OF STATE OF MIND

1. In General

Section 303 contains a series of rules governing (unless "otherwise expressly provided") the proof of culpability. There are no comparable provisions in present Federal law. Where a law has imposed criminal liability without clearly prescribing the requisite degree of culpability with respect to each element of the offense or without stating whether proof of a state of mind is required as to certain factors, the courts have been forced to deal with the questions by gleaning guidance from the statute's legislative history which all too frequently proves elusive on the issue.[29]

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[26] See Model Penal Code § 2.02. Comment, p. 126 (Tent. Draft No. 4, 1955).

[27] The Model Penal Code and most State codifications use the word "unjustifiable" to modify the risk in the definition of negligence. Model Penal Code, § 2.02. See, e.g., Texas Penal Code § 6.05. However, as the Working Papers of the National Commission point out, it may be "more appropriate to talk of 'unreasonable' rather than 'unjustifiable' disregard [of a risk]; the former word more easily encompasses a negligent failure to be aware of, as well as negligent failure to give sufficient weight to, the danger involved". Working Papers, p. 127.

[28] Model Penal Code, § 2.02. Comment, pp. 126–127 (Tent. Draft No. 4, 1955).

2. Required Proof of State of Mind

Subsection (a) requires that a state of mind must be proved with respect to each element of an offense, except that no state of mind must be proved with regard to an element specified as existing or occurring "in fact". In addition, the state of mind to be proved with respect to any element of an offense described outside the Code, or an offense set forth in the Code that describes the offense as a violation of a statute outside the Code, is governed by the provisions of that statute. The first provision introduces a drafting technique for denoting those factors in the description of an offense that should not require proof of any state of mind and that are not otherwise exempted from such proof requirements by the provisions of subsection (d).

In codifying the proof requirement, and its exceptions, in subsection (a), the bill recognizes the force of arguments against the imposition of criminal liability where a person engages in conduct without culpability.[30] By the same token, it acknowledges that some conduct may be declared criminal even though a person acts without fault. The legislature is free in some instances to dispense with the requirement of a culpable mental state,[31] but if the offense is codified in title 18 its intent to eliminate such a requirement as to elements other than matters of law must be manifest.

3. Required State of Mind for an Element of an Offense if Not Specified

Whereas subsection (a) prescribes a rule to determine whether a state of mind must be proved, subsection (b) states a rule of construction prescribing the requisite degree of culpability that must be proved with respect to an element of the offense where none immediately modifies the element.

The rule of construction provided in this subsection applies, except as otherwise provided by subsection (a), where a statute species a mental state but it is unclear whether the mental state applies to all the elements of the offense or only to the element that it immediately introduces (partial specification).[32]

The operation of the rule of construction provided in subsection (b) depends on whether the element of the offense is conduct, an existing circumstance, or a result. Where a state of mind does not immediately introduce an *actus reus* element of an offense, the state of mind which must be proved with respect to conduct is knowing and to an existing circumstance or a result is reckless.

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[29] For a discussion of the confusion that can result from ambiguous provisions relating to the mental element, see Working Papers, p. 131.

[30] See, e.g., Hart, *The Aims of the Criminal Law,* 23, Law & Contemp. Prob. 401 (1958); Packer, *Mens Rea and the Supreme Court,* 1962 Sup, Ct. Rev. 107 (1962).

[31] See, e.g., *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U.S. 57, 70 (1910); *United States* v.*Dotterweich,* 320 U.S. 277 (1943).

[32] Both the Model Penal Code and the Final Report of the National Commission proposed two separate rules of construction, one to apply where there is no specification of mental element and the other to apply where the statute only partially specifies the mental state. See Model Penal Code, §§ 2.02(3) and (4); Final Report §§ 302(2) and (3). By requiring the reader to focus on each element of the offense and determine whether a mental state immediately introduces it, the rules can be consolidated. The reader then does not have to contend with two rules, one governing no specification statutes and the other governing partial specification statutes. In subsection (b), the Committee adopts the consolidation approach.

An example illustrating how the rule will resolve ambiguities about the degree of culpability that applies to an element is instructive. 18 U.S.C. 111 makes assault on a Federal officer engaged in the performance of his duties a felony. In the past the courts have split on the question whether it is necessary to show that a person charged under this section knew that the person he was assaulting was a Federal officer.[33] Pursuant to the rule of construction prescribed in this subsection, in the absence of a provision to the contrary in the criminal statute, it would not be necessary to prove such knowledge. Instead, the standard would be reckless because the element, "a Federal officer," is an attendant circumstance.[34]

By requiring proof of a mental state of at least the recklessness degree as to an element of an offense, the bill reflects the general view that it is inappropriate, in the absence of an explicit legislative determination, to require proof of more than a conscious disregard of the law.[35]

4. Satisfaction of State of Mind Requirements by Proof of Other State of Mind

Subsection (c) establishes the uncontroversial principle that when a higher degree of culpability than the one required in the definition of an offense is proved, the requirement of culpability is satisfied. For drafting purposes, it is thus necessary only to state the minimal degree of culpability for the higher degrees to be included.

5. Matters of Law Requiring No Proof of State of Mind

Subsection (d)(1) states the conventional rule that ignorance of the law is not a defense to criminal liability by providing, *inter alia*, that proof of knowledge or other state of mind is not required as to the fact that conduct is an offense. The phrase "[e]xcept as provided in subsection (a)(2)" qualifies the express statement of this rule here to make it clear that *scienter* with respect to non-title 8 regulatory offenses is to be determined by looking to the intent of Congress under the nontitle 18 regulatory statute. Because the fact that a person knows he is violating the law is normally not an element in the description of an offense, ignorance of the law proscribing the conduct is ordinarily not a defense. Thus, the rule provided in subsection (d)(1) is conceptually not necessary. However, the Committee, along with the draftsmen of the Model Penal Code and the Final Report, believes that its inclusion may avoid needless uncertainty about a settled principle of law.[36]

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[33] See *United States* v. *Feola*, 420 U.S. 671 (1975).

[34] In the bill, as reported, the problem would not arise since the status of the person assaulted (i.e., Federal officer) is not retained as an element of the offense but is a jurisdictional fact for which no culpability is required. See sections 1612-1613, 1302, and discussion of subsection (d) of section 303, *infra*.

[35] See, e.g., Model Penal Code, § 2.02. Comment, p. 127 (Tent. Draft No. 4, 1955).

[36] See Model Penal Code, § 2.02(9); Final Report § 302(5).

Where an offense, however, specifically makes knowledge of the law defining the offense an element of the offense, i.e., where only conscious violation of the law is a violation, ignorance or mistake of law is a defense. For example, there are cases where the courts have held that honest belief that conduct is lawful constitutes a defense where an element of the offense is the intent to evade the law.[37] In such cases, the courts have applied the principle that where ignorance or mistake negates the state of mind required as an element of the offense, a belief based on reasonable grounds that one's conduct is not a violation of the law is a defense.

Subsection (d)(2) states the general rule that proof of culpability is not required with respect to any factor which is solely a basis for Federal jurisdiction, for venue, or for grading. The rule is consistent with the trend of recent decisions interpreting existing criminal statutes, including both substantive offenses and conspiracy, as not requiring proof of *scienter* by a defendant as to the jurisdictional element contained therein.[38] The rationale given for doing so, in many cases, is based on the recognition that the so-called jurisdictional "element" is in reality no part of the crime. For example, in holding that 18 U.S.C. 1343 (wire fraud) does not require such proof, the Court in *United States* v. *Blassingame* stated:[39]

> The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for Federal jurisdiction. The essence of the crime is the fraudulent scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used.

In *United States* v. *Feola,*[40] the Court made the following pertinent observations regarding the jurisdictional "element" in most Federal crimes, which observations are consistant with the approach taken in this section as well as in chapter 2 (Jurisdiction):

> The significance of labeling a statutory requirement as "jurisdictional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.

The same principle is applicable to proof of venue, which bears no relationship to culpability. Similarly, the facts determining the grade of an offense are not part of the offense *per se,* and thus proof of a state of mind is not ordinarily required as to such facts.[41] The phrase "solely a basis" is included to render the rule inoperative where the factor is both a substantive element of the offense and a basis for jurisdiction and grading. Where the factor is included in the definition of the offense, the presumption of subsection (a) requiring proof of state of mind is applicable.

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[37] See, e.g., *Yarborough* v. *United States,* 230 F.2d 56 (4th Cir.), cert, denied, 351 U.S. 963 (1956); *United States* v. *Phillips,* 217 F.2d 435, 442 (7th Cir. 1954).

[38] See e.g., *United States* v. *Feola, supra* note 33: Barnes v. *United States,* 412 U.S. 837, 847 (1973); *United States* v. *Le Faivre.,* 507 F.2d 1288, 1297 n. 14 (4th Cir. 1974). cert. denied, 420 U.S. 1004 (1975).

[39] 427 F.2d 329, 330 (2d Cir.), cert. denied, 402 U.S. 945 (1971).

[40] *Supra* note 33.

Subsection (d)(3) states that proof of culpability is not required with respect to any matter designated as a question of law. Such questions are specifically removed from the province of the jury and assigned to the court for the reason that their evaluation requires legal, not factual, analysis. Correspondingly, they are not matters with regard to which a culpable state of mind should be required.

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[41] See, e.g., *United States* v. *Belt*, 516 F.2d 873, 875 (8th Cir. 1975), cert. denied, 423 U.S. 1056 (1976); but see section 1311 in which proof of a mental state is made expressly relevant to grading. This possibility is allowed for in the clause introducing section 303, that is: "Except as otherwise expressly provided".

CHAPTER 4.—COMPLICITY

(Sections 401-404)

This chapter is intended to establish the general principles whereby an individual or organization can be held criminally liable for the conduct of another. While such principles are related intrinsically to concepts of conspiracy, dealt with in chapter 10, this chapter differs from chapter 10 in that it does not itself presume to create offenses, but instead serves to define who are the offenders.

The complicity concepts contained in this chapter in one sense mark the outermost limits of the criminal law for, in some instances, they operate to hold liable persons who took no part in the conduct and who had no agreement with the actor. In drawing such a line there is an inherent risk of overreaching and constant danger of understating. Since neither consequence is desirable, the Committee has sought to draft the provisions with particular precision in order to establish the clear import of the legislative judgment.

The chapter is divided into four sections. Section 401 deals with the general area of accomplice liability; sections 402 and 403 deal with the special and difficult problems of criminal responsibility in an organizational setting; and section 404 contains general provisions for the chapter.

SECTION 401. LIABILITY OF AN ACCOMPLICE

1. In General and Present Federal Law

This section sets forth the principles governing accomplice liability in general and also treats the issue of accomplice liability for substantive offenses committed in the course of a criminal conspiracy, i.e., the so-called "*Pinkerton*" doctrine.[1]

A. *Accomplice liability in general*

The bulk of current law concerning accomplice liability is embodied in 18 U.S.C. 2. Subsection (a) of that statute provides that whoever "commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

The classical definition of "aiding and abetting" requires that the person associate himself with the venture, that he participate in it as something he wishes to bring about, and that he seek by his action to make the venture succeed.[2]

Typical conduct which has been found to be included within the statute includes the paying of a bribe,[3] assistance in the evasion of court orders amounting to contempt,[4] the forging of a signature which is helpful in uttering and publishing the check,[5] and encouraging another to bring into the country illegal immigrants.[6]

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[1] *Pinderton* v. *United States*, 328 U.S. 640 (1946).

[2] *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949).

[3] *United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966).

The effect of 18 U.S.C. 2 is to abolish the distinction between principal and accessories. It would seem to follow from this that it is irrelevant to the guilt or innocence of the accomplice that the principal or main actor is not brought to trial.[7] Several cases have indeed held that the identity of the principal need not be established, provided it is proved that an offense was committed by some individual whom the defendant aided and abetted.[8] Moreover, the Supreme Court recently determined unanimously that even the acquittal of the person charged as the principal does not bar a prosecution of the accomplice.[9] This result would appear correct since an acquittal of the principal may be on a ground other than that no crime was committed, e.g., it may rest on the suppression of evidence (which only the principal had standing to challenge), or on a finding that the principal was insane or otherwise not responsible for his actions.[10]

Subsection (b) of 18 U.S.C. 2 holds liable as a principal one who willfully causes an act to be done which if directly performed by him or another would be an offense. Causation has been construed to mean bringing about a result that is reasonably foreseeable, through an agent, or by instigation or procurement.[11] The fact that the agent himself is innocent does not exculpate the defendant or diminish his guilt.[12] The culpability requirement of "willfully" seems not to have been intensively explored and has been criticized as potentially too strict and as vague.[13]

In addition to 18 U.S.C. 2 there are a substantial number of offenses in the United States Code that include specific aiding and abetting language within the description of the offense.[14]

B. *The Pinkerton Doctrine*

In *Pinkerton* v. *United States,*[15] the Supreme Court sustained a charge to a jury that if it found that the defendant had been engaged in a conspiracy with his brother to evade taxes, it could convict him of complicity in the brother's specific attempts to evade taxes if they were determined to be in furtherance of the conspiracy. The Court issued a *caveat,* however, to the effect that it might well have reached a different result if the specific offenses charged had not been reasonably foreseeable as a consequence of the unlawful agreement.[16] Since *Pinkerton,* the Federal courts have generally applied the doctrine with the *caveat* added, i.e., that a coconspirator is liable for the substantive offenses committed by his confederates in furtherance of the conspiracy only if the acts were reasonably foreseeable.[17]

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[4] *In re Holland Furnace Co.*, 341 F.2d 548 (7th Cir.), cert. denied, 381 U.S. 924 (1965).

[5] *United States* v. *Chappell,* 353 F.2d 83 (4th Cir. 1965).

[6] *Smith* v. *United States,* 24 F.2d 907 (5th Cir. 1928).

[7] See *Gallot* v. *United States,* 87 Fed. 446 (5th Cir.), cert. denied, 171 U.S. 689 (1898).

[8] E.g., *Cross* v. *United States,* 354 F.2d 512, 514 (D.C. Cir. 1965); *United States* v. *Provenzano,* 334 F.2d 678, 691 (3d Cir.), cert. Denied, 379 U.S. 947 (1964); *Hendrix* v. *United States,* 327 F.2d 971 (1964); *United States* v. *Shuford,* 454 F.2d 772, 779 (4th Cir. 1971).

[9] *Standefer* v. *United States,* 447 U.S. 10 (1980); see also *United States* v. *Deutsch,* 451 F.2d 98, 118–119 (2d Cir. 1971), cert. denied, 404 U.S. 1019 (1972).

[10] See *United States* v. *Bryan,* 483 F.2d 88, 93–94 (3d Cir. 1973), and cases cited therein.

[11] *United States* v. *Inciso,* 292 F.2d 374, 378 (7th Cir.), cert. denied, 368 U.S. 920 (1961); *United States* v. *Scandifia,* 390 F.2d 244, 249–250 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969), and cases cited therein.

[12] See, e.g., *United States* v. *Levine,* 457 F.2d 1186, 1188–1189 (10th Cir. 1972); Reviser's Note to 18 U.S.C. 2. The principal may also be an "innocent dupe" in terms of aider and abetter liability. See *United States* v. *Bryan, supra* note 10 at 92–93.

[13] See Working Papers, p. 154 n.2; see also *United States* v. *Markee,* 425 F.2d 1043, 1046 (2d Cir.), cert. denied, 400 U.S. 847 (1970), indicating that "willfully" requires a specific intent to bring about the forbidden act.

[14] E.g., 12 U.S.C. 630; 18 U.S.C. 552, 752, 1384; 26 U.S.C. 5608, 5661; 46 U.S.C. 1352; 50 U.S.C. App. 462. In addition, it should be noted that 18 U.S.C. 3 and 4 punish the offenses of being an accessory after the fact and misprision of a felony, respectively. These offenses, while related to aiding and abetting, have traditionally been deemed to define separate crimes. See, e.g., *United States* v. *Anthony,* 145 F. Supp. 323, 337–339 (M.D. Pa. 1956). 18 U.S.C. 3 and 4 are carried forward in section 1311 of the reported bill (Hindering Law Enforcement).

[15] *Supra* note 1.

The basic rationale underlying the *Pinkerton* rule is that so long as the conspiracy continues, "the parties act for each other in carying it forward."[18] For example, the Court observed in *Pinkerton* that it is traditional conspiracy law that the overt acts of one coconspirator may be used against another to prove the existence of the conspiracy. Similarly, there seems no reason why they should not likewise be attributed to him in order to convict him of the substantive offense. A further argument in support of the doctrine is that the criminal acts are "sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent."[19] Although this argument has been criticized by some commentators as based upon an overestimation of the dangers of criminal conspiracies,[20] the Committee, like Justice Frankfurter, writing for the Court in *Callanan* v. *United States,*[21] is of the view that:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was forced. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Linked to the *Pinkerton* doctrine is the concept of withdrawal, i.e., determining when and how an individual member of a conspiracy may terminate his association with it so as to end his liability for future acts committed by other conspirators in furtherance of the unlawful agreement.[22] In *Hyde* v. *United States,*[23] the Supreme Court established the rule that the defendant must show "affirmative action" indicating his abandonment. The Court stated:[24] "Having joined in an unlawful scheme, . . . until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law . . . . As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance." The lower Federal courts have construed this statement to place the burden of proof upon the defendant to demonstrate his withdrawal.[25] However, what constitutes sufficient "affirmative action" for this purpose remains unsettled.[26] It has been held that affirmative action requires either informing the authorities or the coconspirators of the abandonment.[27] However, one court has adopted a strict view of the defense requiring not only notification but, apparently, successful persuasion of the other members not to persue the conspiracy further.[28]

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[16] *Id.* at 647–648.

[17] See, e.g., *United States* v. *Alsondo,* 486 F.2d 1339, 1346 (2d Cir. 1973), rev'd. in part on other issues *sub nom. United States* v. *Feola,* 420 U.S. 671 (1975). *United States* v. *Etheridge,* 424 F.2d 951, 964-965 (6th Cir. 1970), cert. granted *sub nom. Bostic* v. *United States,* 400 U.S. 991, writ dismissed as improvidently granted, 402 U.S. 547 (1971). However, some courts apparently apply the doctrine without the restriction as to foreseeability. See *United States* v. *Roselli,* 432 F.2d 879, 894–895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

[18] *Supra* note 1 at 646.

[19] See *Developments in the law: Criminal Conspiracy,* 72 Harv. L. Rev. 920, 998–999 (1959).

[20] *Id.* at 999; see also Working Papers, pp. 156–157.

[21] 364 U.S. 587, 593–594 (1961). See also the discussion in this report of the special dangers arising from a conspiracy in connection with section 1002 (Criminal Conspiracy).

2. Provisions of the Bill, as Reported

Subsection (a) of section 401 provides that a person is criminally liable for an offense based upon the conduct of another person if (1) he intentionally aids or abets the commission of the offense by the other person, or (2) acting with the state of mind required for the commission of the offense, he causes the other person to engage in conduct that would constitute an offense if engaged in personally by the defendant or any other person.[29]

Paragraph (1) is designed to carry forward the principal reach of 18 U.S.C. 2(a). The term "abet" is defined in section 111 to include "induce, procure, and command." The National Commission, by contrast, proposed to drop the term "abets" as not adding anything to the word "aids."[30] Although analysis has not focused on the independent meaning of the various terms employed in 18 U.S.C. 2(a), the Committee believes that it is safer to retain the verb "abets" in the interest of insuring the full measure of intended scope,[31] particularly in view of the frequent association of the term "aids" and "abets."

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[22] The doctrine of withdrawal does not affect an individual's liability for his participation in the conspiracy up to that point. See Working Papers, p. 362, n.28. To deal with that problem, the Committee has proposed a defense of renunciation. See section 1002(c) and the discussion thereof in connection with that section.

[23] 225 U.S. 347 (1912).

[24] *Id.* at 369-370.

[25] E.g., *United States* v. *Dubrin*, 93 F.2d 499 504 (2d Cir. 1937), cert. denied, 303 U.S. 646 (1938); but see *United States* v. *Read*—F. 2d—(9th Cir. 1981).

[26] See Working Papers, p. 395; *Developments in the Law, supra* note 19 at 958-960.

[27] See *United States* v. *Borelli*, 336 F.2d 376, 378 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).

[28] *Eldredge* v. *United States,* 62 F.2d 449 (10th Cir. 1932).

[29] The Final Report would have imposed accomplice liability for the failure of a person with a duty to do so to make a "proper effort" to prevent the commission of a crime. See section 401(1)(b). For the reasons indicated by the National Legal Aid and Defender Association, Hearings, p. 1419, this provision has not been included in the bill, as reported.

[30] See Final Report, § 401(1)(b); Working Papers, pp. 154-155.

[31] Several courts have employed the term "encourage" as a test of whether there was sufficient aiding or abetting to warrant a conviction. E.g., *United States* v. *Thomas,* 469 F.2d 145, 147 (8th Cir. 1972), cert. denied, 410 U.S. 957 (1973); *United States* v. *Varelli,* 407 F.2d 735, 749 (7th Cir. 1969).

The Committee has adopted the suggestion of the National Commission to eliminate the word "counsels" as redundant with "aids". Aiding is intended to encompass all forms of assistance, including the giving of advice or counsel with respect to the commission of an offense. Thus, the deletion of "counsels" is not designed to narrow the existing scope of accomplice liability, although application of the counseling aspect of "aids" must be circumspect to avoid infringment of First Amendment rights.[32]

Paragraph (2) is designed to carry forward 18 U.S.C. 2(b). In place of the vague term "willfully," the Committee, following the recommendation of the National Commission, has substituted the concept of "acting with the state of mind required for the commission of the offense."[33] Thus, for example, if the offense requires "intentional" conduct, "knowledge" as to an existing circumstance, and "recklessness" as to a result, those will be the standards required in order to hold a person liable for causing the offense under this section.[34]

The aspect of current 18 U.S.C. 2(b) that the caused act would be an offense against the United States if directly performed "by him or another" is continued in this section by the phrase "conduct that would constitute an offense if engaged in personally by the defendant or any other person." Like existing law, therefore, this section reaches cases where the agent himself is wholly innocent.[35]

The scope of this section in this regard is further clarified by the defense precluded provision in section 404(c)(1) barring a defense (where the criminal liability of the defendant is predicated upon sections 401, 402, or 403) that the defendant does not belong to the class of persons who by definition are the only persons capable of committing the offense directly. This codifies present Federal law.[36] An illustration of how the principle might operate to assure criminal liability is if a private individual caused (or aided or abetted) a government employee "acting under color of law" to deprive a person of a constitutional right even though the private person by virtue of his non-official status was incapable of acting under color of law.[37] A similar example would be a private person causing (or aiding or abetting) bribery by a public servant.[38]

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[32] See *Gara* v. *United States*, 178 F.2d 38 (6th Cir. 1949), aff'd by an equally divided Court. 340 U.S. 857 (1950); cf. *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969) (bifarious conspiracy involving counseling).

[33] The term "commission of the offense" (used also in paragraph (1)) is defined in section 111 to include the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense.

[34] The Committee intends to preserve current law as to the meaning of the term "causes."

[35] E.g., *United States* v. *Inciso, supra* note 11; see also Working Papers, p. 377. This result is endorsed by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code, see Hearings, p. 7704.

[36] E.g., *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967); *United States* v. *Wiseman*, 445 F.2d 792, 794-795 (2d Cir. 1971), cert. denied, 404 U.S. 967 (1972); see also Working Papers, pp. 377-378. Here, and in the many other instances in which the bill uses the phrase, "it is not a defense," the intended effect is not only to preclude the specified facts from being treated as a "defense" as that term is defined in section 111, but also to preclude any other treatment of such facts or the converse of such facts as the basis of failure of a prosecution. For example, it is intended that the converse of a fact as to which a "defense" is precluded shall not be construed to be part of the element of the offense. Neither may the matter which is stated not to be a "defense" be treated by the courts as a bar to prosecution.

[37] See *United States* v. *Lester, supra* note 36; see also section 1502 (Interfering with Civil Rights under Color of Law).

[38] See section 351 (Bribery). The Committee intends also to perpetuate existing law to the effect that it is an offense to conspire to cause the commission of a crime. See *United States* v. *Lester, supra* note 36 at 73.

Subsection (b) provides that a person is criminally liable for an offense based upon the conduct of another person if he knowingly facilitates the commission of the offense by providing assistance that is in fact substantial. Pursuant to subsection 404(a), punishment for such "facilitation" is for an offense two grades below the offense facilitated. Under subsection 404(b), the ready lawful availability from others of the assistance provided by the defendant is a factor to be considered in determining whether or not his assistance was substantial.

The inclusion of this intermediate level of liability for knowing facilitation adopts the recommendation of the National Commission.[39] The Commission comment to section 1002 of its Final Report are equally applicable to this provision:

> This section, in effect, creates an included offense to accomplice liability, and would provide a legislative solution to the dilemma faced by a court which has to choose between holding a facilitator as a full accomplice or absolving him completely of criminal liability . . . The culpability required of a facilitator is only *knowledge,* whereas that required of an accomplice is *intent* that the crime be committed. But a facilitator must provide substantial assistance. Under this section the fact that the person facilitated could easily and lawfully have gotten the aid elsewhere is evidence negating the substantiality of the assistance. . The principal must actually have committed the felony contempleted . . .

Current law is ambivalent on the question of culpability under 18 U.S.C. 2(a). Most courts of appeal have approved instructions indicating that the defendant must consciously intend to make the criminal venture succeed.[40] Some circuit courts, however, hold that knowingly aiding a crime is sufficient *scienter* for criminal liability.[41] The Committee has concluded that one who acts with an awareness or consciousness that he is promoting or facilitating a crime, even if he does not desire or intend that the crime be committed, is deserving of punishment, albeit at a lower level than one who acts with a specific intent—the traditional aider and abettor liability—that subjects the actor to the same degree of punishment as the principal. As noted by Judge Parker in *Backun* v. *United States,*[42] commenting on *United States* v. *Falcone:*[43]

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[39] Final Report. §§ 401(1)(b), 1002(1).

[40] E.g., *United States* v. *Tijerina,* 446 F. 2d 675, 677–678 n. 1 (10th Cir. 1971): *United States* v. *Kelton,* 446 F. 2d 669, 671 (8th Cir. 1971).

[41] See e.g., *United States* v. *Greer,* 467, F. 2d 1064, 1069 (7th Cir. 1972), cert. denied, 410 U.S. 929 (1973); *United States* v. *Harris,* 435 F. 2d 74, 88–89 (D.C. Cir. 1970), cert. denied, 402 U.S. 986 (1971).

[42] 112 F. 2d 635, 637 (4th Cir. 1940).

[43] I.e., *United States* v. *Falcone,* 109 F. 2d 579 (2d Cir. 1940). Judge Learned Hand enunciated the "stake in the venture" test in exonerating an accused charged with conspiracy by virtue of his supplying large amounts of sugar, yeast, and cans to one known to be engaged in an illegal distilling operating. Although the Supreme Court affirmed the judgment (311 U.S. 205), it did not adopt Judge Hand's formulation of the applicable test. Moreover, the holding in *Falcone* was sharply limited in *Direct Sales Co.* v. *United States,* 319 U.S. 703 (1943), in which a drug supplier was held liable as a conspirator to a physician who had been illegally dispensing morphine where the evidence established that the supplier had been delivering some two hundred times the annual needs of the average physician and hence could be found to have known of the illegal use to which the merchandise was being put and intended to cooperate in such use. See also *Malatkofski* v. *United States,* 178 F. 2d 905, (1st Cir. 1950), (instruction sustained that one who provided bribe money with knowledge of its intended use would be guilty as an accomplice).

> Guilt as an accessory depends, not on "having a stake" in the outcome of crime, as suggested in the Falcone case, but on aiding and assisting the perpetrators; and those who make a profit by furnishing to criminals, whether by sale or otherwise, the means, to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise. To say that sale of goods in a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felonly.

The phrase "facilitates the commission of the offense" is meant only to confirm that, in order for liability under subsection (b) as a "facilitator" to attach, the offense facilitated must have been completed.[44]

Section 401(c) provides that a person is criminally liable for an offense based upon the conduct of another person if (1) he and the other person engage in an offense under section 1002 (Criminal Conspiracy), (2) the other person engages in the conduct in furtherance of the conspiracy, and (3) the conduct is authorized by the agreement or it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy.

This continues and codifies the doctrine of *Pinkerton* v. *United States,* discussed above. Codification has been urged as a "preferable alternative" to the current case law status of the offense, since 18 U.S.C. 2—the only possible source for the doctrine in light of the strong policy in this country against Federal common law crimes—does not clearly encompass conspiratorial as well as complicitous liability and an explicit statutory definition of the conspirator's liability for the substantive offenses of a coconspirator is, therefore, desirable.[45] The requirement in paragraph (3) that the conduct was authorized by, or was a reasonably foreseeable consequence of, the conspiracy adopts the narrower version of the doctrine suggested by the dictum in the *Pinkerton* decision.[46]

Although the Committee is aware that the *Pinkerton* rule has been criticized by those who believe that criminal liability should not attach where the facts would not support conviction on traditional aider and abettor grounds, the Committee considers this criticism misplaced. The *Pinkerton* doctrine is similar in its rationale to the felony-murder rule and proceeds from the sound premise that coconspirators—persons who set in motion a chain of criminal events by agreeing to commit an ultimate offense—should be held accountable and punishable for foreseeable, related offenses that are committed by their coconspirators in furtherance of the conspiracy's unlawful objective. The *Pinkerton* doctrine is particularly effective as a means of reaching the leaders or directors of criminal syndicates—persons who plan, finance, and orchestrate crimes, but who seldom if ever take part in their actual commission. As such, the doctrine is an especially valuable vehicle for assuring a just degree of punishment for the leaders of organized crime, and narcotics conspiracies. Moreover, apart from its theoretical soundness, the *Pinkerton* doctrine is of considerable practical importance. The Committee's research indicates that more than one hundred cases involving the *Pinkerton* principle of liability has been decided by the Federal courts of appeals in the last five years. Given the fact that approximately eighty percent of federal convictions occur as a result of guilty pleas as to which no appellate review would occur, this figure may be translated into an estimate that *Pinkerton* currently accounts for around one hundred convictions per year.[47] Although in some of the cases an alternative means of achieving a conviction (such as the felony-murder rule) might exist, nevertheless it is clear that elimination of the well established *Pinkerton* doctrine would have a substantial adverse impact on effective law enforcement. The Committee has concluded, therefore, that the *Pinkerton* rule not only is firmly rooted in the principles underlying the law of conspiracy, but that it is from a practical standpoint an important basis of criminal liability which should be retained.

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[44] The Committee intends to perpetuate existing law to the effect that conspiracy and accomplice liability are distinct crimes for which separate conviction and punishment may be imposed. See, e.g., *Pereira* v. *United States,* 347 U.S. 1, 11 (1954).

[45] See *Developments in the Law, supra* note 19 at 994–995; Working Papers, pp. 155–156.

[46] A recent example of the use of the *Pinkerton* doctrine is the conviction in Washington, D.C., of the members of the Hanafi Muslim sect. The Hanafi members involved in the forcible occupation of premises at separate locations were convicted of the murder of an individual at one location, at the hands of the conspirators, that occurred during the occupation.

The Committee has not chosen to codify the associated doctrine of withdrawal from a conspiracy and intends that the issue be left for further development by the Federal courts.[48] The Committee, however, disapproves two extreme positions that have evolved in relation to withdrawal, one holding that mere notification to other conspirators is sufficient, and the other requiring successful dissuasion of the other conspirators from pursuing the crime. The Committee contemplates that some "affirmative action" beyond mere notification to coconspirators be required (such as notifying the authorities of the planned offense), yet would not impose the burden on the defendant of persuading the other conspirators to cease their illegal activities under the agreement.

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[47] See e.g., *United States* v. *Michel*, 588 F.2d 986, 999 (5th Cir., 1979) (importation of marijuana); *United States* v. *Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) (causing money orders to be transported in interstate commerce); *United States* v. *Milona*, 581 F.2d 56, 60-61 (2d Cir. 1978) (aiding and abetting the distribution of heroin); *United States* v. *Becker*, 589 F.2d 951, 958-959 (5th Cir. 1978) (mail and wire fraud); *United States* v. *Kaplan*, 548 F.2d 958, 965 (9th Cir. 1977) (mail fraud); and *United States* v. *Tesla*, 548 F.2d 847, 855 (9th Cir. 1977) (distribution of heroin). In addition, the court in *United States* v. *Haldeman, Ehrlichman, and Mitchell*, 559 F.2d 31, 121 (D.C. Cir. 1979) noted that the *Pinkerton* doctrine was available in that case and had it been used, would have made affirmance of some of the Watergate convictions less difficult.

[48] See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 463, 465 (1978).

3. Defense Precluded

In addition to the provision of section 404(c)(1) discussed above barring a defense to criminal liability under this section because the defendant is not in the category of persons who by definition are the only persons capable of committing an offense directly, section 404(c) contains related provisions with respect to a different subject. Subsection (c)(2) states that it is not a defense to a prosecution in which the criminal liability of the defendant is founded on section 401, 402, or 403 that the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, or was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.[49]

These provisions generally codify current decisions and are derived from principles that have been developed mainly from the law of conspiracy.[50] The logic underlying them is largely self-explanatory. Section 1002 (Criminal Conspiracy) contains analogous provisions and the discussion there should be consulted here. The reason for the inapplicability of the acquittal bar to a situation in which the verdicts are returned in the same trial is the settled rule that inconsistent verdicts in the same proceeding are permissible in criminal cases as reflecting the mercy-dispensing powers of the jury.[51]

The National Commission recommended allowing a defense to the "victim" of a crime and to others either expressly or implicitly made not accountable for the conduct of another person by the statute defining the offense or related provisions.[52] The Committee has not included such a defense since the question of who constitutes a "victim" and other issues of implicit statutory exclusions from complicitous liability are best left to case by case determination.[53]

SECTION 402. LIABILITY OF AN ORGANIZATION FOR CONDUCT OF AN AGENT

1. In General and Present Federal Law

This section is designed to codify current Federal law with respect to the circumstances in which the conduct of an agent of an organization may be imputed for purposes of criminal liability to the organization itself. Unlike the proposal of the National Commission, this section does not limit criminal liability to acts authorized, requested or commanded by supervisory or control persons, but continues existing law rendering organizations criminally liable for the act of any agent within the area of duties or functions entrusted to him.[54]

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[49] The National Commission included provisions basically identical to section 404(c)(1) and (2). See Final Report, § 401(2) (a) and (b).

[50] See *Standefer* v. *United States, supra* note 9; *United States* v. *DeCoster,* 487 F.2d 1197, 1199 n.1 (D.C. Cir. 1973); see also *Farnsworth* v. *Zerbst,* 98 F.2d 541, 544 (5th Ctr. 1938) (immunity of coconspirator from prosecution no defense); *United States* v. *Shipp,* 359 F.2d 185, 189 (6th Cir. 1966), cert. denied, 385 U.S. 903 (1967).

[51] See e.g., *United States* v. *Dotterweich,* 320 U.S. 277, 279 (1943); and *Dunn* v. *United States,* 284 U.S. 290 (1932).

[52] See Final Report, § 401(1).

[53] Compare e.g., *United States* v. *Holte,* 236 U.S. 140 (1915) with *Gebardi* v. *United States,* 287 U.S. 112 (1932); see Working Papers, pp. 157-158.

1 U.S.C. 1 provides that in determining the meaning of any Act of Congress, the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals, unless the context otherwise requires. Consistently with this definition, it has long been the rule in the Federal courts that corporations and other entities will ordinarily be found within the class of "persons" covered by a penal statute, notwithstanding the lack of any specific inclusion therein [55]

Although there are a variety of statutes that by their direct language deem acts of agents to be the act of the corporation or other entity for purposes of criminal liability,[56] by and large the doctrines of vicarious organizational liability for crimes have been a matter of case law development.

Among the general principles to have emerged is that, while most often criminal liability is imputed in crimes involving absolute liability, the doctrine of organizational responsibility is not limited to such crimes, and a number of cases exist sustaining convictions of corporations for offenses requiring knowledge or willfulness.[57] Indeed, there seems no reason why, in theory, the concepts should not be extended to common law crimes such as assault or murder.[58]

A second major principle of organizational criminal liability as it has been applied in the Federal courts is that involvement of the organization's managerial or supervisory personnel is not necessary. In fact it has been held that the status of the employee violating the law in the organizational hierarchy is immaterial, and that all that is required is that he be acting in the area of responsibility assigned to him.[59] In this respect Federal law differs from State laws as reflected in the Model Penal Code (and as basically adopted by the National Commission), which limits corporate liability for serious offenses to cases where the directors or high executives are involved, and for other (non-strict liability) offenses to cases where such executives have not exercised due diligence to prevent the commission of the offense.[60]

The basic theory underlying the Federal rules seems to be that the duty to be enforced by criminal sanctions does "not arise out of the relation of employer and employee but [is] one that, in virtue of the statute, [is] owed by [the organization] to the public."[61]

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[54] Compare Final Report, § 402(1): Working Papers, p. 164.

[55] E.g., *United States* v. *Union Supply Co.*, 215 U.S. 50 (1900) (corporation); *United States* v. *A. & P. Trucking Co.*, 358 U.S. 121 (1958) (partnership); *United States* v. *Adams Express Co.*, 229 U.S. 381 (1913) (joint stock company); see also Working Papers, pp. 173–174.

[56] See, e.g., statutes collected in Working Papers, p. 208.

[57] E.g., *C.I.T. Corp.* v. *United States*, 150 F.2d 85, 99 (9th Cir. 1945) (conspiracy to make false statements in order to influence F.H.A., based on acts of branch manager); *United States* v.*Milton Marks*, 240 F.2d 838 (3d Cir. 1957) (submitting a knowingly false claim against the United States); *Zito* v. *United States*, 64 F.2d 772 (7th Cir. 1933) (conspiracy to violate Prohibition Act, based in activities of salesmen). For additional examples, see Working Papers, p. 169 n.8.

[58] For example, an agent who murders a competitor of his organization for its benefit and within the scope of his employment. See generally Note. *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 Geo. L.J. 547 (1962).

[59] See *United States* v. *Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956); *United States* v. *George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir.), cert. denied, 328 U.S. 869 (1928); *C.I.T. Corp.* v. *United States, supra* note 58, 150 F.2d at 89; *United States* v. *Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948); *Standard Oil Co.* v. *United States*, 307 F.2d 120, 127 (5th Cir. 1962).

[60] See Working Papers, p. 172.

Within the framework of the above general principles, there are three broad areas in which courts have found organizations liable for the conduct of their agents. The first, and most obvious, is in the area of strict liability. Where an affirmative duty is placed on an organization by statute, the organization either carries out or violates that duty through the act or omission of its agents. The failure of the agent to perform the duty is imputed to the corporation.[62]

The second area is where the criminal acts are those of an agent acting within the scope of his employment. In determining whether an act is within the scope of employment, the Federal courts have placed some reliance on tort law concepts. In general the principle that may be distilled from the cases is that the organization will be held criminally liable if it was the intended beneficiary of the act,[63] even though the act was misguided and the organization does not benefit therefrom.[64] Moreover, it has been held that liability attaches in such circumstances notwithstanding that the acts were done without the knowledge of the organization's directors and officers, that the executives exercised care to prevent the unlawful activities, and that the acts were contrary to specific orders.[65] In addition, of course, acts which were outside the scope of employment may subject the organization to criminal liability if they are later ratified or adopted.[66]

The third area of liability is where the agent's acts fall within the scope of his authority. Although normally such scope is coextensive with the scope of employment, the concept of "authority" is potentially broader in that it may encompass instances of implied or apparent authority.[67]

As recognized by the National Commission, the Federal courts have also generally rejected the arguments that where an organization and its agents are tried together, acquittal of the individual agents whose acts are imputed to the organization vitiates a verdict convicting the corporation.[68]

2. The Provisions of the Reported Bill

Section 402 provides that, except as otherwise expressly provided, and organization is criminally liable for an offense if the conduct constituting the offense[69] (a) is the conduct of its agent, and such conduct (1) occurs in the performance of matters within the scope of the agent's employment or authority, and is intended by the agent to benefit the organization; or (2) is thereafter ratified or adopted by the organization, or (b) involves a failure by the organization or its agent to discharge a specific duty of conduct imposed on the organization by law.

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[61] *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 244 (1938).

[62] See *United States* v. *Parfait Powder Co.*, 163 F.2d 1008 (7th Cir. 1947), cert, denied, 332 U.S. 851 (1948); *United States* v. *E. Brooke Matlack, Inc.*, 149 F. Supp. 814 (D. Md. 1957).

[63] See *Standard Oil Co.* v. *United States, supra* note 59 at 127-29; Working Papers, pp. 169-170.

[64] *Old Monastery Co.* v. *United States,* 147 F.2d 905 (4th Cir.), cert denied. 326 U.S. 734 (1945).

[65] See *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied 409 U.S. 1125 (1973), and cases cited therein: Working Papers. pp. 171-172.

[66] See *Continental Baking Co.* v. *United States*, 281 F.2d 137, 149 (6th Cir. 1960).

[67] See *id.* at 150-151.

[68] E.g., *American Medical Ass'n* v. *United States*, 130 F.2d 233, 252-253 (D.C. Cir. 1942), aff'd 317 U.S. 519 (1943); see also Working Papers, pp. 172-173 and cases cited therein.

[69] The term "conduct constituting the offense" is defined in section 111 essentially to include all the elements, including mental elements of an offense.

This formulation is intended to perpetuate existing law. The term "organization" is defined in section 111 to mean "a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, trust, union, and any other association of persons."

This definition is similar to that suggested by the National Commission but is more detailed and also broader in that it reaches unincorporated associations.[70] The provisions of section 402 are intended to be controlling unless there exists a clear congressional purpose to apply a different standard. Because the decisions concerning when a national union and its affiliated local unions are to be considered a single "organization" are not uniform, the Committee believes it appropriate in extending the case law codified in sections 402 and 403 beyond corporations to state explicitly that in covering unions it is its intent to incorporate the common law of "actual" agency as outlined in the cases cited below.[71]

Particularly in light of the limitations on the right of a national union to select a local's officers stated in Title IV of the Landrum-Griffin Act,[72] the Committee has concluded that it would be unjust to impose vicarious criminal liability under this section on a national for the acts of a local or its agents except as allowed by the precedents cited. The exception for governmental entities follows the recommendation of the Model Penal Code and the National Commission, the latter of which points out that, although no specific exemption for government entities exists in Federal statutes, the imposition of criminal liability would raise certain unique problems and there does not appear to be a Federal case holding a governmental entity as such criminally liable.[73] Nonetheless the Committee notes that there is nothing in the nature of, e.g., a State or municipal corporation, which would make it inherently incapable of committing a crime and the issue whether to include such governmental entities in this section may therefore well be deserving of further study.

The term "agent" is defined in section 111 to mean a person authorized to act on behalf of another person (defined to include an "organization") or a government, and, in the case of an organization or a government, to include a partner, director, officer, manager, representative, servant, and employee. This, too, carries forward present Federal law.[74] Thus, the "authorized to act" language would clearly cover, *inter alia,* the situation of an independent contractor who failed to perform a duty entrusted to it by an organization.[75]

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[70] Compare Final Report, §409. No justification is offered for the general exclusion of unincorporated associations, and indeed the Working Papers argue for their inclusion, pointing our that current Federal law does not differentiate between entities and corporations for purposes of criminal liability. See Working Papers, pp. 165, 173–174. The law with respect to the criminal liability of labor organizations "participating or interested in a labor dispute," arising from the unlawful acts of their officers, members, or agents, is, however, preserved as it exists presently under the Norris-LaGuardia Act (29 U.S.C. 106), by virtue of the qualifying phrase "except as otherwise expressly provided". The provisions of other specific statutes, *extending* as well as limiting the usual scope of liability, are also preserved. See *supra* note 56.

[71] See *Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344; *Coronado Coal Co.* v. *Mine Workers*, 268 U.S. 295; *IBEW (Franklin Electric Con. Co.)*, 121 NLRB 143; and *Mine Workers* v. *Eastover Mining Co.*, 551 S.W. 2d 245 (Sup. Ct. Ky.).

[72] 29 U.S.C. 481–483.

[73] See Working Papers, pp. 165–166, 175–176.

Paragraph (a)(1) is designed to continue existing Federal decisions imposing liability on an organization for the conduct of its agent either in the scope of his employment, or within the scope of his authority.[76] The Committeee has explicitly carried forward from current law the element that the action must have been intended to benefit the organization.

Paragraph (a)(2) codifies the obvious principle that ratification or adoption of an agent's acts, even if outside the scope of his employment or authority, will render the organization criminally liable.[77]

Subsection (b) restates the doctrine as to criminal liability of an organization in situations where the organization by law has a duty to act[78] and its agent fails properly to execute or perform the duty.[79]

The Committee also intends under this section to continue prevailing Federal law to the effect that the liability of an organization is independent from that of its agents so that their acquittal does not relieve the organization of criminal responsibility for its own unlawful conduct.[80]

It should be noted, finally, that the two defense precluded provisions in section 404, which were discussed in connection with section 401, are equally relevant and apply also to this section.

SECTION 403. LIABILITY OF AN AGENT FOR CONDUCT OF AN ORGANIZATION

1. In General and Present Federal Law

This section states the circumstances under which an agent may be held liable for conduct that he engaged in on behalf of an organization. The section is closely derived from the recommendations of the National Commission,[81] and is designed to follow current Federal law.

Present Federal law contains a large number of statutes specifying that individuals who act illegally in a representative capacity on behalf of an organization are criminally liable.[82] Only in very rare instances has Congress held criminally liable the organization and allowed its agents to escape. Indeed, the Supreme Court in *United States* v. *Dotterweich,*[83] determined on the facts of that case that, even when a statute contains no specific provision for individual criminal liability, it it to be read as reaching all human beings who have a "responsible share, in the furtherance of the transaction which the statute outlaws,"[84] unless an intent to exclude individuals from criminal punishment clearly appears.[85] In *Dotterweich,* the Court affirmed the conviction of the president and general manager of a corporation for violating the strict liability proscriptions of the Food and Drug Act against the distribution of adulterated and misbranded articles in interstate commerce. The Court upheld the imposition of criminal liability even though no showing had been made that the defendant knew of the violation. It stated:[86]

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[74] The definition in effect endorses those cases indicating that the place of the agent in the organization hierarchy is immaterial. See, e.g., *Unites States* v. *George F. Fish, Inc., supra* note 59. This accords with the suggestion of several groups and individuals. See Statements of the New York County Lawyers' Association, National Consumer Law Center; Richard Givens, Hearings, pp. 1401, 1556, 1612, respectively.

[75] *United States* v. *Parfait Powder Co., supra* 62.

[76] E.g., *Standard Oil Co.* v. *United States, supra* note 63; *Continental Baking Co.* v. *United States, supra* note 66.

[77] See *Continental Baking Co.* v. *United States supra* note 65.

[78] Often, but not always, such a duty will be associated with a statute imposing strict criminal liability.

[79] See *United States* v. *Parfait Powder, Co., supra* note 62; *United States* v. *Armour Co., supra* note 59; cf. *Thorne* v. *United States,* 479 F.2d 804 (9th Cir. 1973) (Federal Tort Claims Act). Note that the duty may be to refrain from taking certain action, as well as to act affirmatively, See the definition of "conduct" in section 111.

[80] See cases cited in Working Papers, pp. 172–173.

[81] See Final Report, § 403.

[82] See, e.g., 18 U.S.C. 709, 1115; see also nontitle 18 statutes collected in Working Papers, pp. 209–213.

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

The Court declined in *Dotterweich* to define the class of employees who stand in such a relation to the organizational distributor as to be responsible for its violations of the law, saying that to try to do so would be a "mischievous futility" and that such matters must be left to the "good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[87]

Subsequent decisions of lower courts have applied the principles of *Dotterweich* so as, e.g., to sustain the conviction of a corporation salesman responsible for making a corporate sale of whiskey in excess of the O.P.A. ceiling price.[88] However, the Committee agrees with the conclusion of the National Commission staff that active "participation" by an individual in the organization's offense is probably a prerequisite to a valid conviction where the penal statute is one of non-strict liability; i.e., absent a statutory declaration that specific officers are to be deemed guilty of an organizational violation, or an explicit imposition upon an agent of an affirmative duty to exercise care to discover and prevent illegal conduct by employees, it would seem doubtful that the "knowing but nonacting agent" (i.e., one who merely condones violations of law by inferiors) would be held criminally liable as a "participant" for violation of a penal enactment requiring *scienter.*[89]

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[83] *Supra* note 51.

[84] *Supra* note 51, 320 U.S. at 284.

[85] See also Working Papers, pp. 176–178; *United States* v. *Wise,* 370 U.S. 405, 409 (1962).

[86] *Supra* note 51, 320 U.S. at 284–285.

[87] *Id.* at 285. See also, reaffirming the principles of *Dotterweich* and rejecting a claim that criminal liability of a responsible corporate official must be premised on a wrongful act or negligent failure to act on his part, *United States* v. *Park,* 421 U.S. 658, 670–675 (1975).

[88] See *United States* v. *Bach,* 151 F.2d 177, 179 (7th Cir. 1945).

[89] See Working, Papers, pp. 179-180; but cf. *Belsinger* v. *District of Columbia,* 436 F.2d 214, 219-220 (D.C. Cir. 1970). The opinion in the *Park* case, *supra* note 87, contains strong hints that

2. The Provisions of the Bill, Reported.

Section 403 states that, except as otherwise expressly provided, a person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organization or on behalf of an organization to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf. This merely sets forth the basic rule that a person may not excape liability because his actions were not for himself but for an organization. The term "organization" is defined in section 111 and has been explained in connection with section 402. The concept of "causes" has been discussed in relation to section 401.

S. 1722 as introduced in the Ninety-Sixth Congress included another subsection directed to the situation in which an agent fails to perform a legal duty of an organization. The subsections stated that, except as otherwise expressly provided, if a duty to act is imposed upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto, an "agent of the organization having significant responsibility for the subject matter to which the duty relates" is criminally liable for an offense based upon an omission to perform the duty to the same extent as if the duty were imposed upon him directly, if he (1) has by virtue of his authority or his relationship to the organization the power to prevent the offense from occurring through the exercise of reasonably diligent oversight and exertion, and (2) has the state of mind required for the commission of the offense. This subsection was designed to continue the teachings of *Dotterweich* and related cases. However, because of serious disagreement among witnesses testifying before the Committee as to the scope of these cases and whether, therefore, the provision in the bill accurately reflected the holdings of those cases, the Committee deleted the subsection in the bill as reported with the understanding that the matter be left, as it is today, to the Federal courts. S. 1630 both as introduced and as reported embodies this view.

SECTION 404. GENERAL PROVISIONS FOR CHAPTER 4

This section contains general provisions applicable to all chapter 4 sections. Subsection (c) sets forth two defense precluded provisions; these have been discussed in connection with section 401 and need not be addressed here.

Subsection (a) provides that a person whose criminal liability is based upon section 401(a) or 401(c) "may be charged, tried, and punished as a principal."

This codifies existing law under 18 U.S.C. 2, which expressly declares that aiders and abettors and those who cause offenses to be committed are "punishable as a principal." With respect to the "charging" aspect, the Supreme Court and others have consistently held that an indictment or information charging a person as a principal is sufficient to put him on notice as to his potential liability also under 18 U.S.C. 2 (a) or (b);[90] and the giving of instructions

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the Supreme Court would limit the principles announced in *Dotterweich* to strict liability statutes of a public welfare nature.

[90] E.g., *Nye & Nissen* v. *United States, supra* note 2: *United States* v. *Lester, supra* note 36: *United States* v. *Matousek*, 483 F.2d 286 (8th Cir. 1973); *United States* v. *Bryan, supra* note 10.

to a jury based upon those complicity principles has also been upheld.[91]

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[91] E.g., *Glass* v. *United States*, 328 F.2d 754 (7th Cir.), cert. denied, 377 U.S. 983 (1964); *United States* v. *Megna*, 450 F.2d 511 (5th Cir. 1971); *United States* v. *Pickens*, 465 F.2d 884 (10th Cir. 1972).

CHAPTER 5.—BARS AND DEFENSES

(Sections 501-502)

Chapter 5 in the Code deals with general bars to prosecution, defenses, and affirmative defenses. Because the decision has been made for the purpose of the reported bill to retain the common law approach to the development of defenses by the courts, the general defenses are noted without further definition. Chapter 5 does include provisions defining two specific bars to prosecution—i.e., time limitations and immaturity.

The Committee, like the National Commission and virtually every other principal criminal code reform body in modern times, believes that the legislative codification of general defenses and bars to prosecution may be desirable in the future. In the meantime, the Committee has included a synopsis of the present state of Federal decisional law on the subject.

SUBCHAPTER A.—GENERAL PROVISIONS

This subchapter sets forth the general criteria to be employed by the courts of the United States in deciding whether a defense or bar to prosecution is available to a defendant; it also contains a basic rule for determining when a particular defense, not defined in the code, may be asserted.

SECTION 501. GENERAL PRINCIPLE GOVERNING EXISTENCE OF BARS AND DEFENSES

This section provides that, except as otherwise provided by the Constitution of the United States or by a Federal statute, the existence of a bar to prosecution or of a defense or affirmative defense to a prosecution under any Federal statute, including a defense or affirmative defense of mistake of law or fact, insanity, intoxication, duress, exercise of public authority, protection of persons or property, unlawful entrapment, and official misstatement of law, shall be determined by the courts of the United States according to the "principles of the common law as they may be interpreted in the light of reason and experience". This standard is derived from Rule 501 of the Federal Rules of Evidence, which similarly directs the Federal courts to fashion evidentiary privileges by recourse to such principles. The terms "defense", "affirmative defense", "bar to prosecution", and "courts of the United States" are defined in section 111.

Codification of the above standard is not intended or expected to work any substantive change on the current state of Federal decisional law regarding defenses to crime. This section is included rather as an affirmation of Congress' role in the creation of defenses to criminal conduct which may include fixing standards pursuant to which courts determine such questions. It also serves to emphasize that the courts are involved in the delicate task of determining the availability of defenses and should reject novel theories for the creation of general defenses or bars to prosecution that do not have their roots in the common law, a statute, or the United States Constitution. See, e.g., *Hampton* v. *United States.*[1]

The general common law defenses that are now recognized in case law are discussed as follows:

DEFENSE BASED ON LACK OF CULPABILITY

1. Ignorance or mistake of law

The prevailing general rule for criminal responsibility is that, unless the legislature indicates its intention to make it so, ignorance or mistake of law is no defense.[2]

The rule has often been stated and applied by the Federal courts.[3] Thus the fact that a defendant believed (or even intended) his conduct to be legal is ordinarily of no avail. As stated in *Horning* v. *District of Columbia:*[4]

> It may a be assumed that [the defendant] intended not to break the law but only to get as near to the line as he could, which he had a right to do, but if the conduct described crossed the line, the fact that he desired to keep within it will not help him. It means only that he misconceived the law.

Although there is uniform agreement as to the existence and validity of the general rule, there is not uniform agreement as to its philosophical underpinnings. One of the first modern theories supporting the maxim originated with Austin[5] to the effect that practical necessity in the administration of justice required the rule, i.e., the impossibility of determining by evidence accessible to others whether the party was actually ingorant of the law or was so ignorant that he had no surmise of its provisions or was negligent in failing to acquire the legal knowledge. Holmes thought these difficulties could be overcome by the procedural device of shifting the burden of proof to the defendant, but believed the rule was justified as a device of objective liability required by social utility, i.e., "to admit the excuse at all would be to encourage ignorance where the law-maker had determined to make men know and obey. . . ."[6] These two theories have been denominated the "two pillars which support the maxim"[7] and have been the basis for scholars to postulate logical exceptions where the values expressed would not be significantly affected.[8]

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[1] 425 U.S. 484 (1976).

[2] By "law" is meant, of course, regulations and judicial decisions as well as statutory requirements. See, e.g., *United States* v. *International Min'ls Corp.*, 402 U.S. 558 (1971).

[3] E.g., *United States* v. *International Min'ls Corp., supra* note 2; *Williams* v. *North Carolina,* 325 U.S. 226, 238 (1945); *Sinclair* v. *United States,* 279 U.S. 263 (1929); *Horning* v. *District of Columbia,* 254 U.S. 135 (1920); *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U.S. 57, 68 (1910); *Reynolds* v. *United States,* 98 U.S. 145, 167 (1878); *Braswell* v. *United States,* 224 F.2d 706, 710 (10th Cir.), cert. denied, 350 U.S. 845 (1955). A rare exception to the ignorance-is-no-excuse precept is where a penal statute requires affirmative action by a class of persons who could not reasonably be expected to know of its provisions (e.g., a local statute requiring all previously convicted felons to register). In such a case the Supreme Court held that knowledge of statute was a constitutional prerequisite to a conviction for failing to comply with its requirements. *Lambert* v. *California,* 355 U.S. 225, 228 (1957). For the most part, however, the dissenters' prediction that the decision would turn out to be an "isolated deviation from the strong current of precedents—a derelict on the waters of the law" (335 U.S. 232, 245) has proved accurate.

[4] *Supra* note 3 at 137. These words were written in the context of a prosecution for engaging in the business of a pawnbroker without a license in the District of Columbia. The defendant had removed most of his business to Virginia, but had retained a part of it—significant enough to warrant conviction—in the District.

[5] 1 Austin. *Lectures on Jurisprudence,* p. 497 (4th ed. 1879).

In 1957, Professor Jerome Hall reexamined the rationale of not excusing criminal conduct based on a plea of ignorance or mistake of law, concluding that "neither Austin's nor Holmes' theory cuts to the heart of the problem" and that "the universality of the doctrine" and "frequent expression of the *necessity* of reliance upon it, of the *dependence* of any administration of justice upon it, and the like also indicate that the doctrine is grounded in a more fundamental rationale than was expressed by either Austin or the Holmes of the Common Law."[9] This "more fundamental rationale," in Hall's view, was that to admit the defense, would contradict the essential requisites of a legal system, signified by the principle of legality (the "rule of law").[10] Recognizing the fact that substantive penal law is in varying degree unavoidably vague, with the degree of vagueness increasing toward the periphery, Hall argued that a legal order must provide an authoritative method of establishing certainty and end indefinite disputation. To permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict the "necessary elements" of a legal order. "It opposes objectivity to subjectivity, judicial process to individual opinion, official to lay, and authoritative to non-authoritative declarations of what the law is."[11] Hall also suggested that the rationale can be expressed in terms of ethical policy, i.e., that the criminal law represents certain moral principles and that to recognize ignorance or mistake of law as a defense would contradict those values. He stated:[12]

> The criminal law represents an objective ethic which must sometimes oppose individual convictions of right. Accordingly, it will not permit a defendant to plead, in effect,

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[6] Holmes, *The Common Law*, p. 48 (1881).

[7] Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. Pa. L. Rev. 35, 44 (1939).

[8] See. e.g., Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641 (1941) (reprinted in Hearings, pp. 7529–7571), in which the authors focus on exceptions where one of the branches of the government has led the community or the defendant to believe (erroneously) that certain conduct is not illegal, as where a person acts in conformity with a statute, court decision, or executive statement of the law subsequently determined to be erroneous.

[9] Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind. L.J. 1, 18 (1957).

[10] The necessary elements of a legal order were outlined to be (*id.* at 19):

(1) that rules of law express objective meanings;

(2) that certain persons (the authorized "competent" officials) shall, after a prescribed procedure, declare what those meanings are. They shall say, e.g., that situations A, B, C but not X, Y, Z are included within certain rules; and

(3) that these, and only these, interpretations are binding, i.e., only these meanings of the rules are the law.

[11] *Id.* at 19.

[12] *Id.* at 21.

that although he knew what the facts were, his moral judgment was different from that represented in the penal law.

Despite the existence of the general rule, the Federal courts have placed limits on its application when, by virture of ignorance or mistake, as to the law, the state of mind required for a particular offense is negated. Many of the cases have involved reliance on the advice of counsel. Thus, in *Williamson* v. *United States*, the Supreme Court approved the following instruction by a district judge:[13]

> Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an accurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

In accordance with *Williamson*, it has been held that a person could not be convicted under 18 U.S.C. 1165 for "willfully and knowingly" trespassing upon Indian lands if in good faith he relied upon the advice of counsel that he had a right to go on the lands.[14] On the other hand, where the statute does not require proof of evil motive but merely a conscious course of conduct undertaken with awareness of the risk of its illegality, the courts have held that good faith reliance on legal advice, or reliance on one's own personal understanding of the law, is not a defense.[15] Similarly, reliance on advice of counsel that a certain course of conduct was lawful has been held not to constitute a defense where other evidence shows the defendant's lack of good faith or fraudulent intent.[16]

2. Ignorance or mistake of fact

Cases in Federal law involving ignorance or mistake of fact are much scarcer than those involving ignorance or mistake of law. Nonetheless, the States generally apply the same principle that such ignorance or mistake is not a defense unless it negates an element of the crime,[17] and there seems no reason to doubt that this rule would be followed by the Federal courts as well. An indication that the rule would be adhered to is *United States* v. *Carll,*[18] where the Supreme Court noted in dictum that there would be no violation of the Federal statute dealing with the uttering of a forged instrument if the defendant uttered an instrument believing it to be forged and it was, in fact, genuine.[19] Likewise it has been held that a witness who, through mistake or ignorance, testifies falsely under oath is not guilty of perjury, since knowledge of the falsity of the statement is an essential element of the offense.[20] Similarly, it appears plain that a person who, through mistake, drives the wrong way on a highway and causes the death of another in an accident could not be found guilty of intentional murder.[21] He could, however, be found guilty of manslaughter if his mistake was not of a reasonable nature so as to nullify the recklessness required for that offense.[22]

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[13] 207 U.S. 425, 453 (1908).

[14] See *United States* v. *Pollman*, 364 F. Supp. 995, 1003-1004 (D. Mont. 1973). Similarly in *Long* v. *State*, 44 Del. 262, 65 A.2d 489 (1949), the court held that a conviction for bigamy must be reversed where the defendant had relied on competent but incorrect legal advice that a foreign divorce was valid.

[15] See, e.g., *Braden* v. *United States*, 365 U.S. 431, 437-438 (1961) (sustaining conviction for contempt of Congress in refusing to answer a question under 2 U.S.C. 192); *United States* v. *Jacques*, 463 F.2d 653, 656 (1st Cir. 1972) (holding that reliance on the advice of counsel that an induction order of a local selective service board was invlaid did not constitute a defense to a charge of refusal to obey it since only deliberate disobedience was required under the statute).

[16] See, e.g., *United States* v. *Custer Channel Wing Corp.*, 376 F.2d 675, 683 (4th Cir.) cert. denied, 389 U.S. 850 (1967); *United States* v. *Painter*, 314 F.2d 939 (4th Cir.), cert. denied, 374 U.S. 831 (1963); *United States* v. *Schaefer*, 299 F.2d 625, 629 (7th Cir.), cert. denied, 370 U.S. 917 (1962); *United States* v. *Hill*, 298 F. Supp. 1221 (D. Conn. 1969).

3. Insanity

Congress has never enacted legislation on the insanity defense. The Supreme Court has generally left development of standards to the courts of appeal and those courts, over many years, have gradually broadened the defense.

The foundation of the defense was established in *M'Naghten's Case,*[23] in which the "right-wrong" test was introduced:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

The next step was the widespread adoption of an additional volition test, exculpating a defendant who knew what he was doing and that it was wrong, but whose actions were deemed, because of mental disease, to be beyond his control.[24] This is sometimes called the "irresistible impulse" addition to the *M'Naghten* test. However, because its formulation frequently does not require that the abnormality be characterized by sudden impulse as opposed to brooding and reflection, it is more appropriate to term it a "control" or "volitional" test.

A third stage was the repudiation of both *M'Naghten* and its volitional supplement by the famous decision of *Durham* v. *United States.*[25] There, the court enunciated the formulation: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." [26] The court did not define the terms of the new rule in that decision. After numerous appellate opinions, refining, clarifying, expanding, and limiting *Durham* over a period of eighteen years, the District of Columbia circuit overruled it in *United States* v. *Brawner.* [27]

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[17] See Perkins, *Criminal Law,* pp. 939–942 (2d ed. 1969), and cases cited therein.

[18] 105 U.S. 611, 613 (1881).

[19] Cf. *Bronston* v. *United States,* 409 U.S. 352 (1973).

[20] See, e.g., *Beckanstin* v. *United States* 232 F.2d 1, 4 (5th Cir. 1956).

[21] See also *Konda* v. *United States* 166 F. 91 (7th Cir. 1908), holding that lack of knowledge of the content of a package sent through the mail, even if such ignorance is a result of negligence, is a defense to a criminal prosecution for knowingly depositing such matter in the mails.

[22] See *United States* v. *Pardee,* 368 F.2d 368 (4th Cir. 1966).

[23] Clark & F. 200, 8 Eng. Rep. 718 (House of Lords, 1843).

[24] See *Davis* v. *United States* 165 U.S. 373, 378 (1897).

[25] 214 F.2d 862 (D.C. Cir. 1954).

Meanwhile, the other Federal courts of appeals, with some modifications and hesitations, had moved from *M'Naghten* and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of law." [28] Adoption of the A.L.I. formulation marks the fourth and latest stage of development of Federal decisional law on the subject, although minor differences among the circuits continue to exist.[29] In the *Brawner* case, *supra,* the District of Columbia Circuit joined the other circuits in embracing this approach.[30]

Although the defenses have not been included in the Code, thereby retaining the common law development of an insanity defense, the Committee believes the report should reflect some of the varying views brought out in hearings with respect to the desirability of the insanity defense concepts.

The knowledge tests: M'Naghten and its progeny

While criticism of *M'Naghten* in terms of obsolescence is not in itself an argument for its repudiation, the test does tend to ignore the distinction between a medical concept of mental illness or defect and a normative legal standard focusing on legal purposes rather than the identification of medical or psychological entities. Moreover, as noted in *Durham* v. *United States:* [31]

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his control. The right-wrong test, which considers knowledge or reason alone, is therefore, an inadequate guide to mental responsibility for criminal behavior.
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> By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

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[26] *Id.* at 874.

[27] 471 F.2d 969 (D.C. Cir. 1972). See generally *Symposium on United States* v. *Brawner,* 1973 Wash. U.L.O. 17-154.

[28] Model Penal Code, § 4.01 (P.O.D. 1962).

[29] The positions of the various circuits are surveyed in *United States* v. *Brawner, supra* note 27 at 979-981. The most notable departure from uniformity is the Third Circuit, where the court has eliminated the cognitive aspect of the A.L.I. test. See *United States* v. *Currens,* 290 F.2d 751 (3d Cir. 1961); cf *Government of Virgin Islands* v. *Bellott,* 495 F.2d 1393 (3d Cir. 1974).

[30] Both the National Commission (Final Report, § 503) and S. 1 as introduced originally (§ 1-3C2) proposed the enactment of the A.L.I. insanity defense, with minor textual variations.

[31] *Supra* note 25 at 871-872.

Related to the foregoing is the criticism that *M'Naghten* does not lead to the acquittal of an appropriate number of mentally ill persons. When strictly applied it probably exempts from criminal responsibility only persons who are grossly mentally deficient and psychotics with blurred perception and consciousness, together with some paranoid schizophrenics.[32] This is the most common and the most realistic objection to *M'Naghten*. Frequently it has led to interpretation of key terms of the rule in such a manner as to encompass volitional impairment. "Know" is expanded to include a substantial emotional component together with the possibility of acting upon knowledge. "Wrong" may be expanded to include moral wrong as well as violation of criminal law. More commonly today the approach may be to add a control test to the knowledge test of *M'Naghten* and to exculpate those who are said to be volitionally impaired.

It is sometimes stated that the rule asks questions which a psychiatrist cannot answer since they are said to be directed to moralistic rather than scientific concerns. While it must be conceded that there is ample ambiguity in the language of *M'Naghten*, one may suspect that much of the criticism of vagueness, and perhaps of language regarded as prescientific, is actually directed at the narrow scope of the rule more intensely than at its vagueness. For example, Dr. Gregory Zilborg has stated:[33]

> To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself *for the sake of justice*. For what else is it if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things.

The dispute must be seen as disagreement by psychiatrists with a legal, not a medical, standard.

The control tests

The courts of appeals have widely approved instructions which added the *M'Naghten* test a defense predicated on lack of power to avoid criminal conduct. Functionally, there is much appeal in such a criterion. If one conceives the major purpose of the insanity defense to be the exclusion of the non-deterrables from criminal responsibility, a control test seems designed to meet that objective. Furthermore, notions of retributive punishment seen particularly inappropriate with respect to one powerless to do otherwise than he did. And treatment and incapacitation can be accomplished in a mental hospital, as well as in a prison. Accordingly, it is perhaps understandable that control tests have been utilized in the Federal courts, either alone, as in *United States* v. *Currens,*[34] or combined with a cognition test, as in the proposal of the American Law Institute.

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[32] See Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. Pa. L., Rev. 378, 379 (1952).

[33] Guttmacher and Weihofen, *Psychiatry and the Law*, pp. 400–407 (1952) (emphasis supplied).

A powerful criticism of the control tests, however, is that they tend to exculpate some persons who should be adjudged guilty.[35] A concomitant result in jurisdictions where acquittal on the basis of insanity is likely to result in indefinite commitment to a mental hospital is that confinement for any period subject to the discretion of an administrative board may replace the *safeguards* of the criminal process, that is a fixed maximum term and proportionality between the maximum period of incarceration and the seriousness of the criminal conduct.

A related difficulty with a control test is associated with a determinism which seems dominant in the thinking of many expert witnesses. Modern psychiatry has tended to view man as controlled by antecedent hereditary and environmental factors. Freud, for example, wrote:[36]

> I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of determinism which governs even mental life.

In their widely recognized text,[37] Doctors Frederick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and Chairman of the Psychiatry Department, University of Chicago, respectively, state:

> As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena, in our field can be explained, or that there is no uncertainty. It merely commits us to a scientific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecents in *both* the organism and environment produces a similar *set* of consequences.

Such a view is consistent with a conclusion that *all* criminal conduct is evidence of lack of power to conform behavior to the requirements of law. The control tests and volitional standards thus acutely raise the problem of what is *meant* by lack of power to avoid conduct or to conform to the requirements of law which leads to the most fundamental objection to the control tests—their lack of determinate meaning. The Royal Commission on Capital Punishment stated:[38]

> Most lawyers have consistently maintained that the concept of an "irresistible" or "uncontrollable" impulse is a dangerous one, since it is impracticable to distinguish be-

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[34] 290 F.2d 751 (3d Cir. 1961).

[35] See, e.g., Commission Staff Comments to § 30.05 to McKinney's N.Y. Revised Penal Law (1967).

[36] *Introductory Lectures of Psychoanalysis*, pp. 86–88 (1923).

[37] *The Theory and Practice of Psychiatry*, p. 79 (1966).

[38] 1949–1953 Report, p. 80.

> tween those impulses which are the product of mental disease and those which are the product of ordinary passion, or, where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted.

The same objection was noted in connection with the form of the control test advocated by the Model Penal Code:[39]

> The draft accepts the view that any effort to exclude the non-deterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment to cognition; and this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of *M'Naghten*.
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> Both the main formulation recommended and alternative (a) deem the proper question on this branch of the inquiry to be whether the defendant was without capacity to conform his conduct to the requirements of law . . . The application of the principle will call, of course, for a distinction between incapacity, upon the one hand and mere indisposition on the other. Such a distinction is inevitable in the application of a standard addressed to impairment of volition. We believe that the distinction can be made.

The American Law Institute's commentary fails to elaborate upon its last assertion. How can the distinction be made? *Durham* suggested that the notion involved in a determination of responsibility was freedom of will. But it is in significant part the difficulty of ascribing operational meaning to concepts of volitional freedom which make it a nebulous, if not impossible, criterion to litigate. To be sure, there are situations in which there would be substantial agreement that freedom of choice was absent, for example, actions during unconsciousness such as occur in some epileptic seizures and sleepwalking. These are cases in which lack of *mens rea* and probably *actus reus* would exculpate, as would a cognitive insanity test. They pose no challenge for a volitional insanity defense. Beyond this core type of situation, however, one can expect little agreement as to the meaning of a volitional standard. There is no consensus with respect even to criteria for decision in the real problem areas, where some individuals yield to desires to engage in proscribed conduct and others do not.[40] In testimony before the Royal Commission on Capital Punishment, the Director of Public Prosecutions stated that a volitional standard which extended beyond cases such as automatic epilepsy presented a question which "ceased to be one to which objective tests could readily be applied and became a matter of metaphysical speculation which presented an impossible problem to the Judge and jury."[41] Asked the Lord Chief Justice, "Who is to judge whether the impulse is irresistible or not?"[42]

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[39] Model Penal Code, § 4.01, Comment, pp. 157-158 (Tent. Draft

[40] See Waelder, *supra* note 32 at 383.

[41] 1949-1953 Report, *supra* note 38 at 95.

[42] *Ibid.*

A brief but perceptive discussion of the problem is contained in the concurring opinion of Mr. Justice Black, joined by Mr. Justice Harlan, in *Powell* v. *Texas*,[43] upholding the constitutionality of criminal penalties applied to alcoholics whose public drunkeness is alleged to be beyond volitional control:

> When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force which is nevertheless his except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible.
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> [T]he question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons wish to regard as irrelevant.

The indeterminacy problem of control tests is not sufficiently mitigated by the requirements of mental disease or defect. The disease or defect requirement is present in all of the statements of insanity defenses. It is almost never defined, however. Primary reliance is conveniently placed on expert testimony, apparently because it is widely assumed, first, that there is a medical consensus on the meaning of these terms, and second, that this meaning is relevant to the legal purposes at hand. Neither assumption is entirely accurate.

As Doctors Redlich and Freedman point out:[44]

> In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illnesses of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder. . . . Medically recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders.
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> What, then, are these difficulties psychiatrists are supposed to threat, the so-called behavior disorders? Defying easy definition, the terms refers to the presence of certain behavior patterns . . . variously described as abnormal, subnormal, undesirable, inadequate, inappropriate, maladaptive or maladjusted—that are not compatible with the norms and expectations of the patient's social and cultural system.

The American Law Institute proposal

This test bases exculpation upon lack of cognitive or volitional ability due to mental disease or defect. It is probably the most ably drawn of such tests. It provides that "substantial incapacity" will suffice, rather than requiring that incapacity be total, and uses the more affective term "appreciate" for the more coldly cognitive "know" of *M'Naghten*. It also attempts to avoid the circularity of defining repeated criminal conduct as a disease and of concluding therefrom that ground for exculpation is presented. In explaining this second paragraph, the comments state:[45]

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[43] 392 U.S. 514, 540, 544 (1968).

[44] *The Theory and Practice of Psychiatry, supra* note 37 at 1.

> While it may not be feasible to formulate a definition of "disease," there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. . . . It does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.

The A.L.I. test is largely a control test, and subject to the metaphysical quandaries associated with assigning operational meaning. To a determinist, the abolition of criminal liability appears to be authorized by it; to a nondeterminist it remains indeterminate in scope."Mental disease or defect" and "substantial capacity to conform" cannot be resolved except by utilizing the moral preferences of witnesses and triers of fact.

The effort to exclude the so-called sociopath from exculpation is likely to be ineffective, since this diffuse, amorphous classification of behavioral deviants can be said to be characterized by more than repeated criminality and otherwise anti-social conduct. As a result, large numbers of defendants presently regarded, as bad, rather than sick, would be exculpated on careful psychiatric examination and testimony.[46]

The Mens Rea Test

One suggested formulation of an insanity test would provide a defense if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect would not otherwise constitute a defense."[47] This concentrates attention on the defendant's mental condition insofar as it relates to determining whether the offender acted with the mental states necessary to commit the offense charged.[48] Thus the focus of initial inquiry in criminal trials would be on such questions as "Did the defendant intend to hijack an aircraft?" in a case of air piracy, rather than "Could he have conformed his conduct to the requirements of law?" The Model Penal Code commentary illustrates the proper subject of an insanity defense by posing the example of a madman who believes that he is squeezing lemons when he is actually choking his wife. Under the *mens rea* test he would not be guilty of murder, not because he fell within a special defense, but because he lacked the state of mind required by the offense, that is, he did not knowingly cause the death of another person.

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[45] Model Penal Code, §4.01, Comments p. 160 (Tent. Draft No. 4, 1955).

[46] See Diamond, *From M'Naghten, to Currens, and Beyond*, 50 Cal. L. Rev. 189 (1962).

[47] Such language was contained in S. 1400 and S. 1 of the 94th Congress and was approved by the New York City Bar Association's Special Committee, Hearings, pp. 3490-3491. In the present 97th Congress, Senator Hatch has introduced two bills, S. 818 and S. 1558, which propose this same formulation.

[48] While the provisions are treated in depth in that part of the report dealing with subchapter B of chapter 36, it is worth mentioning here that one who intends to rely upon a defense of insanity must give notice of the defense under Rule 12.2 of the Federal Rules of Criminal Procedure. Cf. *Williams* v. *Florida*, 399 U.S. 78 (1970). The provisions of section 3612 allow for comprehensive psychiatric examinations and a special verdict of not guilty by reason of insanity.

The critical issue is seen as one of disposition. Assuming a finding of an intent to hijack the aircraft and of the requisite conduct, the question at the time of sentencing would be whether, in light of all the circumstances, the defendant should be committed to prison, to a mental hospital, or to some other program.

Apart from its bearing on the defendant's commission of an element of the offense, his mental state or condition at the time of the offense would not provide an excuse for his conduct.

Advocates of a *mens rea* test recognize that certain persons who may be found not guilty by reason of insanity under traditional insanity tests,[49] but who have in fact committed a criminal offense as a result of mental disease or defect, may objectively be found to have committed the offense—and thus to be "guilty"—under this standard.[50] The undesirability of labeling such persons as "guilty" of a crime—given the term's collateral moral connotations—should be weighed against two factors. First, the test would put and end to the abuses which have arisen under the older, more confusing insanity standards and which have in the past allowed those actually guilty of crimes to go free, e.g., those who "cannot" control their behavior because they do not choose to make the effort to do so. Second, though such persons may be technically guilty of an effense under the new standards, the stigma attached to a determination of criminality will be materially mitigated at the sentencing stage by publicly adjudging them to be deserving of proper medical care rather than deserving of a punitive sentence of imprisonment. The nature of the disposition provided by the sentence will constitute society's recognition of the defendant's lack of moral culpability for his offense.

The *mens rea* test is quite simple. In fact this simplicity, when compared to existing law, is one of its major virtues. However, as the hearings before this Committee reveal, the proposal has been the subject of a significant amount of controversy. Support for the *means rea* test is based on three factors: fair treatment for the offender; protection of society; and the proper administration of criminal justice.

Fair treatment for the offender: Dealing with the mentally ill offender, and the history of the insanity defense illustrates, has proven to be a difficult matter, The person has committed the conduct forbidden by law. He has offended social norms and may well doe so again. Yet, there is a natural reluctance to punish an abnormal person for failure to conduct himself in normal fashion.

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[49] The number of persons raising the defense in a given year has been estimated at less than 1% of serious felons with less than 100 persons successfully raising the defense. The Federal portion would be considerably less. See Hearings, p. 7023 (testimony of Seymour Pollack, M.D., President, American Academy of Psychiatry and the Law). Another expert has stated that the defense is successful in only 2% of the cases. See Hearings, p. 7007 (testimony of Stanley Portnow, M.D., Chairman, Committee on Psychiatry and the Law, American Psychiatric Association).

[50] While the categories of such individuals cannot be completely ascertained in advance of a body of decisions under the standard proposed here, for general purposes it can be stated that those who would not be exculpated under this kind of formulation, but who probably would be judged not guilty by reason of insanity under traditional tests, include a person who asserts that he cannot control his hehavior, e.g., he is driven by an overpowering urge to steal, and a person who operates under a delusion that what he does is not morally wrong, e.g., he is told by a voice to kill in order to rid the world of an "evil" person.

On the other hand if the traditional criteria for confinement are considered, then the mentally ill offender is particularly in need of confinement. He is in need of treatment and rehabilitation. Society may well be protected by his incapacitation. His confinement may provide as much deterrent effect as the confinenment of any other offender. Only retribution seems to be an inappropriate basis for his confinenment since his moral fault may in some cases be considered to be non-existent or at least less than that of the "normal" offender.

If focus is placed on conviction rather than disposition the question becomes even more difficult, for under traditional analysis only the "blameworthy" should be branded as criminals. The question then reduces itself to the inquiry as to when is a mentally ill offender blameworthy. This approach answers that question by stating that all offenders are blameworthy to the extent that they may be found guilty of committing an offense when their mental state as to the proscribed conduct and the circumstances surrounding that conduct is that state required by the offense. In that sense, i.e., with regard to the state of mind of the defendant, the mentally ill offender is treated fairly for he is treated the same as all other offenders.[51]

It has been persuasively argued that the mentally ill offender possibly may presently be treated better than some who also have a colorable claim to lack of blameworthiness. Professor Norval Morris has stated the case as follows:[52]

> It too often is overlooked that one group's exculpation from criminal responsibility confirms the inculpation of other groups. Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a nondeterministic criminal law (all present criminal law systems) attributes to accused persons. True, a defense of social adversity would politically be intolerable; but that does not vitiate the analogy for my purposes. You argue that insantiy destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so. But surely, you reply, I would not have us punish the sick. Indeed I would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes, I fail to see the difference between these two defenses. To

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[51] The present insanity defense also tends, more than would the formulation under discussion, in a practical sense to discriminate against the poor defendant. Insanity is frequently and probably properly called a "rich man's defense," for the wealthy can sift the pool of potential expert witnesses for those who will produce favorable testimony in a convincing manner. Poor men, on the other hand, have typically had to rely on public mental hospital experts, or those selected by the court whose reports commonly have been made available to the prosecution as well as the defense. Signs of change are detectable, see 18 U.S.C. 3006A(e), authorizing payment of expert witnesses selected privately by an indigent defendant, but they do not appear to be likely to result in total equality of advantage in litigation of insanity issues.

[52] Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968).

> the extent that they serve rehabilitative, treatment, and curative purposes I fail to see the need for the difference.

The question arises whether it is still not unfair to impose the stigma of criminality on those few who would be exculpated under some current tests but not under the restricted view and whether they ought to be afforded medical rather than penal treatment.

As to the first of these, it is argued that it is altogether uncertain that the criminal label stigmatizes more than does the label of criminal insanity.[53]

As to the question of treatment or disposition, the same latitude in meeting the needs of the defendant should be available in the sentencing process as in a mental commitment procedure.

Indeed, as to therapeutic treatment, it has been suggested that it is more desirable to treat mentally ill offenders as responsible for their actions than it would be to excuse their conduct entirely.[54]

Protection of society: To the extent that the *mens rea* test holds forth greater promise of rehabilitative treatment, it affords greater protection for society in general. To the extent that the proposal requires a direct relationship of the defendant's overall mental state to his criminal culpability it removes nebulous and extraneous issues from the determination of guilt. To the extent that it precludes spurious and fabricated claims it makes justice more swift but no less just.

While the actual effects would only be determined by implementation, it is reasonable to believe that a *mens rea* test would do much to achieve the objectives stated above and that the achievement of those objectives would do much to protect the public interest.

Administration of criminal justice: The various insanity defenses currently in use impeded the administration of justice in two significant ways. First, they focus upon terms which are hopelessly vague to the courts, the lawyer, the psychiatrist, and the layman. Second, they allocate psychiatric resources in a manner that is largely inappropriate and frequently unseemly.

The following dialogue between Dr. Karl Menninger and a trial judge is illustrative of the first point:[55]

> JUDGE. Well, what about the question of whether or not this man is responsible under the law. He committed a crime; that we know. But there is still the question of his intentions and his capacity for knowing right from wrong, his capacity to refrain from the wrong if he knows what wrong is. If he is not responsible, then technically he is not guilty.
>
> ANSWER [Dr. Karl Menninger]. Your Honor, responsible is another one of these functionally undefined words.

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[53] See generally Farina et al. *Mental Illness and the Impact of Believing Others Know About It.* 71 J. Abn. Psych., Feb. 1971. pp. 1-6; Farina, Holland, and Ring. *The Role of Stigma and Set in Interpersonal Interaction,* 71 J. Abn. Psych., Dec. 1966. pp. 421-428: Enis. *Civil Liberties and Mental Illness,* 7 Crim. L. Bull. 101 (1971); Grazia. Report on Pretrial Diversion of Accused Offenders to Community Health Treatment Programs (Georgetown U. School of Medicine, 1972).

[54] Working Papers, p. 251.

[55] Menninger. *The Crime of Punishment,* pp. 136-137 (1968)

> Judge. But your colleagues have often testified in this court that in their opinion a certain prisoner *was* or *was not* responsible.
>
> Answer. Yes, your Honor, because the word *responsible* is in every day use. But this use is different from the legal use, as you well know, and that fact is not always clear to your witnesses.
>
> * * * * *
>
> What you want to know, I suppose, is whether this man is capable of living with the rest of us and refraining from his propensity to injure us. You want to know whether he is dangerous, whether he can be treated and cured—whether we must arrange to detain him in protective custody indefinitely.
>
> Judge. Exactly. This is indeed what the court would like to know. But it seems we do not know how to communicate with one another, and our laws do not permit us to ask you. How, I beg of you, may I obtain direct, nonevasive answers to precisely these questions?
>
> Answer. Your Honor, by asking for them. As you say yourself, you are not permitted by precedent and custom to do so.

Chief Judge Bazelon, a prolific writer on the subject of the insanity defense, has himself cast doubt as to its utility simply because of the difficulty in stating the terms in a comprehensible manner.[56]

While the *mens rea* test, dependent as it is on the use of the phrase "mental disease or defect," may be said to suffer from some of the same vagueness problems it should be noted that the reduction in availability of the defense reduces the harm and impact of the necessary vagueness. Moreover, juries have traditionally dealt with the existence or non-existence of *mens rea* and this formulation, unlike the traditional insanity defense, poses no additional burdens on them.

The misallocation of psychiatric and psychological resources is an additional consideration favoring a *mens rea* approach. The question has three aspects; first, the shortage of psychiatric resources; second, the unseemly battle of the experts; and third, the desirability of using such personnel functionally, by explicitly directing their attention to the crucial questions whether defendants should be institutionalized and, if so, to what sort of facility.

As to the first, it is of some interest that in response to a survey conducted some years ago by the Committee staff, some 62% of the Departments of Mental Health in the several States favored either total abolition of an insanity defense or abolition of a separate insanity defense.[57] Many of the responses favoring some form of abolition emphasized the burden that the defense creates on their departments and the time it takes away from the therapy.[58]

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[56] *Washington* v. *United States*, 390 F.2d 444, 457 n.33 (D.C. Cir. 1967). See also the English case of *Regina* v. *Byrne*, [1960] 2 Q.B. 396, 404: "In a case where the abnormality of mind is one which affects the accused's self-control the step between 'he did not resist his impulse' and 'he could not resist his impulse' is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses."

[57] Hearings, pp. 6381–6409.

Not only do the present defenses place a burden on resources, they also misuse them, for as one psychiatrist wrote to the Committee: "I have felt for a long time that psychiatry does not belong in the adversary proceeding. There is nothing in the training of a psychiatrist which prepares him for this type of business. I think his primary training has to do with the diagnosis and treatment of mentally and emotionally sick people."[59] Moreover, it can hardly be said to be therapeutically valuable to have a patient view psychiatrists as advocates for or against the patient.

Several other persons who have appeared before or corresponded with the Committee have expressed a distaste for the "battle of the experts."[60] They concluded that it can be of little good to the general view of the psychiatric profession and the criminal justice system to require psychiatrists to testify against each other in an advocate form on matters on which many of them argue they have no expertise.[61]

Continuation of an insanity defense based on amorphous concepts of blameworthiness may ultimately be detrimental to the administration. of the criminal justice system and is a waste of judicial and psychiatric resources.[62]

The ultimate question, posed by one expert in the field, is "why an insanity defense?"[63] Exceptions to criminal liability should be based on sound policy grounds, for such special and unequal treatment should not be lightly permitted. A focus on the culpability of the defendant as defined by the state of mind elements is one answer to the question posed. The Committee has found widespread support for the *mens rea* test since its initial proposal by the National Commission's consultant on the subject, its recommendation by a substantial minority of the members of the National Commission, and its adoption in S. 1400 of the 93d Congress.

The Committee on Federal Legislation of the New York County Lawyers Association, in its report on its proposed new Federal Criminal Code, noted the difficulties with the various current formulations of the insanity defense and urged that condiseration be given to abolishing the separate insanity defense.[64] Subsequently, in testifying on behalf of the Association, Mr. Vincent L. Broderick noted that: [65]

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[58] The terminololgy "abolition of the insanity defense" is commonly used by writers in the field as a shorthand reference designed to include the modified form of an insanity defense. A more accurate reference would be "abolition of the *separate* insanity defense" or "abolition of the *traditional* insanity defense." Most of the writers utilizing such terminology have in mind a formulation under which psychiatric testimony could be introduced with regard to the defendant's possession of the mental state required as an element of the offense charged—a possibility which is not generally available under the approach of current law.

[59] Hearings. p. 6391 (letter of Zigmond M. Lebensohn, M.D.).

[60] E.g. letter of Dr. Ethel Bonn, *id.* at 6388; letter of Dr. Reginald White, *id.* at 6396.

[61] *Id.* at 6385.

[62] A fairly extreme example is *Wright* v. *United States*, 250 F.2d 4 (D.C. Cir. 1957), in which eleven psychiatrists examined the defendant and testified before the jury. In the District of Columbia a committee of the Judicial Conference reported that some psychiatrists were avoiding hospital staff conferences evaluating persons facing criminal charges to avoid being subpoenaed. Judicial Conference of the District of Columbia Circuit, *Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases Before Trial*, p. 32 (1966).

[63] Goldstein, *The Brawner Rule—Why? Or No More Nonsense on Non Sense in the Criminal Law, Please!*, 1973 Wash. U.L.Q. 12.

[64] Hearings, p. 1402.

[65] *Id.* at 5929, 5933-5934.

> In the area of insanity as a defense the approach taken by S. 1400 is more consistent with the prior reports of this Committee and other Bar groups.
>
> S. 1400 had adopted our recommendation and that of the other Bar groups by providing that insanity is a defense only insofar as it negatives the intent required for commission of the offense (section 502). For the reason stated in the prior reports of our Committee and the other Bar groups, we deem S. 1400 to be preferable to S. 1 in this area.

Mr. Broderick emphasized that the Association's Committee on Federal Legislation felt "quite strongly" that the separate insanity defense should be abolished.[66]

Similar support has been expressed by the Committee on Federal Legislation of the New York State Bar Association. Mr. Anthony P. Marshall, testifying as Chairman of that Committee, observed:[67]

> Our report ("The Dilema of Mental Issues in Criminal Trials—Report of the Committee on Federal Legislation," 41 N.Y. State B.J. 394) in 1969 suggested that . . . the insanity defense should be abolished, and questions of mental competency should only be considered in regard to whether the defendant had the requisite criminal intent to commit the offense with which he was charged.
>
> S. 1400 essentially adopts that view. . . .
>
> (W)e favor the treatment in S. 1400. . . .

The Association of the Bar of the City of New York expressed a similar view:[68]

> We also endorse the views expressed in the Consultant's Report on Criminal Responsibility—Mental Illness: Section 503 (Working Papers, pp. 228 et seq.), particularly the summary of considerations set out at pages 248–254. We believe that the elimination of the insanity defense should be accompanied by more careful and sophisticated attention to the mental condition of the accused in connection with sentencing and the channeling of the accused to appropriate correctional or treatment facilities.

A special committee formed by the American Bar Association to review the National Commission's Code stated in its report:[69]

> A majority of the Committee present voted that § 503 should be approved as drafted. It should be noted, howev-

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[66] *Id.* at 5947.

[67] *Id.* at 3490–3491.

[68] *Id.* at 6363, 6364–6365.

[69] *Id.* at 5406. See generally Working Papers, pp. 229–259. Further support may be found in the following sources: Koota, *A Comparable Study of Criminal Insanity: A Plea for the Abolition of the Insanity Defense*, Hearings, pp. 2154 *et seq.*; Committee on Federal Legislation, New York State Bar Association, *The Dilemma of Mental Issues in Criminal Trials*, 41 N.Y. State B.J. 394 (1969); Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 Yale L.J. 853 (1963); Douglas, *Should There Be An Insanity Defense?*, Corrective Psych. & J. Soc. Therapy, Fall 1968, p. 129; Menninger, *The Crime of Punishment* (1968); Friedman, *No Psychiatry in Criminal Court*, 56 A.B.A.J. 242 (1970). See also Bennett & Matthews, *The Dilemma of Mental Disability and the Criminal Law*, 54 A.B.A.J. 467 (1968); Schwartz, *Psychiatry and Criminal Law*, N.Y.L.J., July 30, 1968, p. 54, col. 7; Arafat & McCaherty, *The Insanity Defense and the Juror*, 22 Drake L. Rev. 538 (1973); Goldstein, *supra* note 63.

> er, that a substantial minority of the Committee felt that section 503 should be amended to provide that a mental disease or defect provides no defense unless it negatives an element of the offense. The formulation would eliminate "insanity as a separate defense, according it only evidentiary significance." 1 Working Papers 247. The problems of formulating an intelligible or workable insanity defense need no documentation. No one has been satisfied with the attempts made to date, least of all the psychiatrists, and other professionals called upon as expert witnesses to make or break the defense. The minority believed that it would be preferable to direct attention to the more pressing issues concerning (1) civil commitment of the mentally ill acquitted by virtue of their lack of culpability; (2) competency to stand trial; (3) treatment of the mentally ill convicted of a crime; and (4) the corresponding procedural questions that must be answered.

A study in comparative law of the Swedish experience under laws similar to a *mens rea* test illustrates that the approach is not only workable but effective.[70] The reported bill, by deleting any reference to the issue, will leave the further development of the appropriate approach to this problem to the courts in the light of experience and the accumulating insights of the varied disciplines involved.

4. Intoxication

Under present Federal law, no special legal doctine is applied to the vast majority of criminal cases where intoxication is associated with the commission of a criminal act. Intoxicated persons ordinarily intend their conduct in a way similar to those who are sober. As a result, intoxication is quite uniformly held not to be exculpatory or to afford a defense in itself.[71] This principle prevails even if the defendant's intoxication was a manifestation of a disease (e.g., chronic alcoholism) and thus in some sense not wholly voluntary, since the commission of offenses forms no "characteristic and involuntary, since the commission of offenses forms no "characteristic and involuntary pattern of the disease."[72] Indeed in *Powell* v. *Texas*, the Supreme Court rejected a claim that chronic alcoholism was a constitutionally required defense even to a charge of public drunkenness, on the ground that, while the chronic alcoholic may have no control over his drinking, it is no necessary part of his disease that he be drunk in public.[73]

Although voluntary intoxication is not recognized as a defense *per se*, the Federal courts—like those in virtually every State[74]—hold that such intoxication may be considered in determining whether the defendant possess the "specific intent" required for the commission of certain crimes; on the other hand, where the crime is said to involve only a "general intent," proof of intoxication is held irrelevant to guilt. Examples of crimes falling in the latter category are felony murder,[75] second degree murder and manslaughter,[76] rape,[77] bank robbery,[78] and assault with a dangerous weapon.[79] Examples of offenses to which proof of intoxication is deemed relevant are first degree (non-felony) murder, kidnapping, burglary, and theft.[80]

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[70] See Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparisons With American Law*, 22 Am. J. Comp. L. 71 (1974).

[71] E.g., *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), cert. denied, 374 U.S. 844 (1963).

[72] See *Powell* v. *Texas, supra* note 43 at 559 n.2 (Fortas, J., dissenting); *Driver* v. *Hinnant*, 356 F.2d 761, 764 (D.C. Cir. 1966); see also Working papers. p. 225.

[73] See also *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir.) (*en banc*), cert. denied. 414 U.S. 980 (1973) (drug addiction not a defense to possession of drugs for personal use).

[74] E.g., *Kane* v. *United States*, 399 F.2d 730, 736 n. 11 (9th Cir. 1968), cert. denied, 393 U.S. 1057 (1969).

It is evident that the terms "specific intent" and "general intent" in this context mask a good deal of conceptual ambiguity, since in certain crimes, such as rape, where the defense of intoxication has not been allowed, it is clear that the "intent required is more than that of merely committing the act."[81] The notion that intoxication will not establish a defense to some charges is, therefore, in effect a "special doctrine of liability."[82]

An analysis of the cases applying the "specific intent" versus "general intent" doctrine tends to support the conclusion that, where an element of an offense requires actual knowledge or intent, intoxication evidence has been deemed pertinent to show the defendant's lack of such mental state. Where, however, the mental element of an offense is satisfied by proof of reckelssness or negligence, the courts have not been disposed to consider intoxication as a defense. For instance, recklessness as to ownership of property is thought insufficient for larceny, and intoxication may negative the purpose or knowledge required. On the other hand, recklessness is sufficient for mansluaghter, and intoxication is not allowed to disprove it.[83]

DEFENSE BASED ON LACK OF VOLITION

5. Duress

Although existing in Federal decisional law, the defense of duress is viewed with general disfavor and has rarely been successfully asserted. Tension is created by the competing policies of the criminal law: to punish the voluntary choice of criminal conduct, balanced by an unwillingness to penalize conduct that was not wholehearted but undertaken in response to a serious threat of physical injury; the recognition that the deterrent effect of the penal code is helpless against dire compulsion, offset by the refusal to approve mitigated but unjustifiable criminal conduct; concern for the victims of compelled offenses, offset by concern for unwilling actor; and fear of abuse of the defense. The defense thus represents society's statement that it does not demand exceptional heroism in resisting a demand to perform criminal acts but will not sanction cowardice.

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[75] *United States ex rel. Rucker* v. *Myers, supra* note 71.

[76] E.g., *United States* v. *Jewett*, 438 F.2d 495, 498–500 (8th Cir.), cert. denied, 402 U.S. 947 (1971); *Kane* v. *United States, supra* note 74 at 736.

[77] E.g., *Henry* v. *United States*, 432 F.2d 114, 119 (9th Cir. 1970), cert. denied, 400 U.S. 1011 (1971).

[78] E.g., *United States* v. *Porter*, 431 F.2d 7. 9–10 (9th Cir. 1970), cert. denied, 400 U.S. 960 (1971); *United States* v. *De Leo*, 422 F.2d 487, 490–491 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

[79] *Parker* v. *United States*. 359 F.2d 1009 (D.C. Cir. 1966).¼

[80] See *Tucker* v. *United States*, 151 U.S. 164 169 (1894); *Wheatley* v. *United States*, 159 F.2d 599 (4th Cir. 1946); Working Papers, p. 224; see also *United States* v. *Jacobs*, 473 F.2d 461 (10th Cir.), cert. denied, 412 U.S. 920 (1973) (defense applicable under 18 U.S.C. 2312, transporting a vehicle interstate, "knowing" it to have been stolen).

[81] Working Papers. p. 224.

[82] *Ibid.* As an example of one such explicitly proposed policy, with respect to marihuana intoxication, the National Commission on Marihuana and Drug Abuse, in its First Report (March 1972), recommended against permitting a "negation of specific intent" based upon such intoxication. *Id.* at 152.

[83] *Ibid.*

At common law, as under Federal law today, duress is recognized as a defense to all crimes except murder and, perhaps, offenses involving an intent to take life such as attempted murder or assault with intent to kill.[84]

Much of the Federal law, still relatively meager, dealing with the defense of duress arose in the context of treason prosecutions. In two early decisions the courts, while recognizing the defense, indicated that it was limited to situations solely involving the "fear of immediate death, not the fear of any inferior personal injury nor the apprehension of any outrage on property."[85] Subsequent treason cases arising out of World War II mollified the doctrine so as to permit the defense to be asserted (albeit finding it insufficient on the facts) where the defendant was under the apprehension of serious and immediate bodily harm, as well as threat of imminent death, although the court in one case noted, in rejecting a contention that the defense be expanded to include threats of future, nonimmediate harm, that the person claiming the defense must be one "whose resistance has brought him to the last ditch."[86] This modest expansion of the defense to include threats of imminent and serious bodily harm has since become widely accepted in Federal case law.[87] However, the cases have declined to go beyond that point, holding, for example, that threats of imprisonment, even if unjustified, do not establish the defense.[88]

The Federal authorities also appear to have rejected the defense of "pharmacological coercion," i.e., that the pangs of heroin withdrawal excuse the possession or sale of narcotics.[89] The archaic presumption that wives who commit crimes with their husbands have been "coerced" into doing so has likewise not been recognized by the Federal courts.[90]

It has also been held that the threat must remain constant and inescapable during the relevant period.[91] Thus, a person compelled prosecution for treason if he escaped as soon as possible, but the defense would not be available if he remained with the enemy forces for a substantial length of time in which the threat to his life was not always present.[92]

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[84] See Perkins, *Criminal Law*, pp. 951-953 (2d ed. 1969); see generally *United States* v. *Moore*, 486 F.2d 1139, 1180 (D.C. Cir.), cert. denied, 414 U.S. 980 (1973) (*en banc*) (opinion of Leventhal, J., joined by McGowen and MacKinnon, JJ); *R.I. Recreation Center, Inc.* v. *Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605-606 (1st Cir. 1949).

[85] *Respublica* v. *McCarty*, 2 U.S. (2 Dall.) 86, 87 (Sup. Ct. Pa. 1781); see also *United States* v. *Vigol*, 2 U.S. (2 Dall.) 346 (Cir. Ct. Pa. 1795).

[86] See *Iva Ikuto Toguri D'Agruino* (*"Tokyo Rose"*) v. *United States*, 192 F.2d 338, 357-359 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *Gillars* (*"Axis Sally"*) v. *United States*, 182 F.2d 962, 976 (D.C. Cir. 1950); see also *Kawakita* v. *United States*, 343 U.S. 717, 735 (1952) (*dictum*); contrast *State* v. *Toscano*, 21 Crl 237 (N.J. Sup. Ct. 1977) (imminence of threatened harm not required).

[87] See, e.g., *United States* v. *Patrick*, 542 F.2d 381, 386-388 (7th Cir. 1976); *United States* v. *Birch*, 470 F.2d 808, 812-13 (4th Cir. 1972), cert. denied, 411 U.S. 931 (1973); *United States* v. *Palmer*, 458 F.2d 663, 665 (9th Cir. 1972).

[88] See *Phillips* v. *United States*, 334 F.2d 589, 590-591 (9th Cir. 1964), cert. denied, 379 U.S. 1002 (1965); *United States* v. *Birch*, *supra* note 87; *Iva Ikuko Toguri D'Aquino* v. *United States*, *supra* note 86.

[89] See *Castle* v. *United States*, 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929, 953, (1965); *United States* v. *Moore*, *supra* note 84.

[90] See *Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935); *Conyer* v. *United States*, 80 F.2d 292, 294 (6th Cir. 1935); *United States* v. *Anthony*, 145 F. Supp. 323, 340 (M.D. Pa. 1956).

[91] See *Giugni* v. *United States*, 127 F.2d 786, 791 (1st Cir. 1942); *Shannon* v. *United States*, *supra* note 90.

The cases, moreover, continue to adhere to the venerable rule that threats of damage to property or financial loss are inadequate grounds for claiming complusion sufficient to excuse criminal conduct. In *United States* v. *Palmer*[93] the court held that the defendant's contention that his illegal reentry into the United States was justified since he allegedly faced "financial ruin" if he failed to appear for a deposition, was insufficient to constitute duress. However, there is precedent to the effect that economic threats may be sufficient to negate the specific intent required for certain offenses such as bribery.[94]

One issue not yet settled by the Federal decisions is the extent, if any, to which a claim of duress may be predicated upon a threat of serious injury or threat to a third person. The few Federal cases touching on the question seem to imply that reasonable apprehension of immediate death or serious bodily harm to a close relative will excuse criminal conduct,[95] but no case seems yet to have extended the defense to a threat involving another person not related to the offender (e.g., an employee in a bank whose life is threatened by robbers).

Duress has been called an "affirmative defense,"[96] although no Federal decision has addressed inself in any depth to the question of how the burden of proof should be allocated.[97]

DEFENSES BASED ON JUSTIFIABLE CONDUCT

Under the common law it is recognized that circumstances could arise under which the performance of all the elements of what would otherwise constitute a crime would not be regarded as criminal but rather necessary and, therefore, "justified." The source of this "justification" arose either from a duty imposed upon the actor by the law or from the inherent right of the individual to protect himself, his family, and his property from the unjustified aggression of another. Thus, for example, the use of what would otherwise amount to unlawful force against another person might be justified if it was necessary to arrest him, prevent his escape, defend one's self or another from unlawful attack, protect one's property, prevent crime, or engage in warfare.[98]

At civil law justification defenses also exist, defining the circumstances under which otherwise tortious conduct will not incur liability, although they are there discussed in terms of the doctrine of privilege.[99] Such privilege arises in connection with intentional wrongs such as assault and battery, false imprisonment, trespass, and conversion. Justification and privilege thus together comprehend an area in which otherwise wrongful conduct is exempt from civil and criminal liability.

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[92] See *Respublica* v. *McCarty, supra* note 85.

[93] *Supra* note 87.

[94] See *United States*⅓ v. *Barash*, 412 F.2d 26, 29–30 (2d Cir.), cert. denied, 396 U.S. 832 (1969).

[95] See *United States* v. *Stevison*, 471 F.2d 143, 146–147 (7th Cir. 1972); *Johnson* v. *United States*, 291 F.2d 150, 155 (8th Cir.). cert. denied, 368 U.S. 880 (1961); *R.I. Recreation Center* v. *Aetna Cas. & Sur. Co., supra* note 84, 177 F.2d at 605.

[96] *United States* v. *Stevison, supra* note 95 at 147; see also *State* v. *Toscano, supra* note 86.

[97] But cf. *United States* v. *Stevison, supra* note 95 at 155–157.

[98] For an extended discussion of the development of the common law theory of justification, see generally Perkins. *Criminal Law, supra* note 84, pp. 977-1029. See also Wharton, *Criminal Law and Procedure*, pp. 452 *et seq.* (1957).

At the time of the drafting of the Model Penal Code in 1958, eighteen States (as well as the Federal Government) had no statutory formation of the defense of justification, even in relation to homicide.[100] Where State laws did exist, they varied greatly. Some statutes dealt only with homicide, or homicide and assault; others restricted the justified use of force to self-defense or crime prevention. Many formulations reflected inconsistent policies, so that limitations on the privilege to kill in self-defense were nullified by the privilege to do so to prevent crime, and vice versa.[101]

Today a number of States have drafted or are in the process of drafting new criminal codes that, among other things, codify the defenses of justification.[102] The Model Penal Code's formulation of the defenses has had a great influence on these codes.

6. Exercise of Public Authority

The defense of justification based upon public authority has its common law origin in cases involving the use of force by military or law enforcement officials or by members of a posse. Most of the law in this country on the subject has been developed by State courts.[103] However, the applicable principle was stated in one relatively early Federal case involving a homicide prosecution. The central issue in the case involved the shooting by a sentry of a soldier escaping from a military compound. The court found the shooting justifiable on the ground that no bad faith had been shown and that it was within the sentry's proper duties to shoot at an escapee. After discussing the duty of a soldier to obey the orders of his superiors, the court went on to discuss the principle that would apply where the soldier was not acting in direct obedience to an order but pursuant to his duty as he conceived it. The court concluded: [104]

> (U)nless the act were manifestly beyond the scope of (the soldier's) authority, or . . . were such that a man of ordinary sense and understanding would know that it was illegal, . . . it

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[99] See, e.g., *Barr* v. *Mateo*, 360 U.S. 564 (1959); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972), on remand from the Supreme Court's decision, 403 U.S. 388 (1971); Prosser, *Torts*, pp. 98-99 (4th ed. 1971).

[100] See Model Penal Code (Tent. Draft No. 8, 1958), pp. 2-3.

[101] *Ibid.*

[102] The following States, among others, have enacted criminal codes and the sections therein pertaining to the question of justification and exemptions from criminal responsibility are listed below:

(1) Colo. Rev. Stat. ch. 40. §§ 40-1-801—40-1-810 (Perm. Cum. Supp. (1971)).
(2) Conn. Gen. Stat. Ann. Tit. 53a. §§ 53a-16-15a-23 (1971).
(3) Idaho Code Tit. 18 and 19. §§ 19-201, 18-4009, 18-4010, 18-4011, 18-4013, 19-2112. 19-902, 19-203 (Supp. 1973).
(4) Ga. Code. Ann. ch. 26-0, §§ 26-901—26-907 (1972 Rev.).
(5) Ill. Stat. Ann. ch. 38, § 7 (1962).
(6) Kan. Stat. Ann. ch 21, §§ 21-3209—21-3217 (Supp. 16-115, 1973).
(7) Minn. Stat. Ann. ch. 609, 609.06—609.065 (1963).
(8) Ore. Rev. Stat. ch. 161, §§ 161.190-190—161.275 (1971).

[103] See generally Perkins, *supra* note 84 at 977-986, and cases cited therein.

[104] *United States* v. *Clark*, 31 F. 710, 717 (E.D. Mich. 1887). See also *United States* v. *Lipsett*, 156 F. 65 (W.D. Mich. 1907): cf. *United States ex rel. Drury* v. *Lewis*, 200 U.S. 1, 8 (1906).

would be a protection to him if he acted in good faith and without malice.

No more modern Federal decision dealing with the public duty defense apparently exists in the context of a *criminal* prosecution of a public official.[105] However, following the decision of the Supreme Court that Federal agents could be civilly sued for damages based upon a breach of the Fourth Amendment in the conduct of a search and seizure,[106] the lower Federal courts have had to determine the extent of a privilege or defense applicable to such agents. The doctrine that has uniformly emerged from the cases is that the agents are not absolutely privileged but may assert a defense that their actions were based upon a good faith and reasonable belief in the validity of an arrest or search and in the necessity for carrying out an arrest or search in the manner in which it was done.[107]

The Supreme Court has held this same principle applicable not only to law enforcement agents but to officers of the executive branch of government generally. In *Scheuer* v. *Rhodes,*[108] a civil action against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various other Guard officers and members, et al., for their actions relating to the civil disorder at Kent State University in 1970, the Court said (at 247-248):

> (I)n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. . . .

The Court identified two rationales as supporting the existence of such a qualified privilege or defense (at 240):

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his

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[105] An exception may be *United States* v. *Barker,* 546 F. 2d 940 (D.C. Cir. 1976). There the court reversed the convictions of two Watergate "footsoldiers" involved in the burglary of Dr. Fielding's office, on the ground that the trial judge had erroneously precluded them from seeking to establish a defense based upon a good faith and objectively reasonable reliance on the fact that the orders they received from a superior in the White House to conduct the break-in were lawful in the interests of national security. Although the members of the panel disagreed as to the precise nature of the defense potentially available, it appears that the defense recognized by the appellate court more properly falls within the area of a justified reliance on an official misstatement of law—a separate defense discussed subsequently—than within the framework of the traditional public authority defense under discussion here.

[106] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics, supra* note 99.

[107] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics, supra* note 99; *Jones* v. *Perrigan,* 459 F. 2d 81 (6th Cir. 1972); *Hill* v. *Rowland,* 474 F. 2d 1374 (4th Cir. 1973); *Zweibon* v. *Mitchell,* 516 F.2d 594, 670-671 (D.C. Cir. 1975) (*en banc*).

[108] 416 U.S. 232 (1973).

> willingness to execute his office with the decisiveness and the judgment required by the public good.[109]

Scheuer was reaffirmed in a subsequent decision, *Wood* v. *Strickland,*[110] involving a suit under 42 U.S.C. 1983 for damages against school board members for suspending high school students who had "spiked" the punch at a meeting of a school organization. After citing *Scheuer* and noting that the "appropiate standard necessarily contains elements of both (an objective and a subjective test of good faith)", the Court went on to specifically hold that "a school board member is not immune from damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student".[111]

Since the Supreme Court and the Federal courts of appeal have thus clearly recognized a public duty defense when Federal law enforcement agents and other executive branch officials are civilly sued for damages based upon conduct in violation of the Constitution, it seems reasonable that they would continue to acknowledge and apply a defense of at least similar breadth in the context of a Federal criminal prosecution for violating a statute.[112]

The discussion is not complete without touching upon the use of force in the exercise of public authority. At common law any person was privileged to arrest another for treason, felony, and for a breach of the peace committed in his presence. An officer was justified in making an arrest without a warrant for a felony if he reasonably believed that the crime had been committed and that the arrestee was the person who committed it. A private citizen, however, was protected in making such arrest only if the felony had in fact been committed and he had reasonable grounds for believing that the arrestee was the guilty party.[113] Today the authority to make arrests is governed almost entirely by statute.[114]

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[109] See, applying *Scheuer* in the Federal context, *Mark* v. *Groff,* 521 F.2d 1376 (9th Cir. 1975). In the case of some officials, the considerations invoked in *Scheuer* to support the existence of a qualified privilege apply with particular force so as to totally immunize the official from civil liability. Thus, in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), the Court held that prosecutors enjoy an absolute immunity under common law and 42 U.S.C. 1983 from civil liability for acts done within their official role. A similar immunity is also shared by judges, *Pierson* v. *Ray,* 386 U.S. 547 (1967), and legislators, *Tenney* v. *Brandhove,* 341 U.S. 367 (1951); cf. *Gravet* v. *United States,* 408 U.S. 606 (1972).

[110] 420 U.S. 308 (1975).

[111] *Id.* at 321–322. *Wood* has been applied to an action for damages and other relief against prison administrators for denying mailing privileges and access to legal counsel to the plaintiff-inmate. *Knell* v. *Bensinger,* 522 F.2d 760 (7th Cir. 1975); see also *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) (suit against state mental health officials for alleged deprivations of liberty of mental patients remanded for reconsideration in light of *Wood*).

[112] This statement requires a qualification in that it would not apply to confer an absolute immunity from criminal liability upon those classes of officials whom the Supreme Court had held possess an absolute immunity from civil liability. As the Court observed in *Imbler* v. *Pachtman, supra* note 109: "Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. 242, the criminal analog of section 1983. . . . The prosecutor would fare no better for his willful acts." However, barring willfulness (i.e., bad faith conduct), it would appear that the Federal courts would recognize a defense to criminal liability for executive branch officers of no less scope than that applied in the *Bivens* and *Scheuer* lines of cases.

[113] Perkins, *supra* note 84 at 978.

[114] E.g., 18 U.S.C. 3050–3056; 8 U.S.C. 1357; 19 U.S.C. 1581; 21 U.S.C. 878. These statutes generally confer on Federal agents the power to make arrests without a warrant where they have reasonable grounds to believe that the person to be arrested has committed a felony. See also

A distinction must be made between the authority to make an arrest and the extent of the right to use force in effectuating an arrest. Obviously, unless the arrester has the authority to make the particular arrest, any use of force to bring about the apprehension is unprivileged. Assuming the existence of the proper authority to make the arrest, the common law provided that an arrester was privileged to use only that force that was reasonable under the circumstances.[115] Excessive force was prohibited. Moreover, deadly force was never permitted in making an arrest for a misdemeanor. This latter rule applied when the arrest for the misdemeanor was initially made and to an attempt to escape from an arrest already made, whether the arrest was pursuant to a warrant or not, and whether the arrestee was guilty or innocent of the charge.[116] It was felt better to allow one guilty of a misdemeanor to escape rather than to risk taking his life.[117]

A different rule applied to the use of force to arrest a person for a felony. At common law a fleeing felon could be killed if he could not be otherwise apprehended. This privilege extended to both public officials and private citizens[118] and arose because of the common law requirement that all felonies be punished by death. A killing in the course of an arrest was merely regarded as a premature execution.

However appropriate the fleeing felon rule may have been at a time when all felonies were punishable by death, the rule makes little sense today when the death penalty, where it exists, is restricted to a very few of the most heinous offenses. Furthermore, many crimes that are today classed as felonies do not involve physically dangerous conduct, while many misdemeanors, such as reckless driving, do. The distinction between a felony and a misdemeanor in and of itself is therefore no longer a rational criterion upon which to justify the use of deadly force.

Recognizing this, the American Law Institute, in its original Restatement of Torts, limited the privilege of using deadly force to an arrest for treason or for a felony that normally threatens death or serious bodily harm.[119] In formulating its Model Penal Code, the Institute reiterated its belief that a fundamental reform of the law relating to the use of deadly force to effect an arrest was necessary. Accordingly, section 3.07(2)(b) would authorize the use of deadly

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Bell v. *United States,* 371 F.2d 35 (9th Circ.), cert. denied, 386 U.S. 1040 (1967). The above-cited statutes are carried forward in sections 3011–3018 of this Code.

[115] This is also the Federal rule. See Working Papers pp. 271–272 and cases cited therein.

[116] See Perkins, *supra* note 84 at 980–981.

[117] The fact that the crime for which the arrest was being made was a misdemeanor did not, however, deprive the arrester of the privilege of defending himself against an attack from one resisting arrest even to the extent of using dealy force if that were reasonably required. See Perkins, *id* at 981. See also, McDonald, *Use of Force by Police to Effect Lawful Arrest,* 9 Crim. L.Q. 435 (1969); Restatement of Torts, Second, Section 131, and cases cited in Appendix.

[118] However, the private citizen acted at his peril when he failed to act pursuant to a warrant. If he was attempting to make an arrest for a felony and the arrestee was not in fact guilty of the crime, the private citizen's use of deadly force was not privileged. See Perkins, *supra* note 84 at 982.

[119] In 1948, however, the Institute was forced to abandon this more restrictive rule and return to the felony test of the common law. For "[e]very case which actually decides the question agrees that the original English common law is still the law." Restatement of Torts, Second, section 131, Appendix; see also Pearson, *The Right to Kill in Making Arrests,* 28 Mich. L. Rev. 957, 964 (1930); Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201, 275–276 (1940). But see the following cases which are cited in opposition to the position taken by the Restatement in 1931: *Stinnett* v. *Commonwealth of Virginia,* 55 F.2d 644 (4th Cir. 1932); *Thompson* v. *Norfolk & W. Ry. Co.,* 116 W. Va. 705, 182 S.E. 880 (1935).

force where the arrest is for a felony and the arresting officer or person assisting him believes that:

> (1) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
>
> (2) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

In a similar manner, the National Commission would have justified the use of deadly force only if it was necessary to effect the arrest of a person who committed a felony involving violence, who was attempting to escape by the use of a deadly weapon, or who was likely to endanger human life or inflict serious bodily injury unless apprehended without delay.[120]

7. Protection of Persons

Current Federal law regarding the defense of persons, whether of oneself or of others, is essentially that which was developed at English common law.[121] The basic principle is that an individual, who is himself free from fault, is justified in using force in his own defense or in the defense of others to the extent that he reasonably believes such force is necessary to protect himself or some other person from personal harm threatened by the unlawful act of another.[122] As stated by Perkins,[123] the test is not the actuality of impending harm nor the actual amount of force needed to prevent it. The reasonable belief of the defender is controlling in both respects.

In short, a defender, though mistaken as to the necessity of a defensive use of force, will still have the defense available to him so long as he acted reasonably under the circumstances. The same rule of reasonableness applies to the use of deadly force. However, the use of this type of force is considered justified only where the defendant acts under a reasonable belief as to its necessity to protect himself or another from a risk of death or serious bodily injury rather than some lesser harm.

Many cases have dealt with the right of an individual to protect himself from unprovoked,[124] unlawful attack. This right is fundamental to the stability of society and was early recognized by the English courts. Somewhat later developed was the concept that the individual's right of self-help could properly be extended to others, such as his family and servants. Eventually it was recognized that one could go to the aid of any other person if that person was the innocent victim of an unlawful attack.[125] The right to self-help and to intervene for the protection of others is uncontested and recognized today in the Federal courts.[126]

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[120] Final Report, § 607(2)(d). See also President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Police, p. 189 (1967); *Mattis* v. *Scharr*, 502 F.2d 588 (8th Cir. 1976) (*en banc*), vacated on other grounds *sub nom. Ashcroft* v. *Mattis*, 431 U.S. 171 (1977).

[121] For an extended discussion of the historical development in this area, see Perkins, *supra* note 84 at 993–1022.

[122] For cases dealing with the somewhat special situation of resistance to an unlawful arrest or search, see the discussion in connection with section 1302 (Obstructing a Government Function by Physical Interference).

[123] *Supra* note 84 at 995.

[124] Provocation must consist of more than abusive language. Cf. *Rowe* v. *United States*, 164 U.S. 546, 555 (1896); see also 1 Wharton, *Criminal Law and Procedure*, §§ 230, 348 (1957); but see Perkins, *supra* note 84 at 1008, and cases cited therein.

[125] Perkins, *supra* note 84 at 1019.

Equally recognized both at English and American common law was a somewhat more limited right of defense accorded one who had initially provoked the use of unlawful force against himself. The most common instance of such provocation was the fist fight. In view of society's interest in peace and order, even one who by his own conduct brought about the use of force was entitled to self-help if he first withdrew from the affray, made known to his opponent that he had done so, and was thereafter attacked by his opponent. In such a situation the opponent became the aggressor and the other was entitled to defend himself, even to the extent of using deadly force if that became necessary.[127]

Another instance where the right of self-defense will arise in a fight or affray, even without the required withdrawal, is the situation where the other person unexpectedly resorts to the use of deadly force.[128]

It should be emphasized that the self-help defense is available even to one who was mistaken as to the necessity for its use, so long as his belief in its necessity or in the degree or force required was not unreasonable.[129] In determining whether a defendant has acted reasonably, recognition should, of course, always be given to the nature of the situation giving rise to the use of self-defense. What might seem reasonable at a later time and in a different place might not have appeared as reasonable alternatives to a defendant trying to defend himself. In the words of Justice Holmes, "(d)etached reflection cannot be demanded in the presence of an uplifted knife." [130]

The Supreme Court has held that under Federal law there is no duty to retreat as a condition to the use of deadly force; however, the Court noted that one of the circumstances a jury may consider in determining whether a defendant's resort to deadly force was reasonable is the availability of a safe retreat.[131]

Although a substantial minority of jurisdictions do require a person to utilize a safe retreat, where available, rather than resort to the use of deadly force, they generally recognize many exceptions, and the difference between them and the no-retreat jurisdictions seems more apparent than real. The tendency of the courts in such jurisdictions appears to broaden the area from which retreat is not required.[132]

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[126] E.g., *United States* v. *Grimes*, 413 F.2d 1376 (7th Cir. 1969); *Harris* v. *United States*, 364 F.2d 701 (D.C. Cir. 1966); *Inge* v. *United States*, 356 F.2d 345 (D.C. Cir. 1966); see Working Papers, p. 265.

[127] See *United States* v. *Grover*, 485 F.2d 1039 (D.C. Cir. 1973); *Parker* v. *United States*, 158 F.2d 185 (D.C. Cir. 1946), cert. denied, 330 U.S. 829 (1947); *Harris* v. *United States*, *supra* note 126.

[128] For a discussion of the common law on this point, see Perkins, *supra* note 84 at 1005–1006.

[129] See *United States* v. *Linn*, 438 F.2d, 456, 460 (10th Cir. 1971).

[130] *Brown* v. *United States*, 256 U.S. 335, 343 (1921). See also *Hebah* v. *United States*, 456 F.2d 696, 709 (Ct. Cl.), cert. denied, 409 U.S. 870 (1972); *Inge* v. *United States*, *supra* note 126 at 348.

[131] See *Brown* v. *United States*, *supra* note 130.

[132] Thus, one need not retreat from his home. *State* v. *Pontery*, 19 N.J. 457, 177 A. 2d 473 (1955). The castle or home has been held to include an out building, *Parrish* v. *Commonwealth*, 81 Va. 1, (1884); a rented room, *Pond* v. *The People*, 8 Mich. 150 (1860); or a place of work. A guest is entitled to the same privilege as the owner, *Saylor* v. *Commonwealth*, 17 Ky. L. Rep. 959, 33 S.W. 185 (1895).

8. *Protection of Property*

Current Federal law with regard to the defense of an individual's property is virtually the same as that which was early developed at English common law. The judgment was there made, and remains valid today, that the stability of society requires that a person be secure both in his person and property to the extent of justifying his reasonable use of force in their defense. The Federal rule permits an individual to resort to the use of force in defense of his property to the extent reasonably required to prevent or terminate an unlawful interference with his right to that property. Whether or not the use of force is "reasonably required" will, of course, vary from case to case and will depend upon the specific factual setting. However, the value of life being recognized as superior to the interest in property, the taking of life under circumstances that do not involve danger to a person but is solely in defense of a property right is not regarded as justifiable.[133] For example, the setting of a deadly trap to protect unoccupied property is not justifiable. On the other hand, the occupant of a home responding to a prowler involves a danger to the person and must be judged under the doctrines surrounding protection of the person.

This rule incorporates society's long-standing judgment that property rights are so far outweighed in value by the right to life and limb that even one who is known to be in the act of wrongfully appropriating the property of another cannot be killed or seriously injured to stop him.[134] This rule applies, however, only to property offenses and, as noted above, not to the situation where a danger is created to other persons during the course of the "property" offense for example, a burglary of an occupied home.[135]

DEFENSES BASED ON OFFICIAL ACTION

9. *Unlawful Entrapment.*

The defense of unlawful entrapment, although of comparatively recent judicial origin in the United States,[136] has received more attention in Federal decisions than any other defense with the possible exception of insanity. The Supreme Court has rendered at least six decisions on the subject since 1932,[137] while the lower Federal courts have decided hundreds of cases dealing with it.

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[133] See Perkins, *supra* note 84.

[134] Thus, as noted by the National Commission, a ship's captain may not justifiably use "deadly force" to remove a stowaway from his ship in mid-ocean. See Final Report, § 606, Comment, pp. 47–48.

[135] Cf. Working Papers. pp. 266–267. The cases support the view that in the absence of a necessity of protecting persons, there i[illegible]ittle basis for distinguishing a habitation from other property. As observed in *State* v. *Patterson*, 45 Vt. 308, 320–321, 12 Am. Rep. 200 (1873):

> The idea that is embraced in the expression that a man's house is his castle is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and his family. An assault on the house can be regarded as an assault on the person. Only in case the purpose of such assault be injury to the person of the occupant or members of his family. . . .

[136] The first Federal case to recognize a defense of unlawful entrapment by government officers was apparently *Woo Wai* v. *United States,* 223 F. 412 (9th Cir. 1915). The history of the entrapment defense is traced in DeFeo. *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U. San Fran. L. Rev. 243, 244–252 (1967).

[137] *Sorrells* v. *United States,* 287 U.S. 435 (1932); *Sherman* v. *United States,* 356 U.S. 369 (1958); *Lopez* v. *United States,* 373 U.S. 427 (1963); *Osborn* v. *United States,* 385 U.S. 323: (1966); *United States* v. *Russell, 411 U.S.* 423 (1973); *Hampton* v. *United States,* 425 U.S. 484 (1976).

In general, entrapment is a defense which may be asserted when a defendant is intentionally induced by government agents into committing all the elements of a criminal offense.[138] The defense is to be distinguished from other valid defenses such as a "frame up," an example of which is the "planting" of contraband on a person.[139] In a "frame-up," the accused never commits the offense and thus cannot be said to have been entrapped into doing so. In the hypothetical above, for example, as a result of the government's conduct, an essential ingredient of the offense, i.e., knowledge by the accused of the substance possessed, is lacking.[140]

Entrapment should also be distinguished from the defense of reliance on official misstatement of law. A typical instance of this defense can be found in *Raley* v. *Ohio,*[141] where the Supreme Court struck down the contempt convictions of witnesses who had declined to answer questions under the Fifth Amendment privilege against self-incrimination based on erroneous governmental advice that the privilege was available. Similarly, in *Cox* v. *Louisiana,*[142] the Court overturned an accused's conviction for parading near a courthouse in violation of state law because the parade had been held in reliance on authorization by high city officials. The reliance on official misstatement situation, while often referred to as a form of entrapment,[143] is in reality a conceptually distinct defense predicated on the concept of governmental estoppel to punish a person who has reasonably relied on erroneous official advice that his proposed conduct would be lawful.[144] Thus, in asserting a defense based on an official misstatement of law, neither the element of active inducement nor the intent to bring about the commission of a crime need be present.

The defense of unlawful entrapment, in being of judicial origin, requires a thorough analysis of the major Supreme Court decisions.[145]

Sorrells v. *United States* involved a prosecution under the National Prohibition Act for selling whiskey to an undercover Federal agent. The evidence was characterized as "sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that the defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation."[146] The question before the Court was whether, on these facts, the rulings of the courts below that there was no entrapment as a matter of law were correct. Eight justices thought the ruling erroneous but divided sharply over the nature of the entrapment defense. Chief Justice Hughes, writing for five members of the Court, held that the doctrine of entrapment was predicated on the view that Congress could not have intended that the "processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons *otherwise innocent* in order to lure them to its commission and to punish them."[147] The Court noted favorably the well established principle that "the fact that officers or employees of the Government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."[148] It stated, however, that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[149]

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[138] See *United States* v. *Russell, supra* note 137 at 435.

[139] See *Smith* v. *United States,* 331 F.2d 784, 790–791 (D.C. Cir. 1964).

[140] See Working Papers, pp. 310–312.

[141] 360 U.S. 423 (1959).

[142] 379 U.S. 559 (1965).

[143] *Id.* at 571.

[144] See Note. *Applying Estoppel Principles in Criminal Cases,* 78 Yale L. J. 1046 (1969); Orfield, *The Defense of Entrapment in the Federal Courts,* 1967 Duke J. L. 39, 53–54.

[145] See *Sorrells* v. *United States, supra* note 137; *Sherman* v. *United States, supra* note 137; and *United States* v. *Russell, supra* note 137.

[146] 287 U.S. at 441.

The opinion of the majority further stated:[150]

> [T]he defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises [citation omitted]. The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it.

The Chief Justice's opinion thus left no doubt that the gravamen of the defense of entrapment was not the propriety of the conduct of government agents but rather the subjective guilt of the defendant, that is, his predisposition to commit the offense.

Mr. Justice Roberts, in a concurring opinion for three members of the Court, approached the issue somewhat differently. He contended that the basis for an entrapment defense should be a rule of "public policy" based upon the integrity of the judicial process rather than upon imputed congressional intent. He emphasized, to a greater degree, the concern about improper government conduct and indicated that the rationale for the defense ought not to be the innocence of the defendant but "the inherent right of the court not to be made the instrument of wrong." The opinion concluded that where inducement or instigation by the government was shown, the prosecution should not be permitted in rebuttal to introduce evidence of the defendant's predisposition.[151]

The Supreme Court next considered the entrapment defense in *Sherman* v. *United States,*[152] which involved a conviction for selling narcotics to a government informer. All nine justices agreed that, on the evidence,[153] entrapment was established as a matter of law. The Court, however, divided once again over the elements of the entrapment defense. Chief Justice Warren, writing for the majority, held that reversal was required under the rationale of the majority in *Sorrells,* which he characterized as follows:[154]

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[147] *Id.* at 448 (emphasis added).

[148] *Id.* at 441.

[149] *Id.* at 442.

[150] *Id.* at 451.

[151] See *id.* at 453–459.

[152] 356 U.S. *supra* note 137.

> In *Sorrells* v. *United States*, 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended tht its statutes were to be enforced by tempting innocent persons into violations.
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> However, the fact that government agents "merely afford opportunities or facilities for the commission of the offense does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials. [Emphasis in original.] See 287 U.S. at 441, 451. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.

The Court thus adhered to the majority view in *Sorrells* that the entrapment doctrine rests, in part, on a claim of subjective innocence which may be undermined by proof of the defendant's predisposition to commit the crime notwithstanding the government's instigation or persuasion. Moreover, the Court rejected the suggestion that it "reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells*" stating in this regard:[155]

> . . . Mr. Justice Roberts asserted that although the defendant could claim that the Government had induced him to commit the crime, the Government could not reply by

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[153] The facts as detailed in Chief Justice Warren's opinion for the Court showed that the informer met the defendant at a doctor's office where both were receiving treatment to be cured of narcotics addiction. After several such accidental meetings, the informer asked the defendant if he knew of a source of narcotics since he (the informer) was not responding to treatment. The defendant attempted to avoid the issue but "after a number of repititions of the request, predicated upon [the informer's] presumed suffering," he acquiesced. Thereafter he purchased narcotics on several occasions from the source; and shared them with the informer, collecting from the informer a portion of the purchase price. The informer ultimately reported the defendant's activities to Federal agents, who then observed sales of narcotics by the defendant to the informer. *Id.* at 371.

[154] *Id.* at 372–373.

[155] *Id.* at 376–377.

> showing that the defendant's criminal conduct was due to his own readiness and not to the persuasion of government agents. The handicap thus placed on the prosecution is obvious. . . .

The Court further quoted [156] from Judge Learned Hand's opinion in earlier proceedings in the case: [157]

> "Indeed, it would seem probable that, if there were no reply [to the claim of inducement], it would be impossible ever to secure convictions of any offense which consist of transactions that are carried on in secret."

In a concurring opinion for four justices, Mr. Justice Frankfurter, like Mr. Justice Roberts in *Sorrells*, advocated an entrapment defense predicated on the nature of police conduct. He emphasized that: [158]

> This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. These test shifts attention from the record and predisposition of the particular defendant to the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. . . .

In two subsequent cases involving an entrapment claim, the Supreme Court found it unnecessary to reexamine the question disputed in *Sorrells* and *Sherman* as to the appropriate doctinal foundation for the entrapment defense. In *Osborn* v. *United States,* [159] a prosecution for endeavoring to bribe a member of the jury panel in a prospective criminal trial, the Court rejected a contention that entrapment had been established as a matter of law under *Sherman* and *Sorrells*, stating.[160]

> Surely it was not a "trap for the unwary innocent," *Sherman* v. *United States*, 356 U.S. 369, 372, for Vick [an informer] to tell the petitioner, truthfully, that he knew some of the members of the jury panel and that one of them was his cousin [Elliot]. And according to Vick he had said no more when the petitioner "jumped up," went out into the alley with him and initiated the effort to get Elliot "on our side." At the most, Vick's statement afforded the petitioner "opportunities or facilities" for the commis-

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[156] *id.* at 377.

[157] *United States* v. *Sherman*, 200 F.2d 880, 882. The Supreme Court in *Sherman* also specifically reaffirmed the holding in *Sorrells* "that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." 356 U.S., *supra* note 137 at 377. In *Masciale* v. *United States*, 356 U.S. 386 (1958), the Court, dividing as in *Sherman*, held that since the testimony on entrapment was conflicting, the issue was properly submitted to the jury.

[158] 356 U.S., *supra* note 137 at 383–384.

[159] 385 U.S. 323 (1966).

[160] *id.* at 331–332.

> sion of a criminal offense, and that is a far cry from entrapment. *Sherman* v. *United States*, *supra*, at 372; *Sorrells* v. *United States*, 287 U.S. 435, 441 [footnote omitted].

And in *Lopez* v. *United States,*[161] involving a government agent's feigned interest in an unsolicited bribe offer, the Court found that "under any approach," the defendant's claim of entrapment was insubstantial.

In *United States* v. *Russell,*[162] the Supreme Court again embarked upon an in depth examination of the entrapment defense. *Russell* involved a prosecution for manufacturing and selling methamphetamine ("speed"). The predisposition of the defendant, who ws engaged with others in the continuing manufacture of the drug, to commit the offenses was conceded. The evidence showed that an undercover agent, posing as a member of a syndicate desirous of controlling the manufacture of the drug in the region, offered to supply the defendant with a scarce (but not impossible to obtain) chemical ingredient needed in the manufacturing process, in return for one-half the quantity of the drug produced. The defendant accepted the agent's offer, was supplied with the chemical, and thereafter manufactured and sold the drug to the agent. He was convicted for these acts, but the court of appeals reversed on the basis of alternative holdings that the government's furnishing of an essential ingredient (a) constituted entrapment as a matter of law, or (b) constituted an intolerable degree of governmental participation in the crime so as to violate constitutional due process. The Supreme Court, dividing five to four, reversed and reinstated the conviction.

After reviewing the decisions in *Sorrells* and *Sherman,* the majority rejected the defendant's contention that the role played by the undercover agent in obtaining the conviction violated the Constitution. Noting that the evidence disclosed not only that the chemical supplied by the agent could have been obtained without his services but that it had been in fact obtained on other occasions by the defendant and his associates, the Court stated:[163]

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed. [The agent's] contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is legal. While the Government may have been seeking to make it more difficult for drug rings, such as that of which [Russell] was a member, to obtain the chemical, the evidence described above shows that it nonetheless was obtainable.
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> The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal

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[161] 373 U.S. 427. 434 (1963).

[162] 411 U.S. *supra* note 137.

[163] *Id.* at 431–432.

> sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).
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> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practical means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella, supra.*

The majority also rejected defendent's argument that the traditional, nonconstitutional theory of entrapment should be broadened to include the agent's conduct. Although acknowledging that there had been criticism of the rule laid down in *Sorrells* and *Sherman* on the grounds that its basis in the implied intent of Congress is largely fictitious, that it creates an anomalous difference between the treatment of a defendant who is solicited by a private individual and one who is entrapped by a government agent, and that "predisposition" is often difficult to establish[164] the majority retorted that "at least equally cogent criticism has been made of the concurring views" in those cases. By way of illustration it cited the observation of Judge Learned Hand, quoted in Chief Justice Warren's opinion in *Sherman, supra,* that "if there were no reply [to the claim of inducement by government agents], it would be impossible ever to secure convictions of offenses which consist of transactions that are carried on in secret," and likewise pointed out that it did not "seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because governmental undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."[165] The majority noted, finally, that expansion of the entrapment defense to make it focus solely on the quality of the governmental conduct, as done by the court below, would introduce "an unmanageably subjective standard" under which courts would assume the authority to dismiss prosecutions because of what they conceived to be "overzealous law enforcement."

The dissenting justices indicated, in two separate opinions, that they would adopt the theory of entrapment espoused by Justices

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[164] *Id.* at 433.
[165] *Id.* at 434.

Roberts and Frankfurter in *Sorrels* and *Sherman*, respectively.[166] Mr. Justice Stewart, writing for three of the dissenting justices, stated:[167]

> In my view, a person's alleged "predisposition" to crime should not expose him to government participation in the criminal transaction that would be otherwise unlawful. [Footnote omitted]
>
> This does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. *Lewis* v. *United States*, 385 U.S. 206, 208-209 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. *Osborn* v. *United States*, 385 U.S. 323, 331-332 (1966). See also *Sherman* v. *United States*, *supra*, at 383-384 (Frankfurter, J., concurring).
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> But when the agent's involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. . . .

Most recently in *Hampton* v. *United States*,[168] the Court considered a factual variation on the *Russell* theme; in *Hampton*, the question was whether, assuming the defendant had been supplied heroin by a government informer, he was entitled to an instruction that public policy or the Constitution would forbid his conviction for selling the heroin to an undercover narcotics agent, not withstanding his (the defendant's) conceded predisposition to commit the offense. The defendant argued that the case was distinguishable from *Russell* in that what had been furnished by the government was not a mere lawful ingredient of an illicit narcotic substance but the very contraband on which the conviction was based.

Five of the eight justices participating in the decision voted to affirm the conviction. All of these justices agreed that, in view of the defendant's conceded predisposition, the classic defense of entrapment itself was not available. The prevailing opinion for three members of the Court (Burger, CJ and Rehnquist and White JJ) took the position that the finding of predisposition likewise precluded a holding that constitutional due process had been violated, and also stated that, given predisposition, the remedy for any official overstepping of the proper boundaries of law enforcement conduct was by way of administrative or criminal action against the officers themselves, rather than by the creation of judicial remedies "freeing the equally culpable defendant". Two members of the Court (Powell and Blackmun, JJ) in a concurring opinion agreed that the government's action in the case (even accepting arguendo defendant's version of the facts) had neither violated constitutional due process nor supported an invocation of the Court's supervisory powers; but the concurring opinion was unwilling to endorse the plurality's conclusion that "no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." [169]

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[166] *Id.* at 436-450.

[167] *Id.* at 444-445.

[168] 425 U.S. 484 (1976).

Three members of the Court (Stewart, Brennan, and Marshall, JJ) while reaffirming adherence to the minority view of entrapment espoused by Justice Stewart in *Russell,* indicated that they would have reversed the defendant's conviction as an exercise of supervisory power, on the ground that the government's involvement in the offense exceeded permissible limits.

A comparison of the competing views of the entrapment defense as they have emerged in the *Sorrells, Sherman,* and *Russell* line of cases reveals a considerable area of common ground occupied by the respective rationales. Under either theory, for example, entrapment may result only from governmental inducement; inducement to wrongdoing by a private person does not establish the defense. Similarly both prevailing doctrine and the minority formulation recognize that undercover activity, artifice, and stratagem, as well as the mere furnishing of an opportunity or facility to commit an offense, do not constitute unlawful entrapment. Where the two theories differ almost exclusively is on the question whether predisposition of the defendant is an element of the defense. While this difference may result in divergent conclusions being reached as to the availability of the defense in certain factual settings, it is relatively rare for Federal agents to engage in active inducement beyond the level that would cause a normally law-abiding person to be unable to resist commission of an offense. Interestingly, in only one of the five previously discussed entrapment cases to reach the Supreme Court—*Russell*—was there any indication that the choice of theory might determine the outcome, and even then the conclusion of the dissenters that it would do so is open to serious question.[170] In a practical sense, therefore, it is fair to say that the difference in choice of theory has its major impact on procedural aspects of the defense (e.g., determination by court or jury and burden of proof).

Since, under the prevailing theory, the entrapment defense is not constitutionally rooted but reflects a judicial determination of Congress' implicit intent in enacting penal statutes not to entrap individuals,[171] it follows that Congress may define, limit or prohibit gested that,[172] even without an explicit congressional statement with regard to the nonapplicability of the entrapment defense, the courts might construe certain statutes creating "heinous" or "revolting" crimes as not allowing the defense.

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[169] In a footnote, the opinion stressed, however, that (425 U.S. at 495, note 7): The case, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover government involvement. One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic, cf. *United States* v. *Russell, supra* note 137, at 432; L. Tiffany, D. McIntyre, & D. Rotenberg. Detection of Crime 263-264 (1967), which is one of the major contributing causes of escalating crime in our cities. See President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society, 221-222 (1967). Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.

[170] It is doubtful that an undercover agent's offer to supply an essential ingredient needed to manufacture an illicit drug, in return for a share of the product, is so irresistibly tempting that it would induce an average law-abiding person to accept the bargain and commit the offense.

[171] See *United States* v. *Russell, supra* note 137.

Congress, however, has never legislated with regard to the entrapment defense, and subsequent Federal cases have not adopted the *Sorrells* suggestion. Thus, current case law apparently admits the defense in all cases.[173]

Entrapment into committing an initial offense has been held to be a defense to prosecution for subsequent transactions which were not independent,[174] but an initial entrapment will not confer immunity as to future, unrelated transactions.[175]

There is also authority for the proposition that one engaged in a criminal activity in a non-Federal jurisdiction may avail himself of the defense if he was pressured or trapped into conducting the activity so as to violate Federal law.[176]

As previously indicated, a basic element of the defense of entrapment is that the defense be induced by the government.[177] Inducement by a private party cannot form the basis for an entrapment defense.[178] However, the entrapper need not be an official in the legal sense. It is sufficient if an agency relationship exists, such as with an informant,[179] even if officials are not aware of the details of the informant's activities.[180] Similarly, State law officers, though independent, have been held not such strangers to Federal law enforcement as to preclude a defense based on their conduct.[181]

It is not wholly settled whether an accused may derivatively defend on the ground that his accomplice was entrapped. A number of cases have held that he may not, on the theory that he must show that his own innocence was overcome by official action.[182] Apparently to the contrary is *Klosterman* v. *United States.*[183] *However, the Klosterman* case may be harmonized as involving the use by the government of the codefendant as an unwitting agent to convey the inducement to a particular target.

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[172] *Sorrells* v. *United States, supra* note 137 at 450–451.

[173] See *United States* v. *Bowe,* 360 F.2d 1 (2d Cir.), cert. denied, 385 U.S. 961 (1966) (applying the defense in the Statue of Liberty bomb plot case).

[174] *Sherman* v. *United States, supra* note 137 at 374.

[175] *United States* v. *Buie,* 407 F.2d 905, 907 (2d Cir.), aff'd *sub nom. Minor* v. *United States,* 396 U.S. 87 (1969).

[176] *See Carbajal-Portillo* v. *United States,* 396 F.2d 944, 946–947 (9th Cir. 1968) (Mexican narcotics dealer pressured into crossing border); *United States* v. *Kros,* 296 F. Supp. 972 (E.D. Pa. 1969) (amateur pornographer trapped into mailing film).

[177] This does not mean that every time a person is entrapped by a government official the defense is available. The public servant must be acting in an official capacity, offering inducements for a legitimate law enforcement purpose rather than in aid of a criminal frolic of his own such as a bribe. See *Malatofsky* v. *United States,* 179 F.2d 905, 917–918 (1st Cir. 1950); and see generally *United States* v. *Barker,* 546 F.2d 940, 960–961 (D.C. Cir. 1976) (Leventhal, J. dissenting) (the majority in *Barker* did not discuss the entrapment claim, reversing the conviction on other grounds).

[178] See, e.g., *Encinas-Sierras* v. *United States,* 401 F.2d 228 (9th Cir. 1968); *Pearson* v. *United States,* 378 F.2d 555, 560–561 (5th Cir. 1967).

[179] See, e.g., *Notaro* v. *United States,* 363 F.2d 169 (9th Cir. 1966).

[180] *Sherman* v. *United States, supra* note 137, at 373–375.

[181] *Henderson* v. *United States,* 237 F.2d 169, 174–176 (5th Cir. 1956).

[2] *Carbajal-Portillo* v. *United States, supra* note 176; *United States* v. *Dodson,* 481 F.2d 656, 658 n. 3 (5th Cir. 1973); *Crisp* v. *United States,* 262 F.2d 68 (4th Cir. 1958); and *United States* v. *Perkins,* 190 F.2d 49 (7th Cir. 1951).

[183] 248 F.2d 191 (3d Cir. 1957). See *Johnson* v. *United States,* 317 F.2d 127, 133 (D.C. Cir. 1963) (dissenting opinion).

Examples of official conduct held not to constitute entrapment as a matter of law have been the following:

(1) decoy letters soliciting the mailing of obscene material;[184]

(2) using a decoy letter containing money to trap an embezzling postal employee;[185]

(3) undercover purchase of contraband;[186]

(4) supplying essential ingredient or facility, which may be difficult to obtain, for commission of offense;[187]

(5) feigning interest in a bribe offer;[188]

(6) offer of bribe to officer suspected of corruption in an amount not exceeding the degree of temptation to which he would normally be exposed;[189]

(7) use of a contingent fee arrangement to pay informers;[190]

(8) informer's mention to defense counsel of his relationship to prospective juror, precipitating suggestion that juror be corruptly approached;[191]

(9) allowing completed delivery of intercepted contraband or incriminating evidence, where defendant set the chain of events in motion;[192]

(10) failing to remove a corrupt officer so as to preclude a bribe offer.[193]

Examples of conduct determined as a matter of law to be entrapment are less frequent, since most often the evidence is found to warrant submission to the jury. A few such examples are, however, set forth below:

(1) sale of liquor to government agent disguised to deceive defendant into thinking he was not an Indian to whom liquor could not be sold;[194]

(2) repeated solicitations of narcotics by addict informer claiming to be suffering from withdrawal;[195]

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[184] See, e.g., *Grimm* v. *United States*, 156 U.S. 604 (1895); *Andrews* v. *United States*, 162 U.S. 420 (1896).

[185] See, e.g., *Goode* v. *United States*, 159 U.S. 663 (1895). *Goode, Grimm*, and *Andrews, supra* note 184, were cited with approval in *Sorrells* v. *United States, supra* note 137 at 441.

[186] See, e.g., *Casey* v. *United States*, 276 U.S. 413 (1928); *Lewis* v. *United States*, 385 U.S. 206 (1966).

[187] See, e.g., *United States* v. *Russell, supra* note 137; *United States* v. *Croxton*, 482 F.2d 231, 234 (9th Cir. 1973).

[188] See, e.g., *Lopez* v. *United States, supra* note 137.

[189] See, e.g., *United States* v. *Scriber*, 4 F.2d 97 (6th Cir. 1925).

[190] See, e.g., *United States* v. *Grimes*, 438 F.2d 391–396 (6th Cir.), cert. denied, 402 U.S. 989 (1971), and cases cited therein; *United States* v. *Cuomo*, 479 F.2d 688, 691–692 (2d Cir.), cert. denied, 414 U.S. 1002 (1973); *United States* v. *Jenkins*, 480 F.2d 1198 (5th Cir.), cert. denied, 414 U.S. 913 (1973). The only possible exception is the situation where a contingent fee system is used to produce evidence against particular defendants as to crimes not yet committed. See *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962). However, even in these circumstances, *Grimes, supra*, holds that the question whether the informant manufactured the crime in order to obtain the fee involves a question of credibility of testimony which the trier of fact must decide. Moreover, the Fifth Circuit has limited *Williamson* so that it does not apply when the government has cause to suspect that the defendant is engaged in illicit activity. See *Sears* v. *United States*, 343 F.2d 139, 144 (5th Cir. 1965).

[191] *Osborn* v. *United States, supra* note 159.

[192] *Denson* v. *United States*, 424 F.2d 329, 330 (10th Cir.), cert. denied, 400 U.S. 844 (1970); *Glavin* v. *United States*, 396 F.2d 725 (9th Cir.), cert. denied, 393 U.S. 926 (1968).

[193] *United States* v. *Irwin*, 354 F.2d 192, 199 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

[194] *Voves* v. *United States*, 249 F. 191 (7th Cir. 1918); *United States* v. *Healy*, 202 F. 349 (D. Mont. 1913). If the crime of selling liquor to an Indian required knowledge of the purchaser's Indian status, these cases would present a classic "frame-up" scenario. See pp. 136–137. However, they are properly classified as instances of entrapment since the crime was one not requiring scienter, and the government's deception therefore induced the defendant to commit all the elements of the crime.

[195] *Sherman* v. *United States, supra* note 137.

(3) informer's supplying of contraband (heroin) to defendant to sell to undercover agent.[196]

Under the prevailing theory of entrapment, unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped "is for the jury as part of its function of determining the guilt or innocence of the accused." [197] The concurring opinions in *Sherman* and *Sorrels*, which treat the defense as unrelated to innocence and instead directed solely at the quality of the government's law enforcement methods, would provide that the issue of entrapment be submitted to the court.

Although never specifically ruled upon by the Supreme Court, the position uniformly taken by the courts of appeals is that the ultimate burden of disproving entrapment rests on the government beyond a reasonable doubt.[198] The courts vary, however, as to the type of proof required in order to cause the government to introduce evidence to meet its burden. Some circuits require merely that the accused show "some indication," through government witnesses or otherwise, that a government agent corrupted him.[199] Other courts separate the elements and require that the accused first show by a preponderance of the evidence the government induced him to commit the offense, whereupon the government must reply by proving the accused's predisposition.[200]

From time to time, defendants have attempted to argue that, prior to approaching an individual and employing a strategem or opportunity to cause him to commit a crime, the government should have reasonable suspicion or probable cause to believe that he is engaged in criminal activity. The contention has been steadfastly rejected, on the ground that merely offering such inducements is a legitimate investigative technique for which no showing of reasonableness is required.[201]

The defense of entrapment is most commonly asserted by a defendant who confesses his crime but seeks to avoid punishment by claiming that he was induced to commit it by the government. An issue which has divided the courts, however, is whether a defendant who does not admit the crime, denies it, or otherwise presents an inconsistent defense, may assert entrapment. The weight of authority seems to require admission.[202]

However, the First and Fifth Circuits mollify the doctrine by permitting the accused to raise the defense if he has merely put the government to its proof, but not if he has affirmatively denied the transaction.[203] Two circuits have ruled that the defendant may acts,[204] and there is dictum to the same effect in a case from the Fourth Circuit.[205] Two circuits apparently consider the question open.[206]

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[196] *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). The rationale of these cases has, however, been effectively vitiated by the holding in *Hampton*, discussed earlier.

[197] *Sherman* v. *United States*, *supra*, note 137 at 377; see also *Sorrells* v. *United States*, *supra* note 137 at 452.

[198] E.g., *Notaro* v. *United States*, *supra* note 179; *Government of Virgin Islands* v. *Cruz*, 478 F.2d 712, 716 (3d Cir. 1973); *United States* v. *Harrell*, 436 F.2d 606, 612 (5th Cir. 1970).

[199] See *Kadis* v. *United States*, 373 F.2d 370, 373-374 (1st Cir. 1967).

[200] See *United States* v. *Viviano*, 437 F.2d 295, 298-299 (2d Cir.), cert. denied, 402 U.S. 983 (1971).

[201] See *Kadis* v. *United States*, *supra* note 199, at 373, and cases cited therein.

[202] See *United States* v. *Rodriques*, 433 F.2d 760 (1st Cir.), cert. denied, 401 U.S. 943 (1971); *United States* v. *Pickle*, 424 F.2d 528 (5th Cir. 1970); *United States* v. *Georgiou*, 333 F.2d 440 (7th Cir.) cert, denied, 379 U.S. 901 (1964); *Wilson* v. *United States*, 409 F.2d 184, 187 (9th Cir.), cert. denied, 395 U.S. 983 (1969); *United States* v. *Freeman*, 412 F.2d 1181, 1183 (10th Cir. 1969).

[203] See *Gorin* v. *United States*, 313 F.2d 641, 654 n.10 (1st Cir.), cert. denied, 374 U.S. 829 (1963); *Sears* v. *United States*, 343 F.2d 139, 142-144 (5th Cir. 1965).

In holding in *Sorrells* and *Sherman* that the defense of entrapment is linked in innocence, so that the defendant's predisposition to commit the crime is pertinent, the Supreme Court recognized that some evidence bearing on the defendant's character and criminal propensity must necessarily be admissible. In *Sorrells,* the majority stated:[207]

> [I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. . . .

This language was quoted in *Sherman,*[208] where the Court noted without disapproval the fact that the government had introduced evidence of two prior convictions of the accused for narcotics offenses in an attempt to prove predisposition.[209] Subsequent decisions of lower courts have confirmed that evidence of prior convictions, if not too remote, is admissible.[210] In addition, evidence of the accused's reputation, and other hearsay may be admissible to show his propensity.[211] Several courts, however, have placed limits on the nature of the evidence that can be received from this purpose holding that its probative value must be weighed against its potential for undue prejudice.[212]

10. Official Misstatement of Law

The Supreme Court has clearly recognized a general defense to criminal prosecution based upon the furnishing of official, erroneous information as to what the law requires. Although sometimes denominated as a form of entrapment, or predicated on more fundamental principles of due process its essential rationale is one of estoppel resting on the basic notion that it would be unfair to impose penal sanctions in light of the governmental misleading.[213] Many courts have confusingly treated the defense as a problem involving a mistake of law on the part of the defendant which may be excused.[214] In reality, however, the more significant mistake is not that of the defendant, but of the official (or court) responsible for administering or interpreting the law. Thus, for penal purposes, if reliance by the defendant was appropriate under the circumstances, he should be considered as having conformed with the law.[215]

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[204] *Hansford* v. *United States,* 303, F.2d 219 (D.C. Cir. 1962); *United States* v. *Demma,* 523 F.2d 981 (9th Cir. 1975) (*en banc*).

[205] *Crisp* v. *United States, supra* note 182 at 70.

[206] See *Kibby* v. *United States,* 372 F.2d 598 (8th Cir.), cert. denied, 387 U.S. 931 (1967); *United States* v. *Bishop,* 367 F.2d 806 (2d Cir. 1966).

[207] 287 U.S., *supra* note 137 at 451.

[208] *Sherman* v. *United States, supra* note 137 at 373.

[209] *Id.* at 375-376. The Court held, however, that the two convictions, occurring, respectively, five and nine years before the time of the alleged offense, were insufficient to establish the defendant's predisposition, particularly as he was then undergoing treatment for his addiction.

[210] E.g., *United States* v. *Tyson,* 470 F.2d 381, 384-385 (D.C. Cir. 1972), cert. denied, 410 U.S. 985 (1973).

[211] See *United States* v. *Russell, supra* note 137 at 443 (Stewart, J. dissenting).

[212] See *United States* v. *Ambrose,* 483 F.2d 742, 748 (6th Cir. 1973), and cases cited therein; see also *Hansford* v. *United States, supa* note 204 at 223-226 (uncorroborated testimony of a police officer that he had witnessed previous sales of narcotics by the defendant held inadmissible on issue of predisposition).

[213] See in general Note, *Applying Estoppel Principles in Criminal Law,* 78 Yale L.J. 1046 (1969).

[214] That there is an overlap between the two defenses cannot be denied. However, recognizing and applying the narrower estoppel defense when the circumstances warrant is important since it may enable courts to avoid construing statutes in a strained fashion, so as to import a culpa-

The Supreme Court has dealt with the defense of "authoritative" misleading in a variety of contexts. In *Johnson* v. *United States*,[216] the defendant erroneously invoked the Fifth Amendment privilege against self-incrimination in reliance upon a ruling of the trial judge, who allowed the prosecutor to comment adversely on the defendant's refusal to testify. In later exercising its supervisory power over the Federal courts to disapprove the practice of commenting adversely on a defendant's invocation of the Fifth Amendment privilege in these circumstances, the Supreme Court stated:[217]

> An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used aginst him.* * *
>
> We would of course not be concerned with the matter if it turned only on the quality of legal advice which (the defendant) received. But the responsibility for misuse of the grant of the claim of privilege is the court's.

The next case to deal at length with the official misstatement defense was *Raley* v. *Ohio*.[218] There a State investigative commission advised four witnesses that they could invoke the privilege against self-incrimination—which they all did—while in fact a State statute existed conferring automatic immunity from prosecution (and thus precluding an invocation of the Fifth Amendment privilege). The witnesses were subsequently convicted for contempt for failure to answer the questions. The Supreme Court unanimously reversed as to three of the defendants, stating that to sustain the convictions would be "to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him."[219] The conviction of the fourth defendant was affirmed by an equally divided court, on the ground that he did not rely on the advice or determination of the commission in refusing to answer a particular question.[220]

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bility requirement which the defendant's mistake may then be said to have negated. An example of a possibly wrong application of the general mistake of law defense when the narrower defense of reliance on official misstatement was clearly available is *United States* v. *Stagman*, 446 F.2d 489 (6th Cir. 1971), a prosecution under 18 U.S.C. 1952 for using interstate facilities to promote a business enterprise involving gambling in violation of State law. In that case, the defendants claimed that their bingo game had been carried on in reasonable and good faith reliance upon advice (later determined to be erroneous) from the sheriff, and an assistant commonwealth attorney that it was lawful under State law. Rather than reverse the convictions on the basis of the defense of reliance on official misstatement of law, the court of appeals construed the Federal statute, in debatable fashion, as requiring knowledge of the unlawfulness of the conduct under State law, thereby enabling the convictions to be overturned on the ground that the defendants' mistake had negated a mental state necessary for commission of the offense.

[215] See Hall, *Ignorance and Mistake in Criminal Law*, 33 Ind. L.J. 1, 25–27 (1957).

[216] 318 U.S. 189 (1943).

[217] *Id.* at 197, 199.

[218] 360 U.S. 423 (1959).

[219] *Id.* at 438–439, 443.

[220] Both *Johnson* and *Raley* refer to the defense here as a form of entrapment. Although reliance on official misstatement of law is related to entrapment in that they share the theme that

The *Raley* principle was extended in *Cox* v. *Louisiana* to a police chief trying to control a demonstration in progress. The defendant was convicted for having paraded "near a building housing a court" with intent to interfere with the administration of justice. The Supreme Court construed the evidence as establishing that the police chief had given permission, which was relied upon by the demonstrators, for the demonstration to take place across the street from the courthouse. Notwithstanding the subsequent judicial determination that the demonstration was "near" the courthouse, the Court viewed the "on-the-spot permission" as an official interpretation that across the street was not "near" the courthouse for this particular demonstration.[221] Accordingly, it held that conviction amounted to the "indefensible sort of entrapment" present in *Raley*—convicting a citizen for doing what the State had clearly authorized. To the dissenting justices' complaint, among others, that the police chief could not authorize violations of his State's criminal laws, the majority answered that it read the statute as containing this narrow regulatory discretion for purposes of a permissible peaceful demonstration, stating that it is "a far cry from allowing one to commit for example, murder, or robbery."[222]

Raley was applied again in *United States* v. *Laub*,[223] involving criminal charges arising out of area travel restrictions on travel to Cuba under a practice uniformly represented by the State Department as not falling within any criminal provisions. The Court observed that "(o)rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. . . . We may not convict 'a citizen for exercising a privilege which the State clearly had told him was available to him.'"[224] Significantly, in *Laub*, the Court did not require that the reliance upon the official misstatement occur as a result of a direct imparting of a legal interpretation by a representative of the State (as in *Johnson*, *Raley*, and *Cox*), but deemed it sufficient that the defendant had relied on the existence of a well-known general position of the responsible official or agency.[225]

The lower Federal courts have also recognized the doctrine. For example, in *United States* v. *Barker*,[226] the court reversed the convictions of two Watergate "footsoldiers" involved in the burglary of Dr. Fielding's office, because the trial judge erroneously precluded the defendants from seeking to establish that they took part in the break-in while laboring under a good faith and objectively reasonable belief that their act, which had been ordered by a higher gov-

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criminal conduct has been induced by official action, the defenses differ significantly in that true entrapment involves governmental activity of a much more active nature, creating the disposition in an otherwise innocent person to commit a crime; official misstatement, on the other hand, contains no element of solicitation or exhortation to criminal conduct, but consists of the comparatively passive conduct of furnishing an erroneous legal interpretation.

[221] *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

[222] *Id.* at 569. The Court cited, in this regard, the Model Penal Code, Sec. 2.04(3)(b).

[223] 385 U.S. 475 (1967).

[224] *Id.* at 487.

[225] See also *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670–675 (1973), affirming the reversal of a conviction because the trial court had refused to permit the defendant to try to prove that it had relied on a "long standing official administrative construction" of the applicable statute.

[226] 546 F.2d 940 (D.C. Cir. 1976).

ernment official, was in fact authorized in the name of national security.[227]

The above decisions stand for the general proposition that a defendant may validly assert a defense to a criminal prosecution where he had a good faith belief that his conduct was lawful and he acted in conformity with and in reliance upon an official interpretation or statement of the law, subsequently determined to be erroneous.

For the doctrine to apply, there must have been a misstatement of law or other official conduct from which a misstatement can be inferred. It is not enough, for example, that there has been official awareness of illegal conduct coupled with acquiescence or failure to prosecute for a period of time.[228] However, the misleading activity need not always take the affirmative form of conveying false or incorrect information. In the context of the selective service laws, one court has held that the defense applies "where the local board, knowing full well that a registrant holds an erroneous impression of his rights or obligations in the selective service system, nevertheless fails to make any effort to correct the registrant's error or assist him in any way.[229]

In order for the defense to be successfully asserted, there must also be more than mere subjective misleading; the reliance upon an official misstatement of law must have been reasonable. As stated in *United States* v. *Lansing:*[230]

> (I)t is clear that more is required than a simple showing that the defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief.
>
> When a defendant claims, as does appellant here, that his criminal conduct was the result of reliance on misleading information furnished by the government, society's interest in the uniform enforcement of law requires at the very least that he be able to show that his reliance on the misleading information was reasonable—in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

With respect to the reasonableness of reliance, the Federal courts have generally held that a party is entitled to rely upon judicial orders entered in his case at all levels without fear of criminal prosecution, if the act or omission permitted thereunder is later determined to be unlawful.[231] However, as to non-parties, the question whether reliance is justified on lower court decisions is considerably more difficult. The Federal decisions, albeit sparse, seem to indicate that one not a party may not rely on a decision of a lower court to justify his acts, even if he acted in good faith.[232] It would also appear that the rule with respect to administrative decisions should be no different.

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[227] See also *United States* v. *Ehrlichman,* 546 F.2d 910, 923–928 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), recognizing the defense in the national security context but declining to apply it in the absence of any evidence that the defendants' superiors—the Attorney General and the President—specifically authorized the illegal break-in.

[228] E.g., *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 225 (1940); *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 623–624 (1953).

[229] *United States* v. *Timmins,* 464 F.2d 385, 387 (9th Cir. 1972) (involving a registrant who wrote to his local board that, while he considered himself to be a conscientious objector on moral and religious grounds, he doubted whether he had the formal qualifications necessary to qualify as a conscienitous objector, after reading Form 150 sent to him by the local board). The holding in *Timmins* may well be uniquely confined to the selective service system, based upon the affirmative obligation of that particular agency to assist selective service registrants. But cf. *United States* v. *Insco,* 496 F.2d 204, 208–209 (5th Cir. 1974).

[230] 424 F.2d 225, 227 (9th Cir. 1970).

[231] See *United States* v. *Mancuso,* 139 F.2d 90 (3d Cir. 1943) ; *United States* v. *Polizzi,* 450 F.2d 880 (9th Cir. 1971), reversing 323 F. Supp. 222 (C.D. Cal.). However, what would have been rea-

On the other hand, it is arguable that the requirements of "reasonable reliance" and "good faith" belief in the legality of one's conduct should be dispensed with in the case of statutes and Supreme Court decisions; i.e., that these represent such authoritative sources of law that, so long as they remain in force, no criminal sanctions should attach to a person whose conduct is in conformity therewith.[233] A similar doctrine prevails as to State statutes and the decisions of State courts of last resort. For example, it has been held that in a situation where a statute repeals an older enactment, the charged act then occurs in conformity with the new statute, but the new statute is thereafter declared unconstitutional, the accused may successfully invoke the defense of official misstatement.[234] Similarly, the defense has been ruled available for conduct occurring during the tenure of a decision by the highest court of a State interpreting a statute or holding it unconstitutional, notwithstanding a subsequent decision overruling the prior interpretation or holding of invalidity.[235]

SECTION 502. APPLICATION AND SCOPE OF BARS AND DEFENSES

This section provides that the bars and defenses to prosecution set forth in this code are not exclusive,[236] but the general subject matters covered constitute bars or defenses to prosecutions only to the extent described. In view of the decision not to codify general defenses, this section has a more limited utility. It is included, however, because the principle it states is needed to the extent the Code defines special defenses and affirmative defenses applicable to specific offenses, as well as general and special bars to prosecution.

The standard here laid down for determining whether a particular defense—not specifically contained in the Code—may be interposed is substantially similar in operation to that contained in the assimilative crimes section[237] for determining when a State of-

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sonable reliance will not excuse criminal conduct if the actor is bent on wrongdoing and does not honestly believe that his conduct is lawful. Cf., e.g., *United States* v. *Painter*, 314, F.2d 939, 943 (4th Cir.), cert. denied, 374 U.S. 831 and cases cited therein.

[232] See *United States* v. *Calamaro*, 137 F. Supp. 816–820 (E.D. Pa. 1956), rev'd on other grounds, 236 F.2d 182 (3d Cir.), aff'd 354 U.S. 531 (1957) ; *Leon* v. *United States*, 136 A.2d 588, 590 (Mun. Ct. App. D.C. 1957) ; see also *State* v. *Striggles*, 202 Iowa 1318, 210N.W. 137 (1926) ; but see *Wilson* v. *Goodwin*, 291 Ky. 144. 163 S.W. 2d 309 (1942) ; *State* v. *Stout*, 90 Okla. Crim. 35, 210 P.2d 199 (1949). Cf. also *United States* v. *Potts*, 528 F.2d 838 (9th cir. 1975) *(en banc)*, refusing to apply a decision overruling a prior restrictive interpretation of a gun control statute retroactively, on the ground of lack of adequate notice to previous violators.

[233] But see 18 U.S.C. 2520 which provides that a "*good faith reliance* on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under . . . any . . . laws." (Emphasis added.)

[234] See *Claybook* v. *State*, 164 Tenn. 440, 51 S.W. 2d 499 (1932); cf. *Clark* v. *Anderson*, 502 F.2d 1080 (3d Cir. 1974).

[235] E.g., *Commonwealth* v. *Trousdale*, 297 Ky. 724, 181 S.W. 2d 254 (1944); *State* v. *O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910); cf. also *James* v. *United States*, 366 213 (1961). However, some courts have created an exception to this doctrine where the conduct was inherently "wrongful or immoral." See *State* v. *Knox*, 186 N.W. 2d 614, 643 (Sup. Ct. Iowa, 1971).

[236] This provision was adopted pursuant to the suggestion of the New York City Bar Association's Special Committee. Hearings, p. 7707.

[237] Section 1861 of the Code.

jurisdiction of the United States applies. That is, if there is a defense or bar to prosecution set forth in the Code, that provision is controlling to the extent that it is evident therefrom that Congress intended to reject variations of that defense or bar for application to the proposed Code. For example, section 1601(c) makes it an affirmative defense to a felony-murder prosecution that the death was a reasonably foreseeable consequence of neither the underlying felony nor the particular circumstances under which it was committed. In that context section 502 prevents, for instance, judicial development of a defense which would be similar but would focus on the defendant's reasonable belief that no other participant was armed or intended to engage in conduct likely to result in death or serious bodily injury, such as is found in the New York law.[238]

SUBCHAPTER B.—BARS TO PROSECUTION

(Sections 511-512)

This subchapter establishes the two main bases upon which any criminal prosecution may be barred without regard for the merits of the case.

The first of the two sections (section 511) contains the statute of limitations for this title, describing the circumstances under which prosecution is barred unless formal charges are lodged within a certain period of time after the commission of the offense. While there is a statute of limitations of general applicability currently in title 18, there are numerous statutes of limitations of special applicability scattered throughout title 18 and other titles of the United States Code. A principal purpose served by section 511 is to have a uniform provision for testing whether Federal prosecutions have been seasonably instituted. The section largely reflects (while simplifying) current law, but is also innovative in certain respects.

Section 512 describes the circumstances under which prosecution is to be barred because of the age of an offender at the time of the commission of an offense (the conduct nevertheless being cognizable under the juvenile delinquency provisions of chapter 36). The section differs significantly from current Federal law.

SECTION 511. TIME LIMITATIONS

1. In General

This section addresses the problem of time limitations on the commencement of prosecutions. Although not known at common law and depending on their existence for legislative enactment,[1] statutes of limitations are today a part of the criminal law of virtually every State as well as the Federal government.[2]

The primary reasons for restrictions of time revolve around accepted notions that prompt investigation and prosecution insure that conviction or acquittal is a reliable result and not the product of faded memory or unavailable evidence; that time limitations may serve to encourage law enforcement authorities to expedite their investigation and discovery of crimes; that, with certain exceptions involving particularly heinous offenses or offenses which are secretive in nature and thus difficult to discover, ancient wrongs should not be resurrected; and that community security and economy in the allocation of enforcement resouces require that most effort be concentrated on recent crimes.[3]

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[238] See the discussion of section 1601 (c), *infra*.

[1] See *United States* v. *Cadarr*, 197 U.S. 475, 478 (1905); *United States* v. *Marion*, 404 U.S. 307, 317-318 (1971).

[2] See Working Papers, p. 281.

Existing statutes in the United States Code dealing with time limitations on prosecution, of general application to civilian offenses, apply not only to offenses of national scope, but also to offenses prosecuted in enclaves under the Assimilative Crimes Act, 18 U.S.C. 13,[4] and to offenses prosecuted under the District of Columbia Code.[5] The Uniform Code of Military Justice carries its own provisions as to time limitations,[6] which proposed section 511 would not affect. Of course, nothing in such statutes of limitations as now exist or as are here proposed affects a defendant's right to invoke the constitutional guarantees of due process and speedy trial as the basis for dismissing a prosecution, even though timely commenced under the applicable statute of limitations.[7]

Generally speaking, section 511 retains existing law in the area of statutes of limitations. However, it varies in some notable respects. First, the section vastly simplifies the present array of Federal statutes prescribing differing limitations periods for specific crimes by reducing the applicable categories to three: (1) offenses as to which no time limitation is imposed;[8] (2) all other offenses besides infractions, as to which a five-year limitation applies; and (3) infractions, which must be prosecuted within one year. Second, the section contains a few provisions which are innovations; e.g., a provision defining the circumstances in which a prosecution for a lesser included offense is to be deemed timely commenced even if the period of limitation has expired, where the period has not expired with respect to the parent offense charged. Third, the section revises to some degree present law regarding the suspension of the running of the statute of limitations because of the concealment or absence from the jurisdiction of the alleged perpetrator of the offense.

2. Present Federal Law

A. Period of limitations

Current Federal law contains a single statute prescribing a general period of limitations and a myriad of statutes of specific application.

18 U.S.C. 3282 is the statute of general application. Enacted in 1954, it states that, "[e]xcept as otherwise expressly provided by

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[3] See *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970); Working Papers, p. 281.

[4] *United States* v. *Andem*, 158 F. 996 (D.N.J. 1908); see also section 1861 (Violating State or Local Law in an Enclave).

[5] *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958), cert. denied, 351 U.S. 989 (1959).

[6] See 10 U.S.C. 843.

[7] See *United States* v. *Marion*, *supra* note 1, exploring the relationship between statutes of limitations and these constitutional rights.

[8] Also included in the category of offenses having no time limitation is the espionage offense described in section 1121(a)(1).

law," a prosecution for a non-capital offense shall be instituted within five years after the offense was committed.[9]

18 U.S.C. 3281 deals with capital offenses and provides that an indictment for an offense "punishable by death" may be filed at any time. However, as a result of recent Supreme Court holdings,[10] it it likely that, with but a single exception—Public Law No. 93-366 (88 Stat. 409, August 5, 1974) (defining the offense of aircraft piracy and authorizing the death penalty therefor under a complex set of procedures)[11] none of the approximately fifteen death penalty provisions in the United States Code is valid.[12]

18 U.S.C. 3283 provides a five-year time period for the bringing of prosecutions for violation of the "customs" or "slave trade" laws. Since the period prescribed is the same as that under section 3282, the statute is superfluous.

18 U.S.C. 3285 provides that a contempt proceeding under section 402 of title 18 must be instituted within one year of the act complained of.[13] It also provides that such proceeding is not a bar to further prosecution for the same act.[14]

18 U.S.C. 3286 is similarly directed to a single offense, and provides that a prosecution under 18 U.S.C. 2198 for seduction of a female passenger on board a United States vessel by an employee of the vessel shall be commenced within one year after the vessel arrives at its port of destination.

18 U.S.C. 3291 provides that prosecutions for violations of nationality, citizenship and passport laws, or a conspiracy to violate such laws, shall be commenced within ten years after the commission of the offense.[15]

Section 19 of the Internal Security Act of 1950, 64 Stat. 1005, provides a ten-year limitations period for prosecutions under the espionage statutes, 18 U.S.C. 792–794.

50 U.S.C. 783(e) provides that a prosecution for an offense under that section, part of the Subversive Activities Control Act, shall be instituted within ten years after the commission of the offense.[16]

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[9] The generally applicable period of limitations was originally two years and was later increased to three years before being expanded to its present term. See Working Papers, p. 283.

[10] *United States* v. *Jackson,* 390 U.S. 570 (1968); *Pope* v. *United States,* 392 U.S. 651, (1968); *Furman* v. *Georgia,* 408 U.S. 238 (1972); *Gregg* v. *Georgia,* 428 U.S. 153 (1976).

[11] Committee on July 1, 1981, reported a bill (S. 114, S. Rept. 97–143) to restore the death penalty for certain offenses in a form designed to cure the constitutional flaws identified in cases cited *supra* note 10.

[12] It may, however, be possible to contend that notwithstanding the invalidity of the death penalty, the unlimited time period in existing statutes which formally carry that penalty remains applicable. See *Coon* v. *United States,* 411 F.2d 422, 425 (8th Cir. 1969), noting but failing to resolve the issue. Compare also *United States* v. *McNally,* 485 F.2d 378, 406–407 (8th Cir.), cert. denied, 415 U.S. 978 (1973), with *United States* v. *Watson,* 496 F.2d 1125 (4th Cir. 1973).

[13] Section 402 of title 18 punishes willful disobedience of any lawful district court order, process, or writ when the act done is also punishable as another criminal offense. Section 402 thus does not reach other disobedience of court orders punishable as contempt or contempts committed in the presence of the court.

[14] This latter provision would seem to be unnecessary in view of court rulings that the Double Jeopardy Clause of the Fifth Amendment does not prohibit prosecution for contempt and another substantive offense arising out of the same conduct. See *Jurney* v. *MacCracken,* 294 U.S. 125, 151–152 (1935); *United States* v. *Rollerson,* 449 F.2d 1000 (D.C. Cir. 1971).

[15] The period was increased to ten years from three years in 1951. The specific offense now covered by the ten-year period of section 3291 are 18 U.S.C. 1423–1428 and 18 U.S.C. 1541–1544. See Working Papers, p. 284.

[16] Section 783 of title 50 punishes a conspiracy or attempt to establish a totalitarian dictatorship under the domination or control of a foreign government or individual, the communication of classified information by an employee of the United States to a person known or believed to be an agent of a foreign government or member of any Communist organization, and the obtaining or receipt, or attempted obtaining or receipt, by an agent of a foreign government or

42 U.S.C. 2278 provides a similar ten-year period for prosecution of restricted data offenses under the atomic energy laws, 42 U.S.C. 2274-2278.

26 U.S.C. 6531 provides that prosecutions for violation of the internal revenue laws shall be commenced within three years after commission of the offense, except for eight enumerated categories of offenses as to which a six-year limitations period is made applicable.[17]

17 U.S.C. 115(a) provides that no criminal proceeding shall be maintained under title 17 unless commenced within three years after the cause of action arose. The provision is applicable to false affidavits aiding a claim to copyright (17 U.S.C. 18), willful infringement of a copyright for profit (17 U.S.C. 104), and fraudulent notice of a copyright (17 U.S.C. 105).

2 U.S.C. 455(a), part of the Federal Election Campaign Act Amendments of 1974, prescribes a three-year statute of limitations for violations of Subchapter I of the F.E.C.A., as amended (2 U.S.C. 431-442).

B. Continuing offenses

The concept of a continuing offense addresses not the question of the length of the period of limitations, but rather when it begins to run. Because the practical effect of a finding that an offense is continuing in nature is to extend the period within which a prosecution may be commenced, the courts have held that statutes of limitation generally begin to run when the crime is complete;[18] and that an offense will be treated as a continuing one only when the language of a statute or the nature of the offense itself compels the conclusion that Congress so intended.[19]

Congress has expressly declared only three offenses to be continuing crimes. One statute, 18 U.S.C. 3284, provides that concealing the assets of a bankrupt or other debtor (i.e., under 18 U.S.C. 152) shall be a continuing offense until the debtor has been finally discharged or a discharge has been denied.[20] The other enactments, 22 U.S.C. 618(e) and 50 U.S.C. 856, deal with failures to register. Both provide that failing to register—in the case of the former, as a foreign agent having knowledge of, or having received instruction or assignment in, a foreign espionage system—shall be deemed a continuing offense for as long as such failure exists.

Despite the judicial policy in favor of "repose"[21] and the near presumption against construing offenses as being continuing for statutes of limitations purposes, a number of offenses have been held to be continuing crimes by their very nature. The foremost among these is a conspirary which, the Supreme Court had held, continues as long as the conspirators engage in overt acts in fur-

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member of any Communist organization from an employee of the United States of any such classified information.

[17] See Working Papers, p. 290.

[18] *Pendergast* v. *United States,* 317 U.S. 418 (1943).

[19] See *Toussie* v. *United States, supra* note 3 at 112, 115.

[20] In *Guglielmini* v. *United States,* 425 F.2d 439 (2d Cir.), cert. denied, 400 U.S. 820 (1970), the court held that the rationale of this provision applied also to the situation where the bankrupt had waived the right to a discharge.

[21] See, e.g., *United States* v. *Scharton,* 285 U.S. 518, 522 (1932).

therance of their plot.[22] Similarly, it has been held that escape and possession of contraband offenses are continuing crimes.[23] And an indictment alleging a scheme to defraud by means of a false statement under 18 U.S.C. 1001 was held to charge a continuing offense.[24] In addition the crime of an alien who "willfully remains" in the United States in excess of the time allowd in his conditional landing permit, in violation of 8 U.S.C. 1282(c), is probably a continuing offense for statute of limitations purposes.[25]

The courts have, however, rejected most attempts to classify offenses as "continuing." In *United States* v. *Irvine,*[26] it was held, that a crime of wrongful withholding of a pension did not continue, for statute of limitations purposes, for however long the pension was withheld. The making of a false statement in an official proceeding, unaccompanied by an allegation of a scheme to defraud, has also been held not to be a continuing crime. An indictment for contempt in the presence of the court, predicated upon the making of a misrepresentation, has been ruled not to be a continuing offense, notwithstanding subsequent continuous cooperation in concealing the scheme to which the misrepresentation related, although the court noted that had the indictment charged an offense of broader sweep, such as an obstruction of justice, then the scheme would have constituted a continuing offense.[27] Finally, in *Toussie* v. *United States,*[28] a divided Court held that failing to register for the draft, as required within five days after one's eighteenth birthday, was not a continuing offense under 50 U.S.C. App. 462(a), despite the existence of a longstanding Selective Service System regulation stating that the duty to register "shall continue at all times."

C. Commencement of prosecution

(i) In general.—Present Federal statutes and rules do not separately address the question of when a prosecution is commenced for statute of limitations purposes, but the great majority of limitations statutes are worded so as to hinge the commencement of prosecution to the return of an indictment or the filing of an information.[29] Some commentators consider that the modern view is to define commencement as occurring as early as when process is first issued, i.e., when a complaint is filed, rather than when an indict-

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[22] *United States* v. *Kissel,* 218 U.S. 601, 607 (1910); *Brown* v. *Elliott,* 225 U.S. 392, 400–401 (1912); *Toussie* v. *United States, supra* note 3 at 112, 122; see also *United States* v. *Novak,* 448 F.2d 134, 139 (7th Cir. 1971), cert. denied, 404 U.S. 1039 (1972).

[23] *United States* v. *Bailey,* 444 U.S. 394, 413–414 (1980); *Von Eichelberger* v. *United States,* 252 F.2d 184 (9th Cir. 1958).

[24] *Bramblett* v. *United States,* 231 F.2d 489 (D.C. Cir.), cert. denied, 350 U.S. 1015 (1956); see also *United States* v. *Morrison,* 43 F.R.D. 516, 519 (N.D. Ill. 1967) (same holding as to fraudulent course of conduct under the Social Security Act, 42 U.S.C. 408(c)).

[25] See *United States* v. *Cores,* 356 U.S. 405 (1958) (so holding for purposes of venue); see also *United States* v. *Bruno,* 328 F. Supp. 815, 825 (W.D. Mo. 1971) (holding that under 8 U.S.C. 1326, the crime of being "found" in the United States after having been deported is continuous for so long as the alien is present within the country and is not discovered).

[26] 98 U.S. 450 (1878). See *Bridges* v. *United States,* 346 U.S. 209 (1953); *Marzani* v. *United States,* 168 F.2d 133 (D.C. Cir.), aff'd by an equally divided court, 335 U.S. 895 (1948).

[27] *Pendergast* v. *United States, supra* note 18 at 418–421. *Pendergast* thus stands for the proposition that a criminal act which is transitory in nature cannot be extended over a period of time simply because its effects continue. See also *United States* v. *Irvine, supra* note 26.

[28] *Supra* note 3.

[29] See, e.g., 18 U.S.C. 3282, which states that no person shall be "prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years. . . ."

ment or information is filed.[30] A partial reflection of this view is found in 26 U.S.C. 6531, applicable to internal revenue offenses, which provides that, if a "complaint is instituted" within the limitations period prescribed (i.e., either three years or six years, depending on the type of internal revenue offense), then "the time shall be extended until the date which is 9 months after the date of the making of the complaint."[31] The courts have ruled that, in order to toll the statute of limitations, the complaint must be valid, i.e., it must establish probable cause to believe the accused committed an offense.[32]

(ii) Lesser included offenses.—Rule 31(c) of the Federal Rules of Criminal Procedure permits a finding of guilty of an offense necessarily included in the offense charged in appropriate evidentiary circumstances. Out of this Rule arises the problem whether a conviction for a lesser included offense may be sustained where the lesser offense is barred by the statute of limitations even though the charged, parent offense is not. The law in most State jurisdictions, as well as the District of Columbia, is that a conviction under the lesser included offense in these circumstances will not stand.[33] Although the doctrine may work an injustice in some situations, the underlying rationale seems to be that to permit the opposite result would enable prosecutors to revive time-barred offenses merely by obtaining an indictment for a greater offense.

(iii) Time when offense committed.—Aside from continuing offenses and the application of special provisions suspending the running of the statute of limitations (e.g., when a person is a fugitive), statutes of limitations normally begin to run when the offense is complete.[34] In the internal revenue statutes, however, Congress has provided that, in the case when a tax return is filed or a tax is paid before the statutory deadline, the limitations period begins to run on the date when the return or payment was due (without regard to any extension of time obtained by the taxpayer).[35] These statutes are based on the desirability, for purposes of administrative convenience in criminal tax investigations, of a uniform expiration date for most taxpayers despite variations in the dates of actual filing.[36]

(iv) Extended period to commence new prosection.—Current Federal law contains two statutes designed to enable a prosecution to be recommenced within a reasonable time, without being subject to a challenge based on the statute of limitations, where the charges

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[30] See Working Papers, p. 287.

[31] A "complaint" is a written statement, given under oath before a magistrate of the essential facts constituting the offense charged. See Fed. R. Crim. p. 3.

[32] See *Jaben* v. *United States*, 381 U.S. 214 (1965); *United States* v. *Bland*, 458 F.2d 1, 6 (5th Cir.), cert. denied, 409 U.S. 843 (1972).

[33] See *Chaifetz* v. *United States*, 288 F.2d 133 (D.C. Cir. 1960), rev'd in part but cert. denied on this issue, 366 U.S. 209 (1961); *Askins* v. *United States*, *supra* note 5; see also Working Papers, p. 297.

[34] For example, 18 U.S.C. 3282 refers to 5 years "after such offense shall have been committed." See also *Pendergast* v. *United States*, *supra* note 18.

[35] See 26 U.S.C. 6531 and 6513.

[36] See *United States* v. *Habig*, 390 U.S. 222, 225-226 (1968). *Habig* held that, where an extension of time is secured but the return is filed *after* the original statutory due date, the period of limitations starts to run when the return is filed rather than on the date (but for the extension) when it was due. Otherwise, the limitation period would begin before the offense was even committed.

have been dismissed without prejudice either shortly before the statute of limitations is due to expire, or after it has expired.

18 U.S.C. 3288 deals with the situation where a defect in the charge is found after the period of limitations has run. It provides that whenever, in such instance, an indictment is dismissed "for any error, defect, or irregularity with respect to the grand jury," or an information is found "defective or insufficient for any cause," a new indictment may be returned within six months of the date of dismissal or, if no grand jury is in session when the dismissal occurs, within six months after the next regular grand jury is convened.

18 U.S.C. 3289 is directed to the situation where the dismissal occurs before the limitations period has expired. It reiterates the language of section 3288 as to the types of dismissals convered and provides that, if the dismissal occurs within six months of the date when the statute is due to expire, then a new indictment may be brought within six months after the limitations period has run, as provided in section 3288.

(v) Suspension of limitations.—Some Federal statutes provide for a suspension of the applicable statute of limitations in certain circumstances.

18 U.S.C. 3287 applies when the United States is "at war." It provides that at such times the running of any statute of limitations applicable to enumerated categories of offenses[37] "shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." Enacted in the early 1940's, when the generally applicable period of limitations was only three years, the purpose of this statue was to prevent crimes related to the commercial aspects of the war program, "committed in the hurly-burly of war," from going unpunished.[38] By Presidential Proclamation, hostilities with regard to World War II were declared terminated on December 31, 1946.[39] The question whether section 3287 applies only during a congressionally declared war seems never to have arisen. No reported cases exist dealing with its attempted application during the Korean or Vietnam conflicts.

18 U.S.C. 3290 is another statute that, in effect, suspends the period of limitations. It states simply that: "No statute of limitations shall extend to any person fleeing from justice." A conflict in decisions has arisen over whether an intent to avoid justice is necessary for the statute to apply.

The ambiguity derives from *Street* v. *United States,*[40] the Supreme Court's only discussion on the subject. There the defendant, shortly after his commission of the offense, was indicated by the State and fled to Europe. He was subsequently indicted by the Federal Government after the expiration of the normal period of limitation. The question was whether the trial judge had correctly declined to instruct the jury that, in order to find that the defendant had been fleeing from justice, it was necessary to show that he intended to flee from *Federal* justice as opposed to the justice of the State. The Supreme Court sustained the trial court's refusal to give the instruction, holding that "it is sufficient that there is an intent to avoid the justice of the State having criminal jurisdiction over the same territory and the same act."[41] Thus the opinion did not directly confront the issue whether any intent to avoid justice is an element of the statute. The ambiguity with respect to this issue stems from the Court's discussion—in dicta—as to whether the phrase "fleeing from justice" in the present statute is to carry the same meaning as the phrase "fugitive from justice" in the extradition statute, 18 U.S.C. 3182, where an intent to avoid justice has been held not to be an element.[42]

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[37] I.e., (1) offenses involving fraud or attempted fraud against the United States; (2) offenses committed in connection with acquisition, handling, custody, control, or disposition of property of the United States; and (3) offenses committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, or termination or settlement of any contract, subcontract, or purchase order related to the prosecution of the war.

[38] See *United States* v. *Gottfried,* 165 F.2d 360 (2d Cir.), cert. denied, 333 U.S. 860 (1948).

[39] 12 Fed. Reg. 1.

[40] 160 U.S. 128 (1895).

The Fifth, Second, and First Circuits, interpreting *Streep,* have held that second 3290, unlike the extradition law, does require an intent to avoid prosecution.[43] On the other hand, the Fourth, Eight, and District of Columbia Circuits adopt the view that an intent to avoid justice is not an element under section 3290, based on their contrary reading of the *Streep* decisions.[44]

With respect to other issues, it is settled that, to constitute "fleeing from justice," the defendant need not leave the State or district, but need only depart from his usual abode and conceal himself.[45] Moreover, the flight need not occur after a prosecution has been commenced, if an intent to avoid prosecution is present.[46] There is a futher conflict, however, over the question whether incarceration in another State or country will trigger the operation of section 3290.[47]

In addition to section 3290, a special suspension of limitations statute exists in 26 U.S.C. 6531 for internal revenue offenses. That enactment provides that the "time during which the person committing any of the various offenses under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of (18 U.S.C. 3290) shall not be taken as any part of the time limited by law for the commencement of such proceedings." The courts have held that, with respect to the language dealing with absences from the United States, the statute is absolute, requiring no intent to avoid justice and extending to ordinary business and pleasure trips.[48]

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[41] *Id.* at 135.

[42] *Appleyard* v. *United States,* 203 U.S. 222, 227–229 (1906).

[43] *Donnell* v. *United States,* 229 F.2d 560 (5th Cir. 1956); *Brouse* v. *United States,* 68 F.2d 294 (1st Cir 1933); *Shirad* v. *Ferrandino,* 486 F.2d 442 (2d Cir. 1973). In *Donnell* the court observed (229 F.2d at 564):

> [T]he purposes the two statutes were designed to serve are entirely different. When one state indicts a person then physically within another state, it is entitled to extradite him immediately for trial, and it is of no importance that the "fugitive" had been absent from the state of the indictment only one day for that state is entitled to his return regardless of what took him away.
>
> But it would do violence to the reason and purpose of section 3290 to hold that a person was "fleeing from justice" so as to suspend the running of the statute of limitations if he legitimately left the district of the supposed crime or moved his home openly to another district, being all the while easily accessible to any officer who might have a warrant to serve. . . .

[44] *Bruce* v. *Bryan,* 136 F. 1022 (4th Cir. 1905); *King* v. *United States,* 144 F.2d 729 (8th Cir. 1944), cert. denied, 324 U.S. 854 (1945); *McGowen* v. *United States,* 105 F.2d 791 (D.C. Cir.), cert. denied, 308 U.S. 552 (1939).

[45] *United States ex rel. Demarois* v. *Farrel,* 87 F.2d 957 (8th Cir.), cert. denied, 302 U.S. 683 (1937); *Ferebee* v. *United States,* 295 F. 850 (4th Cir. 1924); *Porter* v. *United States,* 91 F. 494 (5th Cir. 1898).

[46] *Streep* v. *United States, supra* note 40.

[47] Compare *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956) and *McGowen* v. *United States, supra* note 44, with *United States* v. *Hewecker,* 70 F. 59 (S.D.N.Y.), certificate dismissed 164 U.S. 46 (1896).

Another special suspension of limitations provision is contained in 50 U.S.C. 783(e). As indicated before, that statute provides a ten-year limitations period for certain criminal subversive activities. The final sentence of section 783(e) provides that if, at the time of the offense, the defendant is an officer or employee of the United States or an agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or an agency thereof, he may be prosecuted within ten years after he has ceased to be so employed. In effect, the provision suspends the running of the limitations period for as long as the defendant is a Federal employee.

3. The provisions of the Bill, as Reported

Subsection (a) of section 511 states the general principle that it is a "bar to prosecution under any Federal statute that the prosecution was commenced after the applicable period of limitation." The section thus applies to prosecutions under any Act of Congress, with the exceptions stated in section 103 (i.e., statutes applicable exclusively to the District of Columbia and the Uniform Code of Military Justice).[49] The classification of the statute of limitations defense as a "bar to prosecution" (which term is defined in section 111) is intended, in the main, to continue existing law which, with a single minor exception, requires the bar to be raised either before or during the trial.[50] A failure to assert the claim timely constitutes a waiver thereof so that the contention may not be first asserted on appeal or on collateral attack.[51] This principle applies both to pleas of guilty or nolo contendere and to other trials.[52]

The sole exception in existing law to the waiver principle arises where there is a verdict or finding of guilty of a lesser included offense which is alleged to be barred by the statute of limitations. In *Askins* v. *United States,* the court permitted the claim to be raised on collateral attack in this situation, despite the fact that it was not advanced either at sentencing or on direct appeal.[53]

Whatever the correctness of that result, there seems no reason to perpetuate this exception to the rule in light of proposed subsection (e). That subsection would modify current substantive law regarding the timeliness of lesser included offense convictions by removing the bar of the statute of limitations for such convictions if, at the close of the evidence, sufficient evidence existed to sustain a conviction of the offense charged. In this context, a defendant may fairly be required to raise any statute of limitations objection to a lesser offense at the time the case is submitted to the fact-finder for decision, if not before, and the Committee intends to mandate this procedure.

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[48] *United States* v. *Myerson,* 368 F.2d 393 (2d Cir. 1966), cert. denied, 386 U.S. 991 (1967).

[49] The Uniform Code of Military Justice has its own provisions as to statutes of limitation. See U.S.C. 843.

[50] See Fed. R. Crim. P. 12(b)(2). Normally, the claim must be raised before trial. However, a court may permit the claim to be made thereafter for cause shown.

[51] See generally *Davis* v. *United States,* 411 U.S. 233 (1973); see also *Askins* v. *United States, supra* note 5; *United States* v. *Gelb,* 175 F. Supp. 267, 270 (S.D.N.Y.), aff'd, 269 F.2d 675 (2d Cir.), cert. denied, 361 U.S. 822 (1959); *Forthoffer* v. *Swope,* 103 F.2d 707, 709 (9th Cir. 1939).

[52] See cases in note 51, *supra.*

[53] *Supra* note 5. Although there are few decisions on the point, it seems clear that a person may, as a result of legitimate plea bargaining, validly waive a statute of limitations claim and plead guilty to an offense which otherwise would be subject to statute of limitations challenge. See *United States* v. *Wild,* 551 F.2d 418 (D.C. Cir. 1977), and authorities cited therein. This possibility is explicitly recognized under the Uniform Code of Military Justice. See Manual for Courts-Martial, par. 74(h).

(i) Period of Limitations

Section 511 simplifies the needlessly confusing variety of limitations periods contained in current statutes. Subsection (b) prescribes a uniform period of five years for all offenses except Class A felonies,[54] as to which no time period is applicable, and infractions, as to which the time for commencing prosecution is one year. The general period of limitations found in 18 U.S.C. 3282 is thus maintained and its applicability is expanded in the subject bill by the removal of a number of specific exceptions. One advantage flowing from this simplification will be the elimination of some litigation with respect to whether or not a particular offense is of a type to which a special period of limitations attaches.[55] Although the generalization of the five-year period increases the time as compared to present law within which certain internal revenue, election, and copyright prosecutions may be brought,[56] its principal effect is to reduce the limitations interval applicable under current statutes to some internal revenue offenses (presently six years), and to certain nationality, citizenship, espionage, subversive, and atomic energy offenses (presently ten years).[57] The Committee believes that there is no justification for a difference in the length of the applicable limitations period between these offenses and other non-capital crimes. Five years is ordinarily sufficient to complete an investigation of any suspected wrongdoing. Where special factors are present, which frustrate the policy underlying the statute of limitations, or which warrant different treatment, other provisions of this section are available (relating to continuing offenses, special time limitations, and suspension of limitations) the effect of which is to extend the applicable period. Barring the presence of any of these factors, however, the Committee perceives no reason for disparate intervals within which prosecutions for non-capital offenses other than infractions may be instituted.[58]

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[54] Espionage as described in sec. 1121(a)(1) is treated for these purposes as a Class A felony.

[55] See e.g., *United States* v. *Noveck*, 271 U.S. 201 (1926); *United States* v. *Scharton, supra* note 21. Of course, litigation of this nature will still arise with respect to the application of other subsections dealing with special limitations periods, continuing offenses, and suspension of limitations. See subsections (c), (d), and (g). Subsection (c) was adopted pursuant to the recommendation of the New York City Bar Association's Special Committee. See Hearings, p. 7708.

[56] See *supra, 2. Present Federal Law.* As to the election offenses, the Special Prosecutor in his October 1975 Report recommended a repeal of the 1974 provision shortening the period of limitations of three years. The Report observed (p. 148): "It is often difficult, in dealing with white-collar crime generally, to uncover violations and bring violators to indictment even within the normal 5-year period. The difficulty increases when campaign-law violators, including both givers and receivers of contributions, make efforts to conceal the illegal nature of their activities, as many did in the 1972 campaigns. Under such circumstances, with a 3-year statute of limitations, the chances are excellent that many violations will be barred from prosecution by the time they are discovered. Another advantage of a 5-year limitation period is that it permits a new Administration to prosecute violations that might have occurred any time during the previous President's last term of office, making it impossible for the previous Administration to cover up its election violations and bar pursuit of those crimes by a New Administration circumscribed by the short, 3-year limitations. No convincing reasons have been advanced for granting this special privilege to Federal candidates, and the statute should be amended to readopt the 5-year period now applicable to all other persons in the criminal code."

[57] Supra, 2. *Present Federal Law.*

Although not excepting misdemeanors from the five-year period,[59] the Committee considered that for infractions, which are punishable by no more than five days in prison, a lesser limitations period of one year is appropriate. A similar judgment was made in S. 1, as originally introduced in the 93d Congress.[60]

Under subsection (b), a prosecution for a Class A felony may be commenced at any time. This continues the policy in 18 U.S.C. 3281 that rejects limitation periods for the most serious category of offenses, the heinous nature of which outweighs the normal considerations in favor of repose.[61] Under the proposed Code, there are four offenses that will have no period of limitations. They are: (1) Murder (section 1601); (2) Treason (section 1101); (3) Sabotage (section 1111); and (4) Espionage (section 1121). The treason and sabotage offenses are classified as Class A felonies only in certain circumstances, so that, in order for the unlimited time period to apply, the indictment would have to charge the offense in its Class A felony form. The espionage offenses are designated as Class A felonies for purposes of section 511 by sections 182(a), 617(b), and 617(c) of the bill, as reported.

(ii) Time When Offense Committed (Continuing Offenses)

Subsection (d) of section 511 is directed primarily to the doctrine of continuing offenses and is intended in nearly all respects to codify existing law. Rather than dealing with the issue of continuing offenses separately, however, this provision treats continuing offenses as a special case with respect to the broader question of when an offense is deemed to be committed for purposes of the statute of limitations. Thus, paragraph (1) states the general rule that, except as otherwise provided by statute, for purposes of this section the commission of an offense occurs, for an offense other than a continuing offense, on the occurrence of the last remaining element of the offense. This codifies the principle that the limitations period normally begins to run when the offense is first complete.[62] The exception for situations "otherwise provided by statute" is designed to leave intact the special internal revenue provisions that compute the commencement of the limitations period from the date an income tax return or payment was due, rather than on the date the return was filed or the payment made.[63]

Paragraph (2) provides that, for purposes of this section the comission of an offense occurs for a continuing offense involving: (A) criminal conspiracy, on the day of the occurrence of the most recent conduct to effect any objective of the conspiracy for which the defendant is responsible, or on the day of the frustration of the last remaining objective of the conspiracy, or on the day the conspiracy is terminated or finally abandoned; (B) a failure, neglect, or refusal to register, on the day the person registers as required, or on the date the duty to register ceases; or (C) a prolonged course of conduct which the statute plainly appears to treat as a continuing offense, on the day the course of conduct terminates.

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[58] This type of approach was endorsed by the American Bar Associations' Section of Criminal Law. See Hearings, p. 5800.

[59] The treatment of misdemeanors equally with felonies for statute of limitations purposes is generally consistent with existing law, see 18 U.S.C. 3282, although several current statutes prescribe lesser limitations periods for misdemeanor offenses. See 18 U.S.C. 2198, relating to seduction of a female passenger on a vessel (one year); 17 U.S.C. 18, 104, and 105, relating to various copyright offenses (three years). The proposal to have a lesser period of limitations for misdemeanors was widely criticized. See, e.g., Hearings, pp, 1402, 1613, 1699, 3494.

[60] See Section 1–3B1(c)(3).

[61] The New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code specifically approved this policy with respect to prosecutions for murder while expressing no opinion on it with regard to the other capital offenses. See Hearings, p. 7708.

[62] See 18 U.S.C. 3282; *Pendergast* v. *United States, supra* note 18.

[63] See 26 U.S.C. 6531 and 6513 and discussion *supra;* see also *United States* v. *Habig, supra* note 36, which the Committee endorses.

Subparagraph (A) is designed to embody the Supreme Court's often declared doctrine that a criminal conspiracy, because of its inherent nature which "clearly contemplates" a prolonged course of action,[64] exists for so long as the conspirators engage in conduct in furtherance of their scheme.[65]

The phrase "conduct . . . for which the defendant is responsible" is intended to reflect the essential conspiracy notion that a person is responsible not only for his own conduct but for the conduct of his coconspirators in aid of the conspiracy. Thus, the time when the applicable period of limitations begins to run as to a person charged with conspiracy is not from the date of his last conduct in furtherance of the illicit scheme, but from the last such conduct for which he is responsible.[66] The phrase "conduct . . . for which the defendant is responsible" is also intended to take account of the situation where an individual's membership in a conspiracy has ceased (e.g., by withdrawal) even though the conspiracy itself continues. As to such a person, the statute of limitations commences to run as of the date when his own membership in the conspiracy ceased.[67]

The final clauses of the subparagraph, relating to the situations where the last remaining objective of the conspiracy has been frustrated or the conspiracy has been terminated or abandoned, are intended to deal with the not infrequent circumstances where a criminal conspiracy is terminated before fulfillment of all of its objectives. In such a case, the applicable period of limitations begins to run when the conspiracy itself was frustrated or abandoned.

Subparagraph (B) applies to offenses of failure, neglect, or refusal to register and provides, in effect, that the period of limitations does not start to run with respect to such offenses until the person registers as required or the duty to register ceases. This subparagraph is a continuation of existing statutory law, which finds its basis in the fact that crimes of non-registration are, by their very nature, among the most difficult to discover and are, therefore, appropriately subject to a more lengthly period of limitations than other crimes. Examples of offenses of this title to which this provision applies are: (1) failing to register as a person trained in a foreign espionage system (section 1125(a)(1)) and (2) failing to register as a foreign agent (section 1126(a)(1)). The subparagraph also applies to offenses outside this title, such as failing to register as an alien.[68]

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[64] *Toussie* v. *United States, supra* note 3.

[65] See, e.g., *Fiswick* v. *United States,* 329 U.S. 211, 216 (1946), and cases cited therein; *Grunewald* v. *United States,* 353 U.S. 391, 396–397 (1957); *Toussie* v. *United States, supra* note 3. This doctrine as stated, or course, applies only to conspiracies which require the commission of an overt act, such as the offense defined in section 1002.

[66] *United States* v. *Novak, supra* note 22.

[67] *United States* v. *Borelli,* 336 F.2d 376, 388–390 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); see also *Hyde* v. *United States, 225 U.S. 347, 369–370 (1912); United States* v. *Heckman,* 479 F.2d 726, 729 (3d Cir. 1973); cf. *United States* v. *Etheridge,* 424 F.2d 951, 964–965 (6th Cir.), cert. granted *sub nom. Bostic* v. *United States,* 400 U.S. 991 (1970), writ dismissed as improvidently granted, 402 U.S. 547 (1971).

It is appropriate to note here that an exception to section 511 has been provided in the conforming amendments for the offense of evading military or alternative civilian service by failing, neglecting, or refusing to register for military service (section 1114(a)(1)(A). The conforming amendment amends 50 U.S.C. App. 462 to essentially provide that a person who refuses to register under the selective service laws shall, notwithstanding the provisions of section 511, be subject to prosecution only until he reaches the age of 26 or until five years have passed since he was first required to register, whichever is the later. This provision continues in a somewhat modified from the decision of the Congress, as expressed in 50 U.S.C. App. 462(d), to correct the inequitable result reached by the Supreme Court in *Toussie* v. *United States.*[69] In that case, the Court, absent express statutory language, construed the law punishing failure to registter for the draft as not creating a continuing offense and thus held that a person who failed to register as required within a short period after his eighteenth birthday could not be prosecuted more than five years thereafter (i.e., beyond the age of twenty-three), even though he was subject to the draft until the age of twenty-six. As stated above, the difficulty of discovering non-registration offenses makes inappropriate the application of the five-year period of limitation. At the same time, it is the Committee's determination that the provisions of 50 U.S.C. App. 462(d), permitting prosecution of the non-registrant until his thirty-first birthday, establishes an unnecessarily long period of limitations for the purposes of the criminal law. The Committee considers that the eight-year period provided by the conforming amendments allows sufficient time in which to discover the commission of the offense and to determine whether the non-registrant should be prosecuted. The alternate period provided, i.e., five years after the individual is first required to register, is designed to apply to individuals such as resident aliens who first enter this country, and thus are first subject to a duty to register, when they are between 21 and 26 years of age.[70]

The final subparagraph states familiar doctrine. The inclusion of the term "plainly" is meant to prevent courts from too readily construing offenses as "continuing" and thereby thwarting the policy of repose underlying the uniform statute of limitations. The requirement that the purpose appear in "the statute" rather than, for example in a regulation, is also consistent with existing law and further limits the scope of the continuing offense concept. The standard adopted by the Committee is intended to be substantially equivalent to the one utilized by the Supreme Court in *Toussie, supra.*[71]

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[68] 8 U.S.C. 1302, 1306(a).

[69] *Supra* note 3.

[70] It is relevant to note that making nonregistration offenses "continuing" does not violate the Fifth Amendment privilege against compulsory self-incrimination. If the initial registration requirement is valid, then providing for a continuing crime of failing to register does not increase the penalty for the original failure and thus does not *compel* incrimination. See *Toussie* v. *United States, supra* note 3 at 133–134. (White J. dissenting); cf. also *United States* v. *Sacco*, 428 F.2d 264, 271 (9th Cir.), cert. denied, 400 U.S. 903 (1970). The majority in *Toussie* pointedly did not seek to justify their result on Fifth Amendment grounds.

> [S]uch a result [i.e., that a particular offense is continuing] should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Although the Committee anticipates that not many offenses will satisfy the criteria in this final subparagraph and thus be deemed "continuing" there is no intent to apply a more stringent standard than presently is in force. Therefore, offenses which have been judicially interpreted as continuing under current law and which are carried forward in the proposed Code should also be deemed to qualify for such treatment under this provision. Examples of such offenses are an alien being present in the United States after having been deported (section 1211(a)(4),[72] and possession of contraband offenses, such as possession of a prohibited object by an inmate of an official detention facility (section 1314(a)(2)) and possession of burglar's tools (section 1715).[73] Similarly the Committee contemplates that offenses outside the proposed Code which have been ruled to be "continuing" will retain that status under this provision.[74]

(iii) Special Time Limitations

Subsection (c) of section 511 extends time limitations for certain offenses by up to three years beyond the normal period of limitations. The offenses to which the special limitations period applies under this subsection involve fraud, concealment, or an opportunity for concealment of the crime, and are of a type generally treated as continuing offenses under current law.

A provision similiar to this subsection was contained in S. 1437 and S. 1722[75] and in the Final Report.[76] The theory underlying this approach is that certain offenses, the discovery of which is more difficult than for ordinary offenses, warrant a longer statute of limitations period but not a period as potentially long as that for a continuing offense.

The subsection provides that even if the applicable period of limitations in subsection (b) has expired, if not more than three years have passed since the date of expiration, a prosecution may nev ertheless be timely commenced (1) for an offense of which a material element is fraud or a breach of fiduciary obligation, within one year after the facts relating to the offense are known or should reasonably have been known by an official of the United States charged with the responsibility to act in the circumstances,[77] who is not an accomplice in the offense; (2) for an offense based on official conduct in office by a public servant at any time when the defendant is a public servant or within two years after he ceases to be a public servant; and (3) for an offense based on concealment of assets of a bankrupt or other debtor, at any time until the debtor has received a discharge or a discharge has been denied.

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[71] 397 U.S. at 115. The Committee believes that under the *Toussie* test the offense at issue should have been held to be continuing in nature.

[72] See *United States* v. *Bruno, supra* note 25.

[73] See generally *Von Eichelberger* v. *United States, supra* note 23.

[74] See, e.g., *United States* v. *Guertler*, 147 F.2d 796 (2d Cir.), cert. denied, 325 U.S. 879 (1945) (failure to notify one's local selective service board of a change of address under 50 U.S.C. App. 462); see also 8 U.S.C. 1306(b) (failure of alien to notify Attorney General of change of address).

[75] See section 511.

[76] See Final Report. § 701(4).

Offenses involving fraud or a breach of fiduciary duty are typically concealed offenses where the opportunity for discovery is reduced as compared with the ordinary crime. Current law has recognized the special nature of such crimes by, in some instances, deeming them continuing offenses,[78] and in others by legislatively extending the applicable period of limitations.[79]

Offenses based on official conduct in office by a public servant[80] are also crimes in which discovery may be difficult while the culprit remains in office and thus in a position to hinder investigative efforts. One present statute, applicable to criminal subversive activities by Federal employees, deals with this problem by, in effect, suspending the running of the limitations period for however long the offender remains a Federal employee.[81] Paragraph (2) herein generalizes from the policy inherent in this current statute, but adopts the less drastic solution of providing an extended period of limitations.[82]

An offense based on concealment of assets of a bankrupt or other debtor is presently a continuing offense until the debtor has received a discharge or a discharge has been denied.[83] Since this particular offense is like the general category of offenses in paragraph (1), it is deemed appropriate for inclusion in this subsection.[84]

The restriction upon the extension of the period of limitations under this subsection to a maximum of three years in effect acknowledges the application of the policies favoring repose that underlie the basic prescription of a statute of limitations.

Thus, while offenses involving fraud or an opportunity for concealment are admittedly more difficult for law enforcement authorities to unearth, it is not thought appropriate to respond to this problem by granting what may amount to an unlimited extension of the applicable period of limitations—for example, by treating such offenses as "continuing," or by suspending the period of limitations, until (in either case) the offense is discovered. Rather, the Committee believes that providing an extended period for prosecution of up to three years will enable nearly all such offenses to be prosecuted, while still insuring that those values inherent in the adoption of a fixed limitation period are preserved.[85]

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[77] The clause in this subsection reading from "the facts relating" through "in the circumstances" is derived from 28 U.S.C. 2416(c), providing for the tolling of the period of limitation in civil actions brought by the United States.

[78] *Bramblett* v. *United States, supra* note 24.

[79] An example is 26 U.S.C. 6531, which describes several Internal Revenue offenses excepted from the basic three year period of limitations. See also Working Papers, pp. 292, 294-95. The Committee intends to perpetuate the holding of *United States* v. *Scharton, supra* note 21, that the offense of evading or attempting to evade taxes does not involve "fraud for the purpose of determining the limitations period for prosecution. Consequently, the period of limitation for an offense under section 1401 (Tax Evasion) will be five rather than eight years. There is no intention, however, to change what we view to be the correct result under 26 U.S.C. 6653(b), that a conviction for an appropriate tax offense collaterally stops the taxpayer from denying the occurrence of fraud under section 6653(b) and 6501(c) of Title 26. See *Amos* v. *Commissioner*, 43 T.C. 50 (1964), aff'd, 360 F.2d 358 (4th Cir. 1965); *Considine* v. *Commissioner*, 68 T.C. 52 (1977).

[80] The term "public servant" is defined in section 111.

[81] 50 U.S.C. 783(e).

[82] See Working Papers, p. 396. This approach was approved by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code. Hearings, p. 7708.

[83] 18 U.S.C. 3284.

[84] The Committee intends that the holding in *Guglielmini* v. *United States, supra* note 20, that 18 U.S.C. 3284 applies also to the situation where the bankrupt has waived his right to a discharge, be perpetuated under this paragraph.

(iv) Commencement of Prosecution

Subsection (e) of section 511 defines the time when a prosecution is commenced. The first sentence provides that a prosecution can be instituted upon the filing of an indictment or information or, if it is impracticable to obtain an indictment before the period of limitation is due to expire, by the filing of a complaint establishing probable cause before a judicial officer empowered to issue a warrant. This latter feature, while new to Federal law, is contained in most modern State statutes of limitations and was recommended by the New York City Bar Association's Special Committee on the proposed new Federal Criminal Code.[86] Permitting prosecutions to be commenced by the filing of a complaint establishing probable cause will enable prosecutors to avoid running afoul of the limitations period when a crime is discovered shortly before the applicable period is due to expire, and there is no grand jury is session or it is impracticable to present the case to a grand jury within the remaining time. Of course, the government would still be required in due course to obtain an indictment, as required by the Constitution. As indicated previously, a similar provision already exists in 26 U.S.C. 6531 with respect to internal revenue offenses.

The first sentence of subsection (e) also provides that commencement of prosecution for an offense shall be deemed commencement of prosecution for any necessarily included offenses. The purpose of this provision is to insure that a conviction for a lesser included offense will not be subject to challenge on statute of limitations grounds where, at the time the prosecution was begun for the present offense, the period of limitation had not expired with respect to the lesser offense, but it had expired at the time of conviction. The problem of how to deal with lesser included offense convictions arising from a prosecution for a parent offense begun after the period of limitation has expired with respect to the lesser offense is addressed in the next sentence.

The second sentence is an innovation and represents a departure from present law. It provides that a prosecution for an offense necessarily included in the offense charged shall be deemed timely commenced, even if the applicable period of limitations has expired, if as to the offense charged the period of limitation has not expired and there is, "after the close of the evidence at the trial, sufficient evidence as a matter of law to sustain a conviction of the offense charged." The purpose of this provision is to afford a fair standard for determining the timeliness of prosecutions for included offenses as to which the period of limitation has expired, but where the prosecution for the parent offense charged was timely. Existing law has treated convictions for such lesser included offenses as out of time, principally predicated on the notion that to hold otherwise would permit prosecutors to revive stale charges for included offenses merely by the device of causing a prosecution to be commenced for the parent offenses.[87] While the Committee agrees that such an opportunity for bad faith resurrection of prosecutions ought not to be allowed, permitting defendants to overturn their convictions of lesser included crimes where the prosecution of the parent offense was not a pretext seems equally unjustified. The standard proposed by the Committee balances these interests by providing that the included offense will be deemed timely commenced only if there was sufficient evidence, at the close of the case, to support as a matter of law a conviction for the offense charged. A substantially identical provision appeared in the Final Report.[88]

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[85] E.g., that the trial verdict is a reliable result and that the law enforcement authorities are encouraged to expeditiously investigate crimes.

[86] See Hearings, p. 7708. For a contrary view, see Hearings, Part XIV, pp. 9973, 9984, and Part XVI, pp. 11842-11843 (statements of the American Bar Association).

(v) Extended Period to Commence New Prosecution

Subsection (f) of section 511 essentially consolidates 18 U.S.C. 3288 and 3289.[89] The subsection provides that if a timely prosecution is dismissed for any "error, defect, insufficiency, or irregularity, a new prosecution may be commenced within one hundred and twenty days after the dismissal becomes final even though the period of limitation has expired at the time of the dismissal or will expire within one hundred and twenty days thereafter." The Committee reduced the six-month period allowed under present law to recommence a prosecution, based on the suggestion of the American Bar Association that this period was excessive.[90] By affording a uniform four-month interval to commence a new prosecution after a dismissal becomes final, the subsection corrects a disparity in existing law under which, if the dismissal takes place within six months of the date when the statute of limitations is due to expire, the government has until six months after the expiration date (not the date of dismissal) in order to begin a new prosecution. The words "becomes final" are included to avoid presenting prosecutors with the unreasonable choice whether to pursue an appeal or to accept the lower court decision and commence a reprosecution. Under the bill the government can appeal and, if unsuccessful, still have four months in which to prosecute. The Committee intends that present law be followed with regard to whether a dismissal was for "any error, defect, insufficiency, or irregularity."[91]

(vi) Suspension of Limitations

Subsection (g) of section 511 provides that the "period of limitation does not run while the person who committed or who is criminally liable for an offense is absent from the United States or is a fugitive." With respect to the concept of domestic fugitivity, the Committee, because of the still unsettled construction of the present "fugitive" statute, 18 U.S.C. 3290, has decided not to attempt a more precise definition of domestic fugitive status, instead leaving the matter to further case development. In general, the Committee believes that an intent to avoid justice is an integral element of fugitivity. However, there should be an exception when an individual cannot, because of objective factors such as the lack of an ascertainable place of work or abode, reasonably be located within the United States. To be sure, the government may, if it knows the identity of an offender, cause a complaint to be issued and thereby stop the running of the limitations period,[92] but inability despite reasonable diligence to locate a suspect will often prevent identification (e.g., in a lineup) necessary to establish probable cause. Moreover such absence prevents the opportunity for questioning and in certain circumstances for a personal search, both of which may further the investigation of a crime.

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[87] See *Askins* v. *United States, supra* note 5; Working Papers, pp. 297–298.

[88] Section 701(6)(b)(i). Such a standard was regarded as "appropriate" by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code. See Hearings, p. 7708.

[89] See discussion under this section of *Present Federal Law, supra.*

[90] See Hearings, Part XVI, p. 11842.

[91] See *United States* v. *Porth,* 426 F.2d 519, 522, (10th Cir.), cert. denied, 400 U.S. 824 (1970), and cases cited therein; *United States* v. *Charnay,* 537 F.2d 341, 353–355 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

Because the government will be contending that the statute of limitations was tolled, it has the burden of establishing the defendant's absence from the United States or his fugitivity.[93]

Because of the difficulties of international extradition, this subsection treats absence from the country, for whatever reason or duration, and regardless of whether an individual's whereabouts are known, as halting the running of the applicable period of limitation. This is consistent with the present internal revenue provision,[94] and with the joint recommendation of a distinguished consultant to, and the Deputy Director of, the National Commission.[95]

As under current law, the offender's absence from the country or his fugitivity need not occur after he has been formally charged with the offense in order for this subsection to be applicable. If at any time after the offense the offender is outside the country or a fugitive, the limitations period is suspended. Thus this provision may apply even though the offender is outside the country at the time the offense is committed (e.g., in the case of a co-conspirator or aider and abettor, or in the case of a principal where extraterritorial jurisdiction extends to the offense).[96]

In accordance with the recommendation of the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code,[97] the Committee determined not to include a suspension of limitations provision applicable in wartime. The existing statute, which applies only to certain crimes relating to commercial aspects of a war program,[98] was enacted in the context of a general three-year period of limitation. Since the general period proposed by the Code is five years, with a further extension for certain crimes involving fraud or conduct by a public servant, there seems no need for a special wartime suspension statute.[99]

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[92] See Working Papers, p. 301.

[93] This is current law. See *Brouse* v. *United States, supra* note 43.

[94] See 26 U.S.C. 6531 and discussion *supra,* note 79.

[95] See Working Papers, p. 293. The consultant referred to is Judge Frank Q. Nebeker of the District of Columbia Court of Appeals.

[96] Compare *United States* v. *Belimex Corp.*, 340 F. Supp. 466. 469–470 (S.D.N.Y. 1971).

[97] See Hearings, p. 7710.

[98] See 18 U.S.C. 3287 and discussion under this section of *Present Federal Law, supra.*

[99] See Working Papers, p. 287.

SECTION 512. IMMATURITY

1. In General

This section addresses the problem of the extent to which society will hold its youth criminally liable.

Under the common law an infant was subject to prosecution and conviction as an adult if he had develped sufficient intelligence and moral perception to distinguish between right and wrong and to comprehend the legal consequences of his acts.[100] As an alternative to this rule, which required an individualized determination of the offender's maturity, the States and the Federal government have generally developed statutes that provide more uniform results by fixing specific age limits below which prosecution as an adult is prohibited. This section is consistent with such a trend. It creates an absolute bar to prosecution as an adult for a juvenile who was less than twelve years old at the time of the offense, and creates a bar to prosecution as an adult for a juvenile who was less than eighteen years old at the time of the offense unless the offense was a crime of violence that is a felony or was an offense under section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs). The Committee's proposal is consistent with the recommendations of the National Commission as to the bar to adult prosecutions for most offenders under the age of eighteen and as to providing a specific lower age limit for adult prosecution even in extremely serious cases.[101] It differs, however, in the lower age limit provided.[102]

2. Present Federal Law

Under 18 U.S.C. 5031, as amended in 1974, a "juvenile" is basically defined as a person "who has not attained his eighteenth birthday."[103] The 1974 amendments to 18 U.S.C. 5032 provide that a juvenile alleged to have committed an act in violation of a law of the United States not punishable by ten or more year's imprisonment, life imprisonment, or death, and not surrendered to the authorities of a State, shall be proceeded against as a juvenile delinquest unless he request treatment as an adult.[104] No Federal proceeding may be initiated unless the Attorney General certifies that the appropriate State court is not willing or has no jurisdiction to proceed or that the State's juvenile facilities are inadequate. Prior to these amendments that statute permitted the Attorney General to proceed against any person, no matter how youthful, as an adult. Indeed, it had been held that the Attorney General's discretion in this regard was not subject to ordinary review by the courts.[105]

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[100] See 43 C.J.S. Infants, p. 94. However, a child under seven years of age was deemed incompetent to have a criminal intent. See Perkins, *Criminal Law*, pp. 837-841 (2d ed. 1969).

[101] See Working Papers, pp. 217-220.

[102] See Final Report § 501. Inclusion of a bar to prosecution for immaturity was supported by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code. See Hearings, p. 7705.

[103] For purposes of disposition and proceedings for an alleged act of juvenile delinquency, section 5031 also defines a juvenile as a person who has not attained his twenty-first birthday, where the act was committed before his eighteenth birthday.

[104] P.L. 93.415, 88 Stat 1109.

[105] See *United States* v. *Verra*, 203 F. Supp. 87 (S.D.N.Y. 1962): see also *United States* v. *Bland.* 472 F.2d 1329, 1337 (D.C. Cir. 1972), cert. denied 412 U.S. 909 (1973); cf., *Cox* v. *United States*, 473 F.2d 334 (4th Cir.), cert. denied, 414 U.S. 869 (1973) (*en banc*).

Under section 5032, only a juvenile sixteen years old or older may be tried as an adult and then only if the crime involves the possible imposition of a sentence of death, ten or more years, or life imprisonment. With respect to the definition of a "juvenile," the courts have determined that it is the individual's age at the time of the alleged commission of the offense that is relevant, not his age at the time of any hearings or trial.[106]

Federal prosecutions of juveniles as adults are rare. There are no Federal family courts outside the Federal territories, and Federal policy is in nearly all instances in which there is concurrent State and Federal jurisdiction to turn over to the States juveniles who have violated Federal law. United States attorneys rarely request authority from the Attorney General to prosecute juveniles criminally, and few authorizations are granted. Such authorization are reserved for exceptional cases in which a youth has committed some major criminal act and does not appear to be suitable for treatment as a juvenile delinquent.[107]

3. The Provisions of the Bill, as Reported

Section 512 provides in part that it is a bar to prosecution under any Federal statute that at the time of the commission of the offense charged the defendant was less than twelve years old. Section 512 also bars prosecution of a juvenile between the ages of twelve and eighteen as an adult unless he is charged with a crime of violence that is a felony or with an offense described in section 1811 (Trafficking in an Opiate) or section 1812 (Trafficking in Drugs). The section also indicates that it is not a bar to a juvenile delinquency proceeding under subchapter A of chapter 36.

The Committee is aware of the extensive controversy in recent years over the appropriate age separating the juvenile delinquent from the adult offender. On the one hand, it has been argued that juvenile offenders are different in kind from adult offenders, and that rehabilitation should be the primary goal of the system in determining how these young people should be treated if they commit offenses.[108] On the other hand, there is growing concern about the high percentage of violent crime committed by juveniles who have records of criminal activity, and growing recognition that for some of these juveniles the rehabilitation theory behind the juvenile justice system is not always adequate to protect the public interest.[109] In 1979, about 20 percent of all arrests for violent crime and 44 percent of all arrests for serious property crimes were arrests of juveniles.[110] The Committee has decided to balance these concerns by retaining the age limit of current law for less serious juvenile offenses, while permitting adult prosecution "in the interest of justice"[111] of a juvenile between the ages of twelve and eighteen if the offense charged is a crime of violence that is a felony or an offense under section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs).[112] The Committee intends that the prosecution of a juvenile as an adult continue to be considered with care, and intends that this authority be used with considerably less frequency, for example, for twelve-year olds than for seventeen-year olds. While the minimum age for adult prosecution varies widely, over half of the States permit adult prosecution of juveniles under the age of sixteen,[113] the minimum age provided in current Federal law. The Committee has chosen the age of twelve as the minimum in order to assure that, if a particularly heinous offense is committed by such a young person, or if a violent offense is committed after a record of serious offenses as a juvenile, adult prosecution will be possible if the judge finds that it is in the interest of justice.

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[106] See e.g. *United States* v. *Jones*, 141 F. Supp. 641 (E.D. Va. 1956).

[107] See Working Papers, p. 218.

[108] See, e.g., National Advisory Comm. for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice*, Standard § 3.116 (1980).

[109] Morgan, *They Think, "I Can Kill Because I'm 14,"* Juvenile Delinquency and the Juvenile Justice System 138, 141 (D. Katkin, D. Hyman, and J. Kramer, eds. 1976); Feld, *Juvenile Court Legislative Reform on the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 Minn. L. Rev. 167 (1981); *Woodward* v. *Wainright*, 556 F.2d 781 (5th Cir. 1977), cert. denied, 434 U.S. 1088 (1978) (treatment as a juvenile is not an inherent right and may be restricted or qualified; the court stated that the legislature was entitled to conclude that the *parens patriae* function of the juvenile system would not work for certain juveniles or that society demanded greater protection from these offenders). See, Reyes, *Juvenile Crime*, Hous. Chronicle, Aug. 14, 1979, at 1, col. 1; *State* v. *Berard*, 401 A.2d 448 (R.I. 1979) (special *parens patriae* treatment of juvenile has not ripened into a constitutional right and therefore a State statute making certain recidivist juveniles over sixteen subject to adult prosecution is not unconstitutional); *Serious Youth Offender Penalties Harden*, 11 Crim. Just. Newsletter 6 (Sept. 29, 1980).

As in present law, the relevant age for determining criminal responsibility will be the age as of the date the alleged unlawful act was committed. In accord with the 1974 amendments to 18 U.S.C. 5031 closing a gap in prior law that existed where an individual commmitted an offense when he was less than sixteen years old but was not apprehended until he was eighteen, provisions contained in the procedural part of the subject bill would broaden the scope of juvenile delinquency proceedings to encompass persons over eighteen, but under twenty-one, when they are charged with offenses occurring prior to their eighteenth birthday, and would expand the authority of the court to impose detention and probation in such proceedings.

"Immaturity" as in this section is denominated as a "bar to prosecution," thus requiring that the issue of immaturity be raised and determined in accordance with the provisions of Rule 12 of the Federal Rules of Criminal Procedure.[114] Since there will seldom be a dispute as to the defendant's age at the time of the commission of the alleged offense, the Committee deems it appropriate that the question of immaturity ordinarily be disposed of prior to trial.

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[110] U.S. Dept. of Justice, Federal Bureau of Investigation, *Crime in the United States 1979* (1980).

[111] See section 3603(a)(2).

[112] Section 512 is a special provision that complements the juvenile delinquency provisions set forth in subchapter A of chapter 36. Those provisions define a juvenile delinquent as a person who engages in conduct constituting an offense before he is 18 (section 3605(b)). If a juvenile commits an offense before he is 18, he is subject to juvenile delinquency proceedings unless he is turned over to the State pursuant to section 3601 or prosecuted as an adult pursuant to section 3603. A juvenile between the ages of 12 and 18 may be treated as an adult only if he so elects on advice of counsel (section 3603(a)(1)), or if he is charged with a violent felony or drug trafficking, the Attorney General files a motion that the juvenile be treated as a adult, and the court after a hearing finds such treatment to be in the interests of justice (section 3603(a)(2)).

[113] See Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards: Standards Relating to Transfer Between Courts* 18 (1979). The ABA Standards, *supra* (Standard 1.1C) recommend a minimum age of 15, while the *Standards for the Administration of Juvenile Justice* of the National Advisory Committee for Juvenile Justice and Delinquency Prevention recommended that the minimum age of 16 be retained. *Standards* at 258 (1980).

[114] See the definition of "bar to prosecution" in section 111.

PART II.—OFFENSES

Part II of the Federal Criminal Code describes the conduct that is made criminal. There are nine chapters (chapters 10–18) in this Part. There is a chapter on offenses of general applicability (chapter 10), a chapter on offenses involving national defense (chapter 11), a chapter on offenses involving international affairs (chapter 12), a chapter on offenses involving government processes (chapter 13), a chapter on offenses involving taxation (chapter 14), a chapter on offenses involving individual rights (chapter 15), a chapter on offenses against the person (chapter 16), a chapter on offenses against property (chapter 17), and a chapter on offenses involving public order, safety, health, and welfare (chapter 18).

This is the substantive part of the Code. It represents, in the main, a revision and codification of the provisions of title 18 of the United States Code. However, criminal provisions in titles of the United States Code other that title 18 have been incorporated in this Part, it being one of the purposes underlying this legislation that the Federal Criminal Code should contain all major offenses against the United States.

CHAPTER 10.—OFFENSES OF GENERAL APPLICABILITY

(Sections 1001–1004)

Chapter 10 covers the offenses of criminal attempt (section 1001), criminal conspiracy (section 1002), and criminal solicitation (section 1003). Each of these sections contains a new affirmative defense of renunciation. A fourth section (1004) contains general provisions applicable to the foregoing crimes. These offenses are alike in that in each the ultimate objective of the actor is to commit some other crime. The gravamen of an offense under this chapter is the manifestation by the actor of his criminal intent. For example, in order to commit a criminal attempt the actor must perform some act constituting a substantial step toward the commission of the crime; and in order to commit criminal solicitation, the actor must communicate with another person in an effort to solicit that person to commit a crime. Likewise, before there is a criminal conspiracy, two or more persons must agree to engage in conduct constituting a crime and one of these persons must engage in conduct to effect any objective of the agreement. In each of these offenses, therefore, the actor must engage in conduct which so sufficiently demonstrates his criminal intent as to justify permitting society to intervene before the ultimate crime is carried out.

SECTION 1001. CRIMINAL ATTEMPT

1. General Scope and Background

This section will provide, for the first time in the Federal criminal code, a general attempt provision. A principal advantage of such a provision is that it will furnish a uniform definition of what constitutes a criminal attempt under Federal law. Another advantage is that a general attempt provision will eliminate many of the irrational gaps in Federal attempt coverage which exist as a result of the present patchwork of attempt statutes.[1] That is not to say

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[1] A good example of such a gap is illustrated by *Keck* v. *United States,* 172 U.S. 434 (1899), where the Court found no violation of former section 2865 of the Revised Statutes, which contained the same basic language as the present 18 U.S.C. 545, although the evidence demonstrated the defendant's clear intent to smuggle diamonds into the United States, and the diamonds had been concealed and transported by ship from Belgium to the port of Philadelphia. The Court stated that (*id* at 444):

"whilst it [section 2865] embraces the act of smuggling or clandestine introduction it does not include mere attempts to commit the same . . . It was, indeed, argued at bar that, as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore, such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission."

Examples of other Federal offenses for which there is no corresponding attempt provision include: embezzlement of any "record, voucher, money or thing of value" of the United States or of any department or agency thereof (18 U.S.C. 641); embezzlement of any property of value of any bank which is a member of the Federal Reserve or is insured by the Federal Deposit Insurance Corporation (18 U.S.C. 655, 656); stealing of any goods, or chattels which are a part of an interstate or foreign shipment (18 U.S.C. 659); disclosure of classified information to an unauthat Congress may not on a principled basis elect not to apply a general attempt provision to a specific crime, such as negligent homicide. Indeed, the Committee does make some exclusions as indicated in and discussed in conjunction with section 1004 (General Provisions for Chapter 10).

At common law, a criminal attempt occurred if a person, with intent to commit a specific crime, did some act, beyond mere preparation, toward carrying out the intent. The greatest problem under the common law was determining whether an act was still in the preparatory state or whether it had passed into the attempt stage. For example, such acts as purchasing a gun or poison, or purchasing and loading a gun have been held to be mere preparatory steps to the commission of murder and not sufficient to constitute attempted murder.[2]

Various tests have been devised to distinguish acts of preparation from acts constituting an attempts.[3] One such test is the "physical proximity doctrine" which requires the act to be proximate to the completed crime, or an act directly tending toward the completion of the crime,[4] or an act amounting to the commencement of the consummation. Under the most stringent view of this test, the actor's conduct does not proceed beyond preparation until the actor has the power, or at least the apparent power, to complete the crime forthwith.[5]

Another test is the "dangerous proximity doctrine" enunciated by Justice Holmes in *Commonwealth* v. *Peaslee,*[6] and adopted by Judge Learned Hand in *United States* v. *Coplon.*[7] Under this test, such factors as the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct will result in the offense intended are taken into consideration. Thus the greater the gravity and probability, and the nearer the act to the crime, the stronger is the case for calling the act an attempt.

A variation of the first two tests is the "indispensable element" approach which requires the actor to be in control of every indispensable aspect of the criminal endeavor in order to commit an attempt. Thus if the successful completion of a crime requires the assistance or action of some third person, that assistance or action must be forthcoming before the actor is guilty of an attempt.[8] Likewise, under this test, a person cannot be guilty of an attempt if he lacks a means essential to completion of the offense. Using this test, it has been held that one cannot be guilty of attempt to manufacture whiskey illegally until he acquires the necessary appara-

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thorized person (18 U.S.C. 798); robbery within the special maritime jurisdiction and territorial jurisdiction of the United States (18 U.S.C. 2111); and robbery of property belonging to the United States (18 U.S.C. 2112).

[2] See Keedy, *Criminal Attempts at Common Law,* 102 U. Pa L. Rev. 464 (1954).

[3] For a general discussion see Model Penal Code § 5.01, comment, p. 39 (Tent. Draft No. 10, 1960).

[4] See 10 U.S.C. 880 ("An act amounting to more than mere preparation and dealing . . . to effect" the commission of an offense).

[5] See *Commonwealth* v. *Kelley,* 162 Pa. Super. 526, 28 A.2d 375 (1948).

[6] 177 Mass. 267, 59 N.E. 55 (1901).

[7] 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

[8] *State* v. *Wood,* 19 S.D. 260, 103 N.W. 25 (1905).

tus,[9] nor can a person be guilty of an attempt to vote illegally until he obtains a ballot.[10]

Another test is the "probable desistance test" which provides that the actor's conduct consititutes an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended. A difficulty with this test is that in each case a judgement has to be made as to whether the actor had reached a point where it was unlikely that he would have voluntarily desisted from his efforts to commit the crime.

Still another test, which takes an entirely different approach to the preparation-attempt problem, is the "*res ipsa loquitur*" test, which holds that an attempt is committed when the actor's conduct manifests an intent to commit a crime. Under this test, the actor's conduct would be considered in relation to all the surrounding circumstances exclusive of representations made by the actor about his intentions. The object of such an approach is to subject to attempt liability conduct which unequivocally demonstrates that the actor is being guided by a criminal purpose.

States which have codified their criminal offenses have taken various approachs to criminal attempt. Some States make it an offense where a person "attempts" to commit a crime "and in such attempt does any act toward the commission of such an offense, but fails in the perpetration, or is intercepted or prevented in the execution of the same."[11] Other States define an attempt as an "act done with intent to commit a crime and tending, but failing, to accomplish it."[12] Still other States, as well as the District of Columbia, impose criminal liability generally for attempts to commit crimes but do not define the offense.[13]

Notwithstanding the differences in the definition of attempt, it is, as the foregoing discussion shows, well established from common law decisions and State statutes that conduct which falls short of the commission of a substantive crime may nevertheless be subject to punishment as an attempt. The reasons for making such conduct a separate criminal offense have been well stated by the authors of the Model Penal Code.[14]

> First: When a person is seriously dedicated to commission of a crime, there is obviously need for a firm legal basis for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in de-

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[9] *State* v. *Addor,* 183 N.C. 687, 110 S.E. 650 (1922); *Trent* v. *Commonwealth,* 155 Va. 1128, 156, S.E. 567 (1931).

[10] *State* v. *Fielder,* 210 Mo. 188, 109 S.W. 580 (1908).

[11] See, e.g., Florida Stat. Ann. § 776.04 (1972); Alaska Comp. Laws. Ann. § 11.05.020 (1970); Mass. Laws Ann. § 274.6 (1956); Mich Stat. Ann. 28-287 (1961); Okla. Stat. Ann. tit. 21 § 42 (1951).

[12] See, e.g. N.M. Stat. Ann. 40A-28-1 (1963); Nev. Rev. Stat. § 208.070 (1957); Wash. Rev. Code § 9.01.070 (1951).

[13] See, e.g. D.C. Code § 22-103 (1951); N.H. Rev. Stat. Ann. §§ 590:5-590:6 (1955), N.J. Stat. § 2A:85-5 (1951), Tenn. Code Ann. § 34-603 (1955).

[14] Model Penal Code. Art. 5, Comment, p. 25 (Tent. Drat No. 10, 1960).

ciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.

Second: Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.

Third: Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortunity, as when the bullet misses in attempted murder . . . his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system, designed to serve the proper goals of penal law.

2. Present Federal Law

Currently, as indicated before, there is no general attempt provision applicable to all Federal offenses. Several statutes, however, include attempt language within the substantive offense. For example, 18 U.S.C. 794, provides that: "Whoever . . . communicates, delivers, or transmits, *or attempts to* communicate, deliver, or transmit, to any foreign government . . ." 18 U.S.C. 2197 provides: "Whoever forges, counterfeits, or steals, or *attempts to* forge, counterfeit, or steal . . ." [Emphasis added in the quoted excerpts, *supra.*] Similarly 18 U.S.C. 771 makes it an offense to pass, utter, publish, or sell or to *attempt to* pass, utter, publish, or sell any counterfeited or altered obligation of the United States.

Other Federal statutes define as a substantive offense both efforts to obtain the prohibited result as well as the prohibited result itself. Thus 18 U.S.C. 912 provides: "Whoever falsely assumes or pretends to be an officer . . . of the United States . . . and . . . in such pretended character demands or obtains any money, paper, document or thing of value . . ." In the traditional sense a person who demanded but did not receive money or other thing of value would only be guilty of criminal attempt. However, since the statute prohibits a person from demanding as well as receiving money in the defined situation, the person would be guilty of the substantive offense.

Other Federal statutes defind as a separate crime conduct which is only a step toward commission of a more serious offense. For example, 18 U.S.C. 1952 prohibits anyone from traveling in interstate commerce or using "any facility in interstate . . . to commerce . . . with intent to . . . promote, manage, establish, carry on . . . any unlawful activity. . . ." 18 U.S.C. 1002 prohibits one from "knowingly and with intent to defraud the United States . . . [possessing] any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States . . . any sum of money . . ." And 18 U.S.C. 1341 makes it a crime for anyone who "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses representations, or promises . . . places in any post office . . . any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing. . . ."

At common law, the conduct listed above would be considered a criminal attempt, but since there is no general criminal attempt provision in Federal law it has been necessary to enact separate legislation to cover each situation. By providing a general criminal attempt provision it will be possible to eliminate many of these statutes which prohibit particular conduct amounting to an attempt.

Since none of the Federal statutes which covers attempts defines what constitutes an "attempt," Federal courts, like courts in other jurisdictions, have had to struggle with distinguishing between conduct that is mere preparation and conduct that goes beyond that into the attempt phase. Judge Learned Hand in *United States* v. *Coplon,*[15] adopted the following test first enunciated by Justice Holmes in *Commonwealth* v. *Peaslee:*[16]

> [P]reparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime.[17]

However, a recent compilation of model instructions for Federal judges [18] adopts the somewhat broader test declaredd in *United States* v. *Robles,*[19] where the court stated:

> To attempt to do an act does not imply a completion of the act, or in fact any definite progress toward it. Any effort or endeavor to effect the act will satisfy the terms of the law.

3. The Offense

A. Elements

Subsection (a) of section 1001 provides that a person commits an offense if, acting with the state of mind required for the commission of a crime, he intentionally engages in conduct that, in fact, constitutes a substantial step toward the commission of the crime.

The offense of attempt, like all of the offenses in chapter 10, is limited to conduct directed at the commission of a "crime." The term "crime" is defined in section 111 to mean a felony or misdemeanor, but not an infraction. Thus, there can be no offense of attempting to commit an infraction. The offense as drafted here contains two essential elements: a person must (1) intentionally engage in conduct, acting with the state of mind otherwise required for the commission of a crime, and (2) the conduct must constitute a substantial step toward its commission.[20]

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[15] 185 F.2d *supra* note 7 at 633.

[16] *Supra* note 6.

[17] Judge Hand sustained the conviction of a woman arrested before she could pass to her paramour classified documents which were in her purse.

[18] See Mathes and Dev[illegible] *Jury Practice and Instructions* (1965).

[19] 185 F. Supp 82, 85 (N.[illegible]) In this case the court sustained a conviction for attempting to illegally import narcotics usin[illegible] communication facilities where the defendant had mailed a letter to a Mexican manufacturer [illegible] heroin asking to purchase some.

The first element is consistent with the common law view that the actor must intend to commit acts constituting a specific crime, that is, he may not recklessly or negligently attempt to commit a crime; for example, negligently inflicting injury where death does not result is not attempted manslaughter.[21]

The second element deals with the problem of distinguishing between acts which amount to no more than preparation and those acts which manifest a serious dedication to the commission of a crime. The test set forth in the second element differs from those enunciated in the *Coplon* and *Robles* cases, *supra,* in that it shifts the focus from what remains to be done to what already has been done. The Committee's formulation rejects the dangerous proximity doctrine adhered to in *Coplon.* Thus, there need be no showing under this section that the crime was nearly completed, as where the would-be bank robber is apprehended just as he enters the bank with weapon brandished. On the other hand, the Committee desires specifically to continue the view, finding wide acceptance in the cases, that acts of mere preparation do not constitute attempts. For example, in the absence of other incriminating circumstances, merely reconnoitering a bank which the actor intends to rob would not be sufficient to constitute attempted robbery. Similarly, purchasing a weapon or other materials to be employed in the intended crime is not, in and of itself, sufficient to make out an attempt under this statute. Rather, the actor's conduct must constitute a substantial step *toward* commission of the crime, thereby clearly indicating his intent that the crime be completed.[22] This is consistent with the recommendation of the National Commission, which defined "substantial step" as meaning "any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." [23]

The Committee, as did the National Commission, has left the development of the law of attempt largely to case law under the standard furnished by this section, without listing in the statute the kinds of conduct that ordinarily would constitute the crime. However, as a general matter, the Committee intends that the following types of conduct be deemed sufficient to indicate an intent to complete the commission of a crime.

1. where the actor lies in wait, searches for, or follows his contemplated victim;
2. where the actor entices or seeks to entice an intended victim to go to the place contemplated for engaging in the conduct constituting the crime;

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[20] This formulation may be compared with that in use in the 5th and 7th circuits. *United States* v. *Mandujano,* 499 F.2d 370, 376 (5th Cir. 1974); *United States* v. *Green,* 511 F.2d 1062, 1072 (7th Cir. 1975).

[21] See *People* v. *Foster,* 19 N.Y. 2d 150, 225 N.E. 2d 200 (1967).

[22] See Working Papers, pp. 355–357. See also Recommendations of Committee on Reform of Federal Criminal Laws of the Section of Criminal Law of the American Bar Association. Hearings, pp. 5801, 5786–87; Report of the Association of the Bar of the City of New York, Hearings pp. 7711–7713.

[23] Final Report, § 1001.

3. where the actor enters a building, structure, vehicle, or other enclosure in which he intends to engage in conduct constituting the crime;

4. where the actor possesses, collects, or fabricates materials to be employed in the conduct constituting the crime, at or near the place contemplated for engaging in the conduct constituting the crime where such possession, collection, or fabrication serves no other intent of the person under the circumstances; or

5. where the actor solicits a person to engage in conduct constituting an element of the crime.

Needless to say, the conduct listed above constitutes examples centered on familiar common law offenses to illustrate the concept and is not intended to be exclusive of other types of conduct which may demonstrate the intent to complete the commission of an offense.[24]

B. Culpability

The conduct in this section is "engages in conduct." The culpability level is designated as "intentionally," thus requiring proof that the offender consciously desired to perform the conduct. The element that the offender must be "acting with the state of mind required for the commission of a crime" is intended to indicate the type of mental state which he must harbor with respect to elements of the intended crime other than conduct (since, as just noted, the section requires that the conduct be intentional). In other words, as to a particular intended crime, if the state of mind required for an attendant circumstance or a result of conduct is "reckless" or "knowing," that is the minimum mental state that would be required under this section as to those elements. For example, under the offense of burglary, the culpability applicable to the circumstances that the place entered was a dwelling of another and that the entry took place at night is "reckless." Thus, a person would be guilty of attempted burglary if he intentionally made an effort to enter a building, being aware of but disregarding the substantial risk that the building was a dwelling of another and the time was at night.

The remaining element that the conduct constitutes a substantial step toward commission of the crime is preceded by the drafting device "in fact" and hence requires no proof of a mental state.[25]

4. Defense Precluded

Subsection (c) (1) provides that it is not a defense to a prosecution under this section that it was factually or legally impossible for the actor to commit the crime, if the crime could have been committed had the circumstances been as the actor believed them to be. Subsection (c) (2) provides that it is not a defense to a prosecution under this section that the crime attempted was completed.

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[24] See Mark Crane's application of these examples in the antitrust field, Hearings, pp. 5601-5604; compare also the article by the same author. *Reform of the Federal Criminal Laws: A Major Change in Criminal Antitrust Liability*, XIX Antitrust Bulletin 493, 499-500 (1974). It should be remembered, however, that this section, like all of the chapter 10 offenses, is inapplicable to antitrust offenses. See section 1004(b).

[25] See section 303 (a) (2).

Thus, under subsection (c) (1), if a person receives goods believing them to be stolen, when, in fact, they are not, or shoots at a dummy believing that it is a person he intends to kill, or picks a pocket which is in fact empty, he would be guilty of an attempt under this section. Excluding the defense of impossibility does not, however, permit prosecution of a person who believes that he is violating a law when, in fact, no such law exists, e.g., a person who possesses liquor in a jurisdiction which he erroneously believes is "dry." A belief that one is doing something criminal would not satisfy the condition that the crime "would have been committed" if the circumstances were as the actor believed them to be [26] because the fact that an act is a violation of the law or the belief that an act is a criminal violation is not an element of the offense.

Precluding the defense of factual or legal impossibility is in accordance with modern State criminal code revisions and with the modern theory of the crime of attempt.[27] The reasons have been succinctly stated by the drafters of the Model Penal Code as follows:[28]

> In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result the actor's dangerousness is plainly manifested.

Current Federal law, albeit sparse, is divided as to whether impossibility is a defense to an attempt prosecution. In *United States* v. *Heng Awkak Roman,*[29] the court rejected impossibility as a defense and held that the defendants were guilty of the crime of attempting to sell heroin to government agents posing as buyers, even though prior to the attempted sale the government had removed heroin from the suitcase where the defendants believed it to be, and had substituted soap powder. However, in two other cases, *United States* v. *Hair,*[30] and *United States* v. *Berrigan,*[31] the courts, although acknowledging that the doctrine of impossibility was obsolete, held that they were bound to recognize and apply it until the Congress acted to abolish the defense.[32]

In view of the virtual unanimity of modern opinion that the defense should be eliminated, the Committee determined to do so explicitly in subsection (c). The Committee is aware that concern has been expressed that by doing away with the impossibility defense convictions will result in what are called "extreme cases" such as that of the person who sticks a pin into a doll believing that it will kill the person in whose image the doll was fashioned.[33] The Committee feels, however, that such cases as a practicial matter will pose no problem, for they will fall into one of the following categories:

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[26] See section 102; see also Working Papers, p. 361.

[27] See Ga. Code Ann. § 26-1002 (1969); Kan. Gen. Stat. Ann. §21-3301 (1969); Ill. Stat. Ann., ch. 38 § 8X4 (1961); McKinney's N.Y. Penal Law §110.10 (1967), see also *People* v. *Dlugash*, 41 N.Y. 2d 725 (1977); Working Papers, p. 360; Report of the Association of the Bar of the City of New York. Hearings, p. 7712.

[28] See Model Penal Code, § 5.01. Comment, p. 31 (Tent. Draft No. 10, 1960).

[29] 356 F. Supp. 434 (S.D.N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974).

[30] 356 F. Supp. 339 (D.D.C. 1973).

[31] 482 F.2d 171 (3d Cir. 1973).

[32] In *Hair*, the court held the defendant could not be guilty of attempting to receive stolen property under the District of Columbia Code where the property was not, in fact, stolen although the defendant believed it to be. In *Berrigan,* the court held that the defendant could not be guilty of having attempted to smuggle letters out of a Federal prison "without the consent of the warden" where in fact the warden, unbeknownst to the defendant, was aware of the efforts to smuggle out letters.

(1) cases in which lack of mental responsibility will be a successful defense;

(2) cases in which the inherent unlikelihood that the conduct will result or culminate in commission of the crime may constitute a reasonable doubt as to the actor's intent to commit the crime, justifying exercise of discretion by the prosecutor not to proceed;

(3) cases in which, despite the inherent unlikelihood of success of this particular attempt, firmness of criminal purpose is so clear that the actor should be prosecuted because, being educated by his failure, he is likely to try to achieve the same result in another more dangerous manner.

Subsection (c) (2) provides that it is not a defense to a prosecution for an attempt that the crime attempted was completed. Although at common law there could be no conviction for an attempt where the attempted crime was completed, jurisdictions which have laws similar to Rule 31 (c) of the Federal Rules of Criminal Procedure have abolished the common law rule by permitting conviction for an attempt as a lesser included offense.[34] Thus, although no Federal cases directly in point appear to exist, subsection (c) (2) probably is consistent with the result that the Federal courts would reach if presented with the issue today.

5. Affirmative Defense

Subsection (b) provides an affirmative defense of renunciation applicable to section 1001. The defense afforded is that "under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking affirmative steps that prevented the commission of the crime." Virtually identical provisions were contained in S. 1, as originally introduced in the 93rd Congress, S. 1437 of the 95th Congress, S. 1722 of the 96th Congress,[35] and in the Final Report.[36]

There are two principal reasons for allowing a defense of renunciation. First, renunciation of culpable intent tends to negate dangerousness. One of the underlying premises of an attempt provision is that where a person engages in conduct which sufficiently demonstrates an intent to commit an offense, the law is justified in intervening to prevent him from completing the offense. However, where a person has taken steps indicating prima facie sufficient firmness of purpose to complete the offense, he should be allowed to rebut such a conclusion by showing that he has demonstrated his lack of firm purpose by completely renouncing his intention to commit the crime. Second, allowing renunciation of culpable intent as a defense to an attempt charge encourages actors to desist from pressing forward with their criminal designs, thereby diminishing the risk that the substantive crime will be committed.

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[33] See Recommendations of Committee on Reform of Federal Criminal Laws of the Section of Criminal Law of the American Bar Association. Hearings p. 5801.

[34] See Clark and Marshall, *Crimes* (7th ed. 1967), pp. 258–259; see also *Hall* v. *State*, 503 S.W. 2d 210 (Ct. Crim. App. Tenn. 1973).

[35] See section 1–24A4(d) of S. 1, 1001(b) of S. 1437, as passed by the Senate in the 95th Congress, and 1001(b) of S. 1722, as reported by the Senate Committee on the Judiciary Committee in the 96th Congress.

[36] See section 1005(3)(a).

An example illustrating how this defense will apply is in the area of smuggling. If an item has been carefully concealed in order to evade a customs inspection, the would-be smuggler will have renounced sufficiently to avoid prosecution if he lists the item when asked if he has anything to disclose or otherwise avoids landing the item illegally.

The key element to a renunciation defense is that the renunciation must be "voluntary and complete." Section 1004(a) partially defines the phrase "voluntary and complete." Under this definition a renunciation is not voluntary and complete if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective.

Thus, under the former example, the would-be smuggler would not have renounced sufficiently if he did not declare the item until the customs inspector started to lift up the false bottom in his suitcase or if he decided to postpone his attempted entry to a different time or location.

In a case where mere abandonment of culpable intent by the actor is insufficient to prevent the avoidance of the offense, the actor must take affirmative steps to prevent the commission of the offense. Thus where a bomb has been planted and set to go off at a predetermined time, the actor must deactivate the bomb or give sufficient notice to the authorities to enable them to deactivate the bomb. If, however, the actor has gone so far that he has put in motion forces which he is powerless to stop, then renunciation will not constitute a defense although it might serve to mitigate punishment.

The description of the defense as an "affirmative defense" means that the defendant has the burden of proving the elements of the defense by a preponderance of the evidence.[37]

6. *Proof*

Subsection (d) provides for the applicability, in a prosecution under this section for an attempt, of any special proof provision that is applicable to the offense attempted, unless a different application is plainly required. Thus, for example, in a prosecution for attempted perjury, the proof provisions relating to falsity and materiality under section 1346(b) would be applicable.

7. *Jurisdiction*

Under subsection (f), there is Federal jurisdiction over an attempt in two situations. The first is where the crime attempted is a Federal crime as to which Federal jurisdiction is not limited to certain specified circumstances. Examples of such crimes may be found in chapters 11 and 12 of the subject bill (e.g., treason, section 1101). The second situation in which there is Federal jurisdiction for an attempt is where the crime attempted is a Federal crime as to which Federal jurisdiction is limited to certain specified circumstances and any such circumstance has occurred or would occur if the course of conduct involving the crime attempted were completed. Thus there would be Federal jurisdiction for attempted murder if any of the circumstances set forth in section 1601(e) were present, or if the defendant was apprehended prior to completing the course of conduct he intended with respect to the jurisdictional factor (e.g., before depositing a bomb in the mail). In short, there is Federal jurisdiction for a criminal attempt whenever there would have been Federal jurisdiction for the offense attempted had the offense been completed as contemplated.

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[37] See section 111.

8. Grading

In the past, various approaches have been taken in grading an attempt. At common law an attempt to commit a felony was punishable only as a misdemeanor. In some States, an attempt is graded as permitting one half of the maximum penalty prescribed for the completed offense. Other States, most notable New York, grade an attempt at one class lower than the completed offense. In the present Federal system, wherever an attempt is punishable, there generally is no distinction between the penalty for the attempt and the substantive offense. An exception is attempted murder or manslaughter,[38] where the maximum, incongruously, is only three years.[39]

The principal issue in determining what should be the maximum sentence for an attempt is whether there is any penological significance to the fact that the crime was not actually completed. In accordance with the modern view that an appropriate sentence depends upon the antisocial disposition of the actor and the demonstrated need for a corrective sanction, the fact that the crime was not consummated should have little or no bearing on the maximum sentence which is available to the sentencing judge, even though the reasons why it was not consummated may have relevance to the actual sentence imposed.

In keeping with this theory, this section grades an attempt as an offense of the same class as the offense attempted except that if the offense attempted is a Class A felony the attempt is graded as a Class B felony. The reason for the limited exception is that in the instance of a crime such as murder or any of the other Class A felonies, one of the reasons for the penalty assigned is that a particular result has occurred; in other words, the penalty to some extent reflects a retributive purpose. However, where the particular result does not occur, this factor is not as relevant to the sentencing picture and the primary considerations are the need for deterrence, incapacitation, and rehabilitation. The penalty provisions for a Class B felony are deemed sufficient to meet the requirements of these latter factors.[40]

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[38] 18 U.S.C. 1113.

[39] The penalty is incongruous since the essentially similar offense of assault with intent to murder has a maximum of twenty years (18 U.S.C. 113).

Finally, the Committee accepted the National Commission's proposal to preclude consecutive sentences for attempt and for another offense that was the sole objective of the attempt.[41] Although such a prohibition is implicit in the Constitution's double jeopardy clause, the Committee determined to make it explicit out of an abundance of caution.

SECTION 1002. CRIMINAL CONSPIRACY

1. General Scope and Background

The crime of conspiracy traces its history back to fourteenth century England where a statute known as the Ordinance of Conspirators [42] sought to protect the innocent from false and malicious prosecutions effected by conspiratorial means. Under this statute, the offense was not complete until the party falsely accused had been actually indicted and acquitted. It was not until the seventeenth century that the Court of Star Chamber ruled that an agreement or combination to indict falsely was punishable as a conspiracy even though nothing was done to effect the purpose of the agreement.[43] It was from this beginning that the modern day offense of criminal conspiracy has evolved. Today, the definition which is most commonly given to criminal conspiracy is:

> An understanding, express or tacit, to accomplish an unlawful object by lawful means, or by unlawful means a lawful object. It is a partnership in crime, the gist of which is, a combination of minds to violate the criminal law.[44]

While criminal conspiracy provisions have sometimes been criticized and referred to as the "darling of the prosecutor's nursery," [45] the criticism has mainly focused on the evidentiary and procedural rules attending the offense.[46] There is little disagreement as to the essential justification for punishing a conspiracy as a separate offense. As the Supreme Court in *United States* v. *Rabinowich* [47] stated:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the

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[40] In following existing Federal law which grades attempts at the same level as the completed offense, the Committee adopts the recommendation of the National Commission and of the American Bar Association. See Final Report, section 1001; Hearings, Part XVI, pp. 11843–11844. The New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code agreed with an earlier ABA recommendation that the section be amended to classify an attempt as one grade less serious than the crime attempted. Hearings, p. 7712.

[41] See section 2304; Final Report § 3204(2).

[42] 33 Edw. I. (1305).

[43] See, Comment. *Criminal Conspiracy: A Balance Between Protection of Society and the Rights of the Individual*, 16 St. Louis U. L. Rev. 254 (1971).

[44] *United States* v. *DeLoache*, 279 F. Supp. 720. 729 (W.D. Mo. 1968).

[45] *Harrison* v. *United States*, 7 F.2d 259, 263, (2d Cir. 1925); see also *Krulewitch* v. *United States*, 336 U.S. 440, 445–458 (1949) (Jackson, J., concurring).

[46] See *United States* v. *Spock*, 415 F.2d 165, 171 & n. 12 (1st Cir. 1969).

[47] 238 U.S. 78, 88 (1915)

> conspirators for further and habitual practice and it is characterized by secrecy, rendering it difficult of detention, requiring more time for its discovery and adding to the importance of punishing it when discovered.

Justice Frankfurter, writing for the Court in *Callanan* v. *United States,*[48] similarly observed that:[49]

> This settled principle [the distinction between substantive offenses and conspiracy] derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be fully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Most recently the Supreme Court in *United States* v. *Feola*[50] adverted to the basic principles that support the existence of the conspiracy offense. The Court observed that:

> It is well settled that the law of conspiracy serves ends different than, and complementary to, those served by criminal prohibitions of the substantive offense. Because of this, consecutive sentences may be imposed for the conspiracy and for the underlying crime. *Callanan* v. *United States,* 364 U.S. 587 (1961); *Pinkerton* v. *United States,* 328 U.S. 640 (1946). Our decisions have identified two independent values served by the law of conspiracy. The first is protection of society from the dangers of concerted criminal activity, *Callanan* v. *United States, supra,* 364 U.S., at 593; *Dennis* v. *United States* 341 U.S. 494, 573-574 (Jackson, J. concurring) (1951). That individuals know that their planned joint venture violates federal as well as state law seems totally irrelevant to that purpose of conspiracy law which seeks to protect society from the dangers of concerted criminal activity. Given the level of criminal intent necessary to sustain conviction for the substantive offense, the act of agreement to commit the crime is no less opprobrious and no less dangerous because of the absence of knowledge of a fact unnecessary to the formation of criminal intent. Indeed, unless imposition of an "anti-federal"

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[48] 364 U.S. 587, 593-594 (1961).

[49] See also Comment, *supra* note 43 at 260-261.

[50] 420 U.S. 671, 693-694 (1975).

> knowledge requirement serves social purposes external to the law of conspiracy of which we are unaware, its imposition here would serve only to make it more difficult to obtain convictions on charges of conspiracy, a policy with no apparent purpose.
>
> The second aspect is that conspiracy is an inchoate crime this is to say, that, although the law generally makes criminal only antisocial conduct, at some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law. See Developments in the Law—Criminal Conspiracy, *supra,* 72 Harv. L. Rev., at 923-925. The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed. *United States* v. *Bayer,* 331 U.S. 532, 542 (1947). Criminal intent has crystallized and the likelihood of actual, fulfilled commission warrants preventive action.

In the light of these evident and strong reasons for criminal conspiracy provisions in the law, the Committee believes it is essential that such a provision be included in the new Federal Criminal Code. A like judgment was reflected in S. 1, as originally introduced in the 93d Congress, S. 1437, as passed by the Senate in the 95th Congress, S. 1722 as reported in the 96th Congress,[51] and in the Final Report.[52]

2. Present Federal Law

The basic conspiracy statute in the Federal Criminal Code is 18 U.S.C. 371 which, *inter alia,* makes it an offense to conspire to commit any offense against the United States, where one or more of the conspirators does "any act to effect the object of the conspiracy."[53]

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[51] Section 1-2A5 of S. 1 and section 1002 of S. 1437 and S. 1722.

[52] See section 1004; but compare Johnson, *The Unnecessary Crime of Conspiracy,* 61 Calif. L.R. 1137 (1973) with Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases,* Task Force Report: Organized Crime, President's Commission on Organized Crime and the Administration of Justice, pp. 80-83 (1967).

[53] In addition to section 371, title 18 alone contains more than twenty other conspiracy provisions. Set forth seriatim, they are: sections 224 (Bribery in Sporting Contests); 241 (Conspiracy against Rights of Citizens); 286 (Conspiracy to Defraud the Government with Respect to Claims); 351 (Congressional assassination, kidnapping, and assault); 372 (Conspiracy to Impede or Injure Officer); 757 (Prisoners of War or Enemy Aliens); 794 (Gathering, Transmitting or Losing Defense Information); 794 (Gathering or Delivering Defense Information to Aid Foreign Government); 799 (Violation of Regulation of National Aeronautics and Space Administration); 892 (Making Extortionate Extensions of Credit); 894 (Collection of Extensions of Credit by Extortionate Means); 956 (Conspiracy to Injure Property of Foreign Government); 1201 (Kidnapping); 1751 (Presidential Assassination, Kidnapping and Assault); 1972 (Mutiny, Riot, Dangerous Weapons Prohibited in Federal Penal Instituions); 1951 (Interference with Commerce by Threats or Violence); 2153 (Destruction of War Material, War Premises, or War Utilities); 2154 (Production of Defective War Material, War Premises or War Utilities); 2155 (Destruction of National-Defense Materials, National-Defense Premises or National-Defense Utilities); 2156 (Production of Defective National-Defense Material, National-Defense Premises or National-Defense Utilities); 2192 (Incitation of Seamen to Revolt or Mutiny); 2271 (Conspiracy to Destroy Vessels); 2384 (Seditious Conspiracy); 2385 (Advocating Overthrow of Government); and 2388 (Activities Affecting Armed Force during War).

In addition, there are a considerable number of substantive criminal statutes scattered throughout the Federal Code which contain their own conspiracy provisions. Many of these statutes are worded differently from 18 U.S.C. 371 and do not require an overt act as an element of the offense.[54] However, despite the numerous statutes on the subject, the evolution of conspiracy law has basically been the product of a wealth of case decisions. For example, under 18 U.S.C. 371 it is settled that, in order to consitute an overt act to effect an objective of the conspiracy, the act must be done both during and in furtherance of the conspiracy.[55] Moreover, acts done to conceal the conspiracy will not normally be deemed a part of the conspiracy's objectives, unless the charge specifically includes an allegation that the agreement extended to the concealment phase.[56] It has also been held that conspiracy is a continuing offense for purposes of the statute of limitation, with the time running from the last overt act in furtherance of the illicit scheme.[57] This doctrine is expressly retained in section 511 of the proposed Code (Time Limitations). The decisions have likewise recognized the availability, for purposes of avoiding subsequent accomplice liability, of an affirmative defense of withdrawal from a conspiracy predicated on "affirmative action," although just what acts will be deemed sufficient to establish withdrawal is unclear.[58] This doctrine is discussed in connection with section 401 (Accomplice Liability). With respect to *scienter*, the Supreme Court has recently resolved a conflict among the circuits on the issue whether knowledge of the jurisdictional factor in a conspiracy is an essential element of the charge.[59] The Court held that, save for unusual circumstances, such knowledge need not be proved under 18 U.S.C. 371. The proposed Code is consistent with this view and, by separating the jurisdictional element from the offense itself, specifically removes any basis on which to argue that knowledge of the jurisdictional predicate is required.[60]

3. The Offense

A. Elements

Subsection (a) of section 1002 provides that a person commits an offense if he agrees with one or more persons to engage in conduct the performance of which would constitute a crime or crimes, and he, or one of such persons in fact, engages in any conduct with intent to effect any objective of the agreement.

With a few exceptions the offense described above will be applicable to all substantive offenses in the proposed Code and will thus replace numerous conspiracy statutes in present law.[61] This consolidation will help to eliminate the current situation in which conspiracy is variously defined in title 18 to include or exclude a requirement of an overt act. In addition, it will help to eliminate sentencing disparities that exist under present laws. As with the attempt offense (section 1001), the offense here is described in terms of conduct which would constitute a "crime." Thus, under this Code, there can be no offense of conspiracy to commit an infraction.[62]

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[54] See, e.g., 15 U.S.C. 1, 2; 18 U.S.C. 224, 241, 286, 372, 757, 892, 894, 1782, 1951, 2192, 2271, 2384, and 2385; 21 U.S.C. 846 and 963.

[55] See *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Fiswick* v. *United States*, 329 U.S. 211 (1946).

[56] E.g., *Krulewitch* v. *United States*, *supra* note 45.

[57] E.g., *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957).

[58] See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 463–465 (1978); *Hyde* v. *United States*, 225 U.S. 347, 369–370 (1912); Working Papers, p. 395, and cases cited therein.

[59] *United States* v. *Feola*, *supra* note 50.

[60] See section 303(d)(2) and the discussion of jurisdiction under this section, *infra*.

[61] One exception is section 1202 (Conspiracy against a Friendly Power), which carries forward the provisions of 18 U.S.C. 956. This conspiracy offense is of a different type from section 1002, since it punishes a conspiracy to do somthing where the "something" is not itself a Federal offense. Another exception (see section 1004(b)(1)(B)) is section 1764 (Antitrust Offenses), where the

Under subsection (a) there are two essential elements in the offense. First, a person must agree with one or more persons to engage in conduct the performance of which would constitute a crime or crimes. Second, he or any member of the conspiracy must engage in conduct with intent to effect an objective of the agreement. The Committee wishes to emphasize that it intends by this formulation to perpetuate the scope of current conspiracy law as it has developed under 18 U.S.C. 371. The term "agree" is used to continue the concept that a conspiracy must involve a combination of minds—a partnership in crime—to accomplish an unlawful object by lawful means, or by unlawful means a lawful object. There is thus no such thing as a "unilateral" conspiracy and this formulation does not change that situation. Moreover, the actors must intend to commit a crime at the time the agreement was made. Thus, if more than two actors are involved in the agreement and one of the actors does not have an intent that a crime be committed then that actor cannot be convicted of conspiracy. If only two actors are involved in the agreement and one actor does not have the intent that a crime be committed there is no conspiracy. To the extent that some have suggested that the language in this provision may be susceptible to a construction different from current law concepts, the Committee reiterates that such a construction would be contrary to its intent.

As to the first element, the agreement need not be express or in any particular form and may be inferred from the acts and conduct of the conspirators.[63] The Committee rejected as unnecessary the National Commission's proposal to include a statement in the statute itself adopting the widely accepted principle that the agreement need not be explicit. The Committee also decided to utilize the traditional notion of "agreement" as opposed to the term "relationship," which was in S. 1, as originally introduced in the 93d Congress. Use of the term "relationship," while possibly justified in theory, does not represent a clearly superior formulation and could lead to unforeseen complications. In view of the well/established

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intent is to preserve the precise contours of current law which contains its own conspiracy provision and around which a body of specialized case law has developed. See also section 1004(b)(3).

[62] Contrast *United States* v. *Hutto*, 256 U.S. 524 (1921); see Working Papers, pp. 389-390.

[63] See *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943); *Jones* v. *United States*, 251 F.2d 288 (10th Cir.), cert. denied, 356 U.S. 919 (1958); *United States* v. *Cudia*, 346 F.2d 227 (7th Cir.), cert. denied, 382 U.S. 955 (1965). However, the Committee endorses and intends to perpetuate the restrictions on this doctrine, announced in *United States* v. *Spock, supra* note 46, in the case of "bifarious" agreements, involving both legal (constitutionally protected) and illegal conduct. The court held (416 F.2d at 173): When the alleged agreement is both bifarious and political within the shadow of the First Amendment, . . . an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.'

case law defining the terms "conspiracy" and "agreement" the Committee believed it would be ill advised to inject uncertainty by using a new term such as "relationship."

The second element requires that the actor or another member of the conspiracy engage in any conduct to effect any objective of the agreement. It is not necessary, under this second element, that one or more of the conspirators personally commit an overt act; it is sufficient if a conspirator causes an innocent third party to perform an act to effect an objective of the conspiracy.[64] The point of employing the words "conduct" and "any objective" is to emphasize that the performance of any overt act, regardless of its importance to the overall scheme, or its legality, is sufficient, and that the statute is intended to cover conspiracies having multiple objectives. As under present law, the overt act must be done for the purpose of furthering any objective of the agreement. However, it is not necessary that the overt act succeed in its purpose. The function of the overt act requirement is simply to manifest that the conspiracy is at work and is "neither a project still resting solely in the minds of the conspirators nor a fully complete operation no longer in existence."[65] Accordingly, the overt act must be such that it manifests a purpose to effect an objective of the agreement.

The proposed section does not address the question of when a person may become a member of a conspiracy and the extent of knowledge he must possess with respect to the identity or actions of other members in order to be liable hereunder. The Committee intends that these issues be governed by current law.[66]

With respect to acts of concealment the Committee intends to perpetuate the doctrine of *Grunewald* v. *United States*,[67] that, in order for the concealment phase to be deemed part of the conspiracy the government must both allege and show that the agreement encompassed acts of concealment. Thus, concealment is a possible objective of a criminal conspiracy.

B. Culpability

The conduct for this offense is agreeing with one or more persons to engage in conduct, and the engaging in any conduct by a conspirator. As no culpability level is designated with respect to the agreeing, the applicable state of mind that must be proved is at least "knowing,"[68] i.e., that the defendant was aware that he was agreeing with one or more persons[69] to enage in conduct.[70] The fact that the agreed upon conduct would constitute a crime or crimes is an existing circumstance. However, by the operation of section 303(d)(1)(A), it is not necessary to prove any state of mind as to this element.[71] The aspect that a member of the conspiracy other than the defendant thereafter engaged in conduct is preceded by the phrase "in fact." Thus, by the operation of section 303(a)(2), no state of mind of the defendant need be shown as to this element. This accords with the limited role played by the overt act requirement of simply evidencing that the conspiracy is at work.

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[64] *United States* v. *Montgomery*, 440 F.2d 694 (9th Cir.), cert. denied, 404 U.S. 884 (1971).

[65] *Yates* v. *United States*, 354 U.S. 298, 334 (1957); see Working Papers, pp. 392-393.

[66] See Working Papers, pp. 391-392 and cases cited therein. The different issue of criminal responsibility for the crimes of other members committed in the course of a conspiracy is dealt with in section 401(c).

[67] *Supra* note 57.

[68] Section 302(b) and section 303(b)(1).

[69] The term "person" is defined in section 111 to include corporations and other organizations.

[70] By adopting the level of culpability of "knowing" the Committee adopts the recommendation of the American Bar Association's Section of Criminal Law. See Hearings, pp. 5801-5802.

[71] Thus the common law doctrine of "corrupt intent," requiring knowledge by the conspirators that their agreement was unlawful, which was rejected by Judge Learned Hand, is not here car-

The element that the post-agreement conduct be performed "with intent to effect any objective of the agreement" states the purpose for which the conduct must be performed by the actor. If it is the defendant who engaged in the conduct, he must have done so with the requisite intent. If, however, another conspirator engaged in the conduct with such an intent, his doing so is a circumstance as to which no state of mind on the part of the defendant need be proven. Normally, the conduct will in fact further an objective of the conspiracy. However, under this section there is no requirement that it actually do so, and there thus need be no proof that the act contributed to the aims of the conspiracy. Once again, this accords with the limited role played by the overt act requirement of simply evidencing that the conspiracy is at work.

4. Defense Precluded

Subsection (c) states that it is not a defense to a prosecution under section 1002 that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, or was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.[72] These provisions codify existing law except possibly insofar as the acquittal of co-conspirators is concerned. Under present law, lower court decisions have generally held that acquittal of all but one of several conspirators necessarily requires acquittal of the other.[73] However, the rule announced in these cases is inconsistent with the rationale of the recent unanimous holding of the Supreme Court in *Standefer* v. *United States*.[74] In that case the Court rejected the argument that acquittal of the principal should bar the trial and conviction of another person as an aider and abettor of that principal, since the reasons for the former acquittal need not have been related to the defendant's guilt and in any event should not bind the government in a separate trial.[75] Logically extended, this rationale should also apply to the conspiracy context where all but one of the conspirators have been previously acquitted. In short, the simplistic analysis found in the earlier lower court opinions fails to consider the effect of such variables as confessions and admissions; false exculpatory statements; evidence that is lost, destroyed, suppressed or otherwise unavailable; or missing, hostile, or deceased witnesses.

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ried forward. See *Mack* v. *United States*, 112 F.2d 290, 292 (2d Cir. 1940); Working Papers, pp. 387-388.

[72] In support of this provision, see the Report of the Special Committee on the Proposed New Federal Criminal Code of the Association of the Bar of the City of New York. Hearing, p. 7713.

[73] See *Lubin* v. *United States*, 313 F.2d 419 (9th Cir. 1963); *Romantic* v. *United States*, 400 F.2d 618 (10th Cir. 1968), cert. dismissed as improvidently granted, 402 U.S. 903 (1971): but see *United States* v. *Strother*, 458 F.2d 424 (5th Cir.), cert. denied, 409 U.S. 1011 (1972).

[74] 447 U.S. 10 (1980).

[75] The reason for not applying the bar to a single trial situation is recognition of the settled principle that inconsistent verdicts in the same trial are permissible in criminal cases as reflecting the mercy-dispensing powers of the jury. *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn* v. *United States*, 284 U.S. 390 (1932).

Thus, for example, the existence of a confession by one conspirator and the suppression of evidence against his confederate may fully warrant both his conviction and the acquittal of the confederate. Legal commentators have observed that the present rule is not founded on logic.[76] Accordingly, the purpose of this subsection is to make clear that, in the acquittal situation as well as others, the culpability of the defendant does not necessarily depend on the result of, or susceptibility to, a trial of his co-conspirators.

5. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution for conspiracy that, under circumstances manifesting a voluntary and complete renunication of his criminal intent, the defendant prevented the commission of every crime that was an object of the conspiracy. The provision, which has no counterpart in existing law,[77] is derived virtually *in haec verba* from the recommendations of the National Commission[78] and is primarily intended to encourage voluntary abandonment of the crime before actual harm is caused by the completion of the unlawful objectives.[79] The defense is similar to that provided for attempt, discussed above, although worded somewhat differently because of the fact that conspiracy necessarily involves other actors. Thus, the defense requires that the defendant show that he "prevented" the commission of every crime contemplated by the unlawful agreement under circumstances manifesting a "voluntary and complete"[80] repudiation of his criminal intent. Such renunciation would ordinarily be manfested by notifying a law enforcement officer of the scheme.[81] If, however, such notification would not be sufficient to prevent the crime, the defendant must insure that his action is effective to do so. For example, if in a conspiracy to dynamite a building the fuse has been lit, the defendant must step on the fuse to extinguish it.[82]

6. Jurisdiction

The scope of jurisdiction under this section parallels that under section 1001. There is Federal jurisdiction here in two situations. The first is where any objective of the conspiracy is a Federal crime as to which Federal jurisdiction is not limited. The second is where any objective of the conspiracy is a Federal offense as to which Federal jurisdiction is limited to certain specified circumstances and any such circumstance has occurred or would occur if the course of conduct involving any crime which is an object of the conspiracy were completed.

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[76] See Note. *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 972-974 (1959); LaFave and Scott, *Criminal Law*, pp. 488-489 (1972).

[77] As observed before, existing law contains a defense of withdrawal, the main function of which is to relieve a conspirator from liability for the acts of his co-conspirators during and in furtherance of the remainder of the conspiracy. See Working Papers, p. 362. Federal law contains no defense, however, exonerating a conspirator from liability for the conspiracy offense itself.

[78] See Final Report, § 1005(3)(b).

[79] See *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920, 957 (1959).

[80] The term "voluntary and complete" is partially defined in section 1004(a), and is discussed in connection with the prior section concerning the offense of attempt.

[81] As originally introduced, S. 1 provided that renunciation could only be accomplished by notifying a law enforcement officer. This restriction of the defense was criticized by the Special Committee of the New York City Bar Association:

"This [limitation of the defense to circumstances where the person notifies a law enforcement officer] seems to us to be unnecessary because the objects of the conspiracy could be totally frustrated under some circumstances without contacting the police. For example, if five men conspire to steal a certain painting, the crime could be prevented by warning the museum and causing them to move the painting and notifying one's fellow conspirators that this has been done. Under existing law, this would satisfy the defense of renunciation. We believe it should continue do so." Hearings, p. 7717.

The Committee agrees with this assessment and adopts the recommendation.

[82] See *Eldridge* v. *United States*, 62 F.2d 449, 451 (10th Cir. 1932).

As a result of this provision and section 303(d)(2), the government will not have to prove *scienter* as to jurisdictional facts. As noted before, at present some cases hold that a defendant who is unaware of the circumstances giving rise to Federal jurisdiction cannot be convicted of conspiring to violate Federal law. This so-called "anti-federal intent" doctrine, however, has been subjected to strong criticism[83] and is without rational basis. To hold, for example, that knowledge of interstate transportation or insurance by the FDIC is unnecessary in a prosecution for the substantive offense, while requiring proof of such knowledge for conspiracy to commit these offenses, is anomalous. The government's interest is manifest the moment the bank receives its certificate of insurance or the property enters interstate commerce. The defendant who agrees with another that the conduct constituting the crime be performed should be subject to the Federal criminal process regardless of whether he knew the Federal interest was involved.

7. Grading

18 U.S.C. 371 currently provides a maximum penalty of five years for conspiracy to commit a felony irrespective of the gravity of the crime sought to be committed or the penalty for that offense.[84] As a result, the penalty for conspiracy is often considerably greater or less than that for the substantive offense which is its object. The Committee considers that this scheme of grading is inadequate since it fails to distinguish between those conspiracies whose objectives are serious crimes and those conspiracies whose objectives are not so serious. In order to rectify the problem and supply a more rational punishment system, subsection (d) provides that conspiracy is an offense of the same class as the "most serious" offense which is an object of the conspiracy, except that a conspiracy to commit a Class A felony is a Class B felony. This treats conspiracy, for grading purposes, like attempt and is consistent with the basic recommendation of the National Commission.[85]

The Committee decided, however, not to accept the National Commission's proposal to preclude consecutive sentences for conspiracy and for a substantive offense which was an object of the conspiracy.[86] This decision was based on the Committee's view that such a limitation might unwisely restrict a sentencing court's ability to impose appropriately severe punishment in an unusual case where the maximum penalty for either the conspiracy or the substantive offense would not, by itself, constitute an adequate response to the defendant's entire course of conduct. The bill does, however, include a direction to the Sentencing Commission to ensure that its sentencing guidelines reflect the general inappropriateness of imposing consecutive terms of imprisonment for conspiracy or solicitation and for an offense that was the sole object of the conspiracy or solicitation.[87]

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[83] See *Developments in the Law: Criminal Conspiracy, supra* note 79; and see *United States* v. *Feola, supra* note 50.

[84] Conspiracy to commit a misdemeanor is punishable by no more than the "maximum punishment provided for such misdemeanor."

[85] See Final Report, § 1004(6). This approach is also consistent with the recommendation of the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code, Hearings, p. 7714.

[86] See Section 2304; Final Report § 3204(2).

SECTION 1003. CRIMINAL SOLICITATION

1. Introduction

This section makes it an offense to solicit another person to engage in conduct constituting a crime described in title 18. The principal reason for this section is to cover the situation where a person makes a serious effort to induce another to engage in conduct constituting a crime but is unsuccessful in doing so. Although the section also reaches the situation where the solicitor is successful, in that event the solicitor would be an accomplice and thus liable under section 401. In addition, if the solicitee agrees to engage in criminal conduct and an overt act is performed to effect an objective of the agreement, the solicitor would be guilty of conspiracy under section 1002, discussed above. The application of the provision is limited to title 18 crimes so as to reserve for future study the application of a solicitation offense to a minor regulatory provision not explicitly incorporated by reference in title 18.

At common law, there was a division of opinion as to whether solicitation was a separate offense or whether it was simply a criminal attempt.[88] The modern viewpoint, however, is that solicitation is a distinct offense.[89] The Committee feels that a separate criminal solicitation provision serves a very important purpose in that it permits law enforcement officials to intervene at an early stage where there has been a clear demonstration of an individual's criminal intent and danger to society. At the same time, limitations placed on the application of the offense are designed to avoid any possible concern that such an offense might be interpreted too broadly so as to impinge on constitutionally protected speech, petition, and assembly rights under the First Amendment. Significantly, while no general offense of criminal solicitation exists in current Federal law, such as offense was recommended by the Model Penal Code and the National Commission, and has been incorporated into the statutes of most States that have recently revised their criminal codes.[90]

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[87] See 28 U.S.C. 994(k).

[88] See Curran, *Solicitation: A Substantive Crime*, 17 Minn. L. Rev. 499 (1933); Blackburn, *Solicitation to Crimes*, 40 W. Va. L.Q. 135 (1934).

[89] See Note, Solicitation, 41 Dick. L. Rev. 225 (1937); Working Papers, pp. 369–371.

[90] See e.g., Code of Alabama. Title 13A, § 13A-4-1(a) (1978); Alaska Statutes. Title 11, § 11.31.110(a) (1978); Arizona Revised Statutes Annotated. Title 13, § 13-002(A) (1978); Arkansas Statutes. Title 41, § 41-705(1) (1976); Delaware Code Annotated. Volume 7, §§ 501-503 (1974); Florida Statutes Annotated. Volume 22, Title 54, § 777.04 (1975); Hawaii Revised Statutes, Penal Code, § 705-510 (1972); Illinois Annotated Statutes. Chapter 38, § 8-1(a) (1967); Kentucky Revised Statutes, Volume 16, § 506.030(1) (1975); Montana Criminal Code of 1973, Title 94, § 94-4-101(1) (1977); New Hampshire Revised Statutes Annotated, Volume 5-A, § 629.2(I) (1974); McKinney's Consolidated Laws of New York. Book 39. §§ 100.00. 100.05 100.10 (1965); Purdon's Consolidated Pennsylvania Statutes Annotated, Title 18, § 902(a) (1972); Tennessee Code, Volume 7, § 39-115 (1975). Nevertheless, some commentators have expressed doubt about the desirability of including criminal solicitations as a general Federal offense. See, e.g., T. Emerson, Hearings, p. 9112.

2. *Present Federal Law*

At present, there is no Federal law of general applicability which prohibits an unsuccessful solicitation. There are, however, a few statutes defining specific offenses which contain language prohibiting solicitation, whether or not successful. For example, current Federal law prohibits soliciting payment of a bribe (18 U.S.C. 201).[91] One of the improvements of section 1003 over current law is that most offenses punishable as criminal solicitations will be combined in one statutory provision,[92] thus promoting systematic case law development of the crime of solicitation.

Since liability for solicitation rests primarily on words of instigation to crime, care is called for in the formulation of a solicitation provision so as to avoid infringment on the interests protected by the First Amendment right of free speech. While the case law concerning this right has not been altogether harmonious, it has been characterized by some recurrent themes. Some cases have emphasized the need for a relatively high degree of proximity, probability, or seriousness in the evil the state seeks to prevent by the regulation of speech.[93] Others have emphasized the need for incitement to unlawful activity, as opposed to abstract advocacy of the propriety of such activity.[94] Still others have combined these themes, as in *Brandenburg* v. *Ohio*,[95] where the standard was said to be that advocacy of the use of force or law violation could be proscribed only where it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[96]

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[91] See Working Papers, p. 369.

[92] Exceptions include, for example, §§ 1351(a)(2), 1352(a)(2), and 1516.

[93] In the seminal case of *Schenck* v. *United States*, 249 U.S. 47 (1919), the defendants were convicted of conspiracy to violate the Espionage Act by causing and attempting to cause insubordination in the military and naval forces of the United States by having printed and circulated a document calculated to cause such insubordination. In upholding defendants' convictions and rejecting their claims that their actions were protected by the First Amendment, the Court through Justice Holmes stated (*id.* at 52):

> "The question is every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In *Dennis* v. *United States*, 341 U.S. 494 (1951), the defendants were convicted of violating the Smith Act (18 U.S.C. 2385), which makes it a crime to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States by force or violence or by the assassination of any officers of such government. The Court held that an essential element of the offense was proof that those charged with its violation had an intent to overthrow the government by force and violence. The Court then approved the trial judge's instruction that the defendants could not be found guilty unless they had the intent to "overthrow the Government of the United States by force and violence as speedily as circumstances would permit." In discussing the "clear and present danger" test in *Schenck*, the Court adopted the language of Judge Learned Hand from his opinion below (*id.* at 516):

> "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

[94] In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court, again interpreting the Smith Act, held that the Act did not prohibit mere advocacy and teaching of forcible overthrow as an abstract principle divorced from any effort to instigate action to that end, and that Congress intended to punish only advocacy "directed at promoting unlawful action." In explaining the distinction, the Court stated:

> "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to *believe* in something."

[95] 395 U.S. 444 (1969).

[96] In *Brandenburg*, *supra* note 95, the defendant was convicted of violating the Ohio Criminal Syndication statute for "advocating . . . the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform." The Court reversed defendant's conviction on grounds that the statute as construed violated the First Amendment. It stated:

Careful examination of the pertinent cases shows that they state standards applicable to situations in which a line-drawing problem is presented between legitimately proscribable criminal activity and criticism of the government, advocacy of political ideologies, or other expression or advocacy of ideas that enjoys constitutional protection. They do not state standards which are meant to be applied routinely to the use of words in the ordinary commission of crimes, and have not been so understood. As one commentator has stated in discussing the relationship of the First Amendment to criminal solicitation:

> The problem is, indeed, no different from that involving the use of speech generally in the commission of crimes of action. Most crimes—certainly those in which more than one person participates—involve the use of speech or other communication. Where the communication is an integral part of a course of criminal action, it is treated as action and receives no protection under the First Amendment. Solicitation to crime is similar conduct, but in a situation where for some reason the contemplated crime does not take place. Solicitation involves a hiring or partnership arrangement, designed to accomplish a specific action in violation of law, where the communication is an essential link in a direct chain leading to criminal action, though the action may have been interrupted. In short, the person charged with solicitation must, in a direct sense, have been a participant in an abortive crime of action. Thus the crime of criminal solicitation may be seen as a particular instance of the more general category of criminal attempts. Here, also, the applicable legal doctrine undertakes to draw the line between "expression" and "action." The fact that issues of this nature rarely arise indicates that establishing the division between free expression and solicitation to crime has not created a serious problem.[97]

The Committee wishes to emphasize, as the quoted statement implies, that the expressions involved in cases brought under section 1003 will very rarely require analysis in light of the principles of First Amendment case law cited earlier. In particular, no such analysis should be necessary in cases in which the solicitation reflects only the usual desire for illicit gain, or the desire to cause unlawful harm to others and is unrelated to the expression or advocacy of ideas. Typical cases under section 1003 would include, for example, a potential heir soliciting the murder of a relative from whom he expects to inherit property, a person importuning another to commit arson on his business premises so that he can collect insurance, or an organized crime boss directing a subordinate to kill a rival gang leader. There is no more need to assess the utterances in such cases under the principles applicable to constitutionally protected speech than there is in connection with a false

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"[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

[97] Emerson, *Toward a General Theory of the First Amendment*, p. 83 (1966).

statement under oath constituting perjury, a misrepresentation involved in a common fraud, or a robber's threat of physical harm to the victim in an attempted robbery.

In the unusual case in which a line-drawing problem is presented between criminal solicitation and dissent enjoying constitutional protection, assessment in light of the case law principles discussed earlier will, of course, be required. Out of an abundance of caution in relation to First Amendment rights, the Committee in section 1004 has exempted from the application of section 1003 certain offenses which may be especially likely to present such line-drawing problems. If problems of this sort occasionally arise in connection with offenses that remain within the scope of application of section 1003, the case law principles defining the First Amendment right of free speech will apply of their own force, and operate as supplementary restrictions on the applicability of the section.

3. The Offense

A. Elements

Subsection (a) of section 1003 provides that a person commits an offense if, with intent that another person engage in conduct constituting a crime described in title 18, and, in fact, under circumstances strongly corroborative of that intent, he commands, entreats, induces, or otherwise endeavors to persuade such other person to engage in such conduct.[98]

The words used to describe the type of conduct required to violate this section are designed to limit it to actual instigation. Thus words such as "counsels," "encourages," and "requests" have been rejected because they suggest equivocal situations too close to casual remarks.[99]

The offense in this section contains two essential elements. First, the offender must have the intent that another person engage in conduct constituting a crime described in title 18 and that intent must be manifest by circumstances strongly corroborative thereof; and second, he must command, entreat, induce, or otherwise endeavor to persuade such other person to engage in such conduct.

Included expressly in the first element is a requirement that the circumstances show that the actor is serious in his intention.[100] For example, the person who expresses the sentiment at a baseball game that the umpire should be killed would not be guilty of solicitation since the surrounding circumstances would not bear out the conclusion that he genuinely possessed the requisite intent that another person kill the umpire. Similarly, the drunk in the corner bar who asks the bartender to murder his wife would probably not be guilty since the surrounding circumstances cast a reasonable doubt as to his intent. These same principles apply to expressions of political hyberbole.[101] However, if a speaker shouted to an angry mob surrounding a jail that one of the inmates should be lynched, it might be concluded that he did intend that other persons engage in criminal conduct.

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[98] The limitation of the provision's application to "crimes" means that it is not an offense to solicit the commission of an infraction.

[99] See Working Papers, p. 371.

[100] This is consistent with the recommendation of the National Commission, Final Report, § 1003. By contrast, S. 1 of the 94th Congress contained no such explicit requirement.

[101] See *Watts* v. *United States*, 394 U.S. 705 (1969); *Hartzel* v. *United States*, 322 U.S. 680 (1944).

In each instance the existence of strongly corroborating circumstances would be a question of fact for the jury. There are, however, a number of circumstances that would often be highly probative. These include:

(i) the fact that the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense;

(ii) the fact that the defendant threatened harm or some other detriment to the person solicited if he would not commit the offense;

(iii) the fact that the defendant repeatedly solicited the commission of the offense,[102] held forth at length in soliciting the commission of the offense,[103] or made express protestations of seriousness in soliciting the commission of the offense;

(iv) the fact that the defendant believed or was aware that the person solicited had previously committed similar offenses; [104]

(v) the fact that the defendant acquired weapons, tools or information suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person solicited.

The Committee regards it as appropriate and desirable for the court to instruct the jury that circumstances like those set out above which are relevant under the facts of the case tend to corroborate the existence of the required intent, and should be considered by the jury in making its determination. Similarly, it is appropriate for the court to instruct the jury concerning pertinent circumstances that tend to cast doubt on the existence of an intention that the person solicited commit a crime. These could include, for example, the fact that the defendant was joking about other serious matters at the time he made the solicitation, and the fact that the solicitation was a brief spontaneous utterance reflecting emotional excitment or agitation.

The second element is that the actor engage in conduct characterizable as commanding, entreating, inducing, or endeavoring to persuade. For example, an order to commit an offense made by a person to another with whom he stands in a relation of influence or authority would constitute a "command"; and threatening another if he will not commit an offense, or offering to pay him if he will, would constitute "inducement."[105] The phrase "otherwise endeavors to persuade" is designed to cover any situation where a person seriously seeks to persuade another person to engage in criminal conduct. However, this phrase is not meant to cover the situation where the actor attempts to communicate with another person but for some reason the communication never reaches that person. For example, a person who writes a letter to another person in which he offers to pay a sum of money if that person would commit a crime, and who mails the letter, would not be guilty of solicitation if the other person never receives the letter. Conceptually, this conduct constitutes attempted solicitation, which under section 1004(b), discussed subsequently, is not an offense. In view of the policy in section 1004(b), the phrase "endeavors to persuade" must be construed as requiring some communication between two or more persons before there is a solicitation.

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[102] If, for example, the defendant made repeated apparent attempts to induce the same person to commit an offense, or apparent attempts to induce two or more persons in succession to commit an offense, that would tend to show that the solicitation was meant seriously.

[103] For example, an apparent effort lasting 30 seconds to induce a person to commit an offense might be no more than a joke, but that would be unlikely if the effort were seriously pursued for an hour.

[104] For example, a solicitation for a murder for hire directed to a person who holds himself out to be a professional hit man would strongly support a conclusion that the solicitor intended to induce the commission of the crime.

[105] The circumstances that characterize a solicitation as an "inducement" overlap the circumstances, discussed above, that tend to corroborate the existence of the required intent on the part of the solicitor.

The section does not require that the person solicited commit an overt act in response to the solicitation. As the American Bar Association's Section of Criminal Law stated:[106]

> The requirement of strong corroboration of the intent is sufficient to distinguish legitimate abstract advocacy from criminal incitement. . . . Deletion of the requirement [of an overt act by the person solicited] would eliminate as an insurmountable obstacle to the prosecution of a serious solicitation the fact that the one solicited spurned the invitation.

B. Culpability

The conduct in this offense is commanding, entreating, inducing, or otherwise endeavoring to persuade another person to engage in conduct constituting a crime. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is "knowing," i.e, that the offender was aware that he was commanding, etc. another to commit a crime.[107] It is, of course, only necessary that the offender intend that the other person engage in the conduct constituting a crime; it is not necessary, however, that he know or have any particular mental state with respect to the fact that the conduct is in violation of law.[108] The remaining element that the circumstances be such as to strongly corroborate the culpable intent is preceded by the phrase "in fact." Thus no proof of a mental state is necessary with respect to this element.[109]

4. Defense Precluded

Subsection (c) of section of 1003 provides that the solicitor cannot successfully assert a defense that the solicitee could not be convicted of the offense because he lacked the state of mind required or was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution. This provision is based upon the universally acknowledged principle that one is no less guilty of the commission of a crime because he uses the overt behavior of an innocent or irresponsible agent.[110]

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[106] Hearings, p. 5801. The Special Committee on the Proposed New Federal Criminal Code of the New York City Bar Association also recommended the deletion of such a requirement. See Hearings, p. 7715.

[107] See sections 303(b)(1) and 302(b)(1).

[108] See section 303(d)(1)(A).

[109] See section 303(a)(1).

This prinicple has been upheld on several occasions by Federal courts.[111] A distinction between the situation under this section and those dealt with in such cases is that the solicitation provision will be utilized when the person solicited, for one reason or another, did not carry out the criminal activity. However, if the agent's innocence or legal irresponsibility would not prevent prosecution of the instigator when the crime was committed, it should not bar a prosecution when the crime was solicited but never completed.

This provision does not mean that irresponsibility or incompetency of the solicitee is never relevant. The lack of responsibility or competence of the person solicited may be relevant in determining the solicitor's intent—for example, an entreaty to a child or an imbecile may indicate the solicitor's lack of serious purpose.[112]

5. Affirmative Defense

Subsection (b) of section 1003 provides an affirmative defense of renunciation under this section. The reasons for providing such a defense are the same as those justifying the defense for attempt under section 1001 and are discussed in connection with that section. As is the case for attempt, the renunciation, to be a defense, must be "voluntary and complete" as partially defined in section 1004(a), i.e., not motivated by a decision to postpone the crime or to substitute another victim. Unlike the attempt offense, however, the affirmative defense here requires that the defendant prevented the crime solicited from being committed. Thus he must persuade the solicitee to desist from committing the offense or take such other steps as will prevent it.[113]

6. Jurisdiction

The jurisdictional provisions under this section directly parallel those under section 1001 and the discussion there is applicable equally in this context.

7. Grading

An offense under this section is graded as an offense of the class next below that of the crime solicited. This was the grading recommended by the National Commission and adopted in S. 1, as originally introduced. It represents a compromise between the common law view that all solicitations be deemed misdemeanors and present Federal statutes which treat solicitation as an attempt for grading purposes, that is, as punishable to the same degree as if the crime solicited had actually occurred. As with section 1002 (criminal conspiracy), section 2304 provides that consecutive sentences may not be imposed both for solicitation to commit an offense and the completed offense.

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[110] See, e.g., *Nigro* v. *United States*, 117 F.2d 624 (8th Cir 1941), *United States* v. *Brandenberg*, 155 F.2d 110 (8th Cir. 1946) (Physicians circulating illegal narcotics prescriptions guilty of sale by innocent druggist).

[111] See Working Papers, pp. 377-378.

[112] See Report of the Special Committee on the Proposed New Federal Criminal Code of the Association of the Bar of the City of New York in support of this provision. Hearings, pp. 7715-7716

[113] The defendant may utilize the defense even if his efforts did not cause the prevention of the crime. For instance, if the solicitee never intended to commit the crime, but the solicitor (not knowing this) took steps to inform the authorities so that the crime would have been prevented if the person solicited had tried to commit it, the solicitor could avail himself of the affirmative defense herein.

SECTION 1004. GENERAL PROVISIONS FOR CHAPTER 10

This section contains general provisions which are applicable to other sections in chapter 10. Subsection (a) contains a partial definition of "voluntary and complete" with respect to the defense of renunciation. This definition has been explained in connection with the discussion of that defense in sections 1001-1003.

Subsection (b)(1) provides that it is not an offense to attempt to commits, to conspire to commit, or to solicit the commission of, an offense described in sections 1001 through 1003; an offense described in section 1202; or an offense described outside this title (including those offenses such as section 1764 (Antitrust offenses) that are incorporated by reference in this title) (i) that consists of an attempt, a conspiracy, or a solicitation, or (ii) to the extent such nontitle 18 offense is subject to another attempt, conspiracy, or solicitation statute outside this title. In the latter case, the Committee intends that the specific nontitle 18 conspiracy, attempt, or solicitation offense control. Under this subsection, if two or more persons enter into an agreement to commit a criminal offense but none of the conspirators does any act to effect any objective of the agreement, they could not be charged with "attempted conspiracy." The Committee believes that the harm in such conduct is simply too remote to warrant prosecution. Likewise, a person who mails a letter to another person soliciting that person to commit an offense would not be guilty of attempted solicitation if the other person never received the letter. Similarly, a person who unsuccessfully solicits another to join a conspiracy could not be found guilty of solicitation of a conspiracy.

Subsection (b)(2) provides that it is not an offense to attempt to commit one of the twenty-two enumerated offenses. This adds to the provisions in subsection (b)(1) certain substantive offenses that the Committee concluded it was not desirable to punish for an attempt to commit the offense. In making this determination, the Committee sought to identify conduct falling within the following categories: (1) inchoate offenses (see subsection (b)(1)); (2) offenses presenting significant implications for First Amendment activity (incitement, demonstration, communication, press, or speech related); (3) negligent offenses; and (4) offenses involving an omission to perform a legal duty.

Subsection (b)(3) provides that is not an offense to conspire to commit, unless it was in fact completed, an offense set forth in section 1115(a)(3), 1116(a)(1), or 1831(a)(1). The three offenses enumerated are the only ones in the Code that punish specific acts of incitement (i.e., incitement to evade military or alternative civilian service, incitement to mutiny, insubordination, or desertion, and incitement to riot).

Subsection (b)(4) lists thirteen offenses (including the foregoing three incitement offenses which are excepted from the applicability of all inchoate crimes) that are specifically exempted from the application of the criminal solicitation offense. Those offenses (enumerated in sections 1114, 1115, 1116, 1122, 1123, 1124, 1301, 1302, 1328, 1334, 1343(a)(1)(A), 1831, and 1833) were selected because of the fact that they may involve conduct which, if a solicitation offense were to apply, could adversely affect First Amendment values. The bill adopts the policy of a cautious application of the solicitation offense given the fact that no such general offense has existed in the Federal criminal justice system. For similar reasons the Committee believes that a conspiracy prosecution for an incitement-type offense should not be available unless the incitement offense has been completed. Although recognizing the existence of some risks to society in precluding a prosecution for, e.g., a conspiracy to incite a riot, the Committee has concluded that the greater danger lies in the overzealous use of such powers to inhibit the exercise of First Amendment rights.[114] In short, the offenses of incitement are deemed to warrant exemption from the applicability of inchoate offenses that would unduly broaden their scope. And, since the conduct of incitement precedes the intended result, removing the ability to prosecute for inchoate offenses in this context does not altogether prevent society from acting to punish the offender before he has achieved his criminally antisocial purpose.

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[114] In so stating, however, the Committee does not intend to criticize any investigation or prosecution under prior laws.

CHAPTER 11.—OFFENSES INVOLVING NATIONAL DEFENSE

This chapter contains a subchapter for each of the three generic offenses involving national defense—treason, sabotage, and espionage—and a fourth subchapter for miscellaneous national defense crimes. The subchapters on treason, sabotage, and espionage include descriptions of several related offenses; the fourth subchapter concerns atomic energy offenses.

SUBCHAPTER A.—TREASON AND RELATED OFFENSES

(Sections 1101–1103)

This subchapter revises part of chapter 115 (Treason, Sedition, and Subversive Activities) of title 18. Sections 1101 and 1102 deal with treason and certain lesser insurrectionary activities now covered by 18 U.S.C. 2381 and 2383. Misprision of treason, 18 U.S.C. 2382, has been assimilated into section 1311 (Hindering Law Enforcement). Section 1103, which prohibits para-military activity, replaces 18 U.S.C. 2386, a complex registration statute which, in effect, has been nullified by judicial rulings on similar legislation.[1] 18 U.S.C. 2384 and 2385 (the Smith Act), which proscribe seditious conspiracy and various acts involving advocacy of the forcible overthrow of the government, are not carried forward in the Code.

SECTION 1101. TREASON

1. In General

Uniquely among Federal crimes, the Constitution itself defines the offense of treason, lays down procedural requirements, and permits Congress to do no more than specify the penalty within certain limits. Section 3 of Article III provides:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

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[1] See *Albertson* v. *SACB*, 382 U.S. 70 (1965); *Communist Party* v. *United States*, 384 F.2d 957 (D.C. Cir. 1967).

> The Congress shall have Power to declare Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The constitutional definition prohibits Congress from declaring conduct that does not fall clearly within its terms as treason. The requirement of two witnesses to the overt act also prevents Congress from denominating an offense containing all the elements of treason by some other name.[2]

The constitutional definition has been construed by the courts as recognizing two forms of the offense: (1) levying war against, or rendering assistance to foreign enemies waging war against, the United States, and (2) engaging in domestic rebellion. Congress, despite the limitations on its power, is entitled to assign different penalties to the different forms that the offense can take. Section 1101 describes the offenses of levying war and assisting foreign enemies and section 1102 (a)(1) the offense of rebellion. The former is declared a Class A felony, and the latter a Class B felony.

Unlike current statutory law, the constitutionally mandated two-witness rule has been codified. Although there is some confusion as to the application of the rule,[3] the Committee deems it useful to include it on the face of the statute in substantially the language of the Constitution.

2. Present Federal Law

In existing Federal law 18 U.S.C. 2381 deals with the conduct described in section 1101.

18 U.S.C. 2381 provides that whoever "owing allegiance to the United States, levies war against them or adheres to their enemies giving them aid and comfort within the United States or elsewhere," is guilty of treason. Essentially the statute tracks the constitutional definition. The addition of the reference to "allegiance" has been held to be superfluous as necessarily implied in the Constitution's definition.[4] So too the stipulation that the offense can be committed without the territorial jurisdiction of the United States.[5]

Section 2381 has remained virtually unchanged since first enacted as section 1 of the Judiciary Act of 1790. The mandatory death penalty was made discretionary when the statute was reenacted as section 1 of the Act of July 17, 1862.[6] The present statute also provides for a minimum sentence of five years and a fine of not less than $10,000 and further contains a disqualification from holding Federal office.

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[2] *Cramer* v. *United States,* 325 U.S. 1, 45–47 (1945).

[3] Compare *Haupt* v. *United States,* 330 U.S. 631 (1947), with *Cramer* v. *United States, supra* note 2.

[4] *United States* v. *Wiltberger,* 18 U.S. (5 Wheat.) 76 (1820).

[5] *Kawakita* v. *United States,* 343 U.S. 717, 732–733 (1952).

[6] The death penalty is in all likelihood unenforceable in the light of Supreme Court decisions. E.g. *Gregg* v. *Georgia,* 428 U.S. 153 (1976); *Furman* v. *Georgia,* 408 U.S. 238 (1972).

3. The Offense

A. Subsection (a)(1)

(i) *Elements.*—Subsection (a)(1) provides that a person commits an offense if, "while owing allegiance to the United States, he adheres to the enemies of the United States and intentionally gives them aid and comfort." The elements of the offense are thus (1) that the defendant owe allegiance to the United States; (2) that there exist enemies of the United States; (3) that he "adhere" to them; (4) that he give them aid and comfort; and (5) that such assistance is rendered intentionally. No change from current law is intended. Indeed, the basic language of the Constitution and 18 U.S.C. 2381 have been retained.[7] This will tend to insure that the proposed provision will comport with constitutional limitations.[8] Moveover, a court enforcing the statute, will not need to concern itself with whether the conduct falls within the ban of the statute. The only question will be, as it is today, whether the conduct is within the ambit of the Constitution as interpreted by the courts.

Treason is a breach of "allegiance" and may be committed only by one who owed allegiance, whether perpetual or temporary.[9] This section employs the term as it has been understood under current law, i.e., allegiance is the obligation of fidelity and obedience owed to the sovereign in return for the protection of the law.[10] The obligation is owed "to the political entity the United States not to the person of the President nor to the party in power for the time being."[11]

The "allegiance" may be either (1) the absolute permanent allegiance owed by a citizen, whether citizenship was acquired by birth or naturalization,[12] which remains in effect at all times and in all places, even in enemy territory beyond the actual protection of the laws, until he has divested himself of citizenship in accordance with our law,[13] or (2) the qualified temporary local allegiance owed by an alien, unless relieved by treaty, so long as he invokes the law's protection by his presence.[14]

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[7] The National Commission recommended redefining the offense in modern language. See Working Papers, pp.419–425

[8] See Hearings, pp. 1482–1483 (testimony of Edward J. Ennis, American Civil Liberties Union).

[9] See *United States* v. *Wiltberger, supra* note 4.

[10] *Carlisle* v. *United States,* 83 U.S. (16 Wall.) 146, 154 (1,873).

[11] *Chandler* v. *United States,* 171 F.2d 921, 938 (1st Cir.), cert. denied, 336 U.S. 918 (1949). By contrast, under the English statute from which our constitutional definition was drawn, 35 Edward III (C. 1350), allegiance is owed the monarch.

[12] The obligation attaches where naturalization was procured by fraud since citizenship thus acquired is merely voidable and not void, *United States* v. *Stephen,* 50 F. Supp. 445, 447, 448 (E.D. Mich.), aff'd, 139 F.2d 1022 (6th Cir. 1943), but not where the naturalization proceedings were void. *United States* v. *Villato,* 2 U.S. (2 Dall.) 370, 372 (C.C.Pa. 1797).

[13] See *Kawakita* v. *United States, supra* note 5. *Kawakita* also holds that treason may be committed by one having dual citizenship, *Id.* at 723–727.

[14] *Carlisle* v. *United States, supra* note 10; *Radich* v. *Hutchins,* 95 U.S. 210 (1877). It is established English law, and probably ours, that such temporary obligation continues after the alien's physical departure if he has left family or property behind which invokes the law's protection. See Foster's *Crown Law* (1762), citing a no-longer extant Resolution of the Justices of 12 January 1707, quoted in Hall, *Famous Trials,* Trail of William Joyce (Lord Haw Haw), Vol. IV, 66. 92–93. The *Joyce* case itself, *Rex* v. *Joyce,* 173 L.T. 377 (1945), aff'd, *sub nom. Joyce* v. *Director of Public Prosecutions,* A.C. 347, 115 L.J. 146 (House of Lords, 1946), extended the rule to an alien abroad holding a valid British passport though he had left neither family nor property behind. This ruling is criticized by Hall, *supra,* and is noted without approval in *Gillars* v. *United States,* 182 F.2d 962, 981 (D.C. Cir. 1950).

The second element is that the offender assist "enemies." The adjective "foreign" is implicit in that, as stated in the *Greathouse* case, "enemies" was always understood to mean a foreign sovereign and his subjects engaged with this country in open hostilities or war.[15]

The third element of "adherence" is a mental state, the harboring of disloyal sentiments,[16] whereas the fourth element of giving "aid and comfort" requires overt conduct. A person may favor the enemy or be unsympathetic to this nation's cause, but he is not guilty of treason until he has given aid and comfort to the enemy. Conversely, he may give aid and comfort, but be innocent of treason if there was no adherence, for example, in time of war engaging in an illegal strike for higher wages, making a speech critical of the government, or assisting an enemy agent not suspected of being such.[17]

"Aid and comfort" means any act which strengthens or attempts to strengthen the enemy in its conduct of war or in its resolve to prosecute it, or which weakness this nation's power or resolve to resist or defeat the enemy.[18] Examples of aid and comfort are communicating military secrets, sheltering saboteurs, assisting escaped prisoners of war, furnishing provisions, making propaganda broadcasts, and abusing American prisoners of war forced to work in an enemy war plant.[19]

The act may be of minimal significance as a contribution to the enemy's war effort, or even unnecessary; [20] or the act may be frustrated or fail. It is sufficient that the defendant did the best he could to make it succeed.[21]

The final element is that the assistance to foreign enemies be rendered "intentionally." The requisite intent in treason is not wholly clear,[22] but has been held by the Supreme Court to involve an intent to betray the United States.[23] Thus if a person knowingly and voluntarily performs acts of aid and comfort to an enemy belligerent, he will generally have acted with the requisite intent to betray. It is no defense that he believed that enemy victory would be best for the United States in the long run,[24] or that he gave aid and comfort for profit rather then ideological considerations. His motives do not negate the requisite adherence or intent to betray.[25] Where, however, the enemy aided is a close family member, it appears that some degree of aid and comfort (food and shelter) can be extended, even with the knowledge of the recipient's hostile purposes. Thus in *Haupt* v. *United States,*[26] it was held that the jury was "correctly instructed" that "if they found that the defendant's intention was not to injure the United States but merely to aid his son 'as an individual, as distinguished from assisting him in his purposes, if such existed, of aiding the German Reich, or of injuring the United States, the defendant must be found not guilty.' "

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[15] *United States* v. *Greathouse*, 26 F. Cases No. 15, 154 (C.C. Cal. 1863). See also *Johnson* v. *Eisentrager*, 339 U.S. 763, 768 n.2 (1950); *United States* v. *Fricke*, 259 F. 673, 677 (2d Cir. 1919). No change is intended of the current rule that an American, who joins the armed forces of a belligerent enemy, is an "enemy," *Ex parte Quirin*, 317 U.S. 1 (1942), and that giving aid and comfort to him is treason, *Haupt* v. *United States*, *supra* note 3.

[16] See Working Papers, pp. 428–430.

[17] See *Cramer* v. *United States*, *supra* note 2 at 28–29: *Kawakita* v. *United States*, *supra* note 5 at 736; *Chandler* v. *United States*, *supra* note 11 at 942–943.

[18] *Cramer* v. *United States*, *supra* note 2 at 28–29.

[19] See *Cramer* v. *United States*, *supra* note 2; *Haupt* v. *United States*, *supra* note 3; *Stephan* v. *United States*, 133 F.2d 87 (6th Cir.), cert. denied, 318 U.S. 781 (1943); *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *Kawakita* v. *United States*, *supra* note 5.

[20] *Kawakita* v. *United States*, *supra* note 5 at 738–739.

[21] See *Haupt* v. *United States*, *supra* note 3 at 643 (harboring saboteur who was apprehended before he could commit sabotage); *Chandler* v. *United States*, *supra* note 11 at 941 (propaganda broadcasts, concerning which there was no evidence that they were heard or adversely affected morale); *Iva IkukoToguri D'Aquino* v. *United States*, *supra* note 19 at 373 (same).

[22] See Working Papers, pp. 427–430.

[23] See *Cramer* v. *United States*, *supra* note 2 at 29, 31.

[24] *Chandler* v. *United States*, *supra* note 11 at 943–44; *Best* v. *United States*, 184 F.2d 131, 137–38 (1st Cir. 1950), cert. denied, 340 U.S. 939 (1951).

The element that the person owes allegiance to the United States is an existing circumstance. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is "reckless," i.e., that the offender was aware of but disregarded the substantial risk that he owed allegiance to the United States. The Committee believes that this comports with current law that holds resident aliens capable of treason even though they might not know of their obligation of limited allegiance imposed by the Constitution. The "reckless" standard is somewhat at odds with the district court's instruction in the *Kawakita* case, *supra,* to the effect that the jury should acquit the defendant (who held dual citizenship) if it credited his claim that he "honestly believed" he had divested himself of United States citizenship. Mere honest belief would not suffice to exculpate under the Committee's formulation, if the person was aware of the risk that he still owed allegiance to this country, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[27] The Committee, in effect, considers that the district court's instruction was overly favorable and did not state the law. Although the National Commission reads the Supreme Court's opinion in *Kawakita* as approving the lower court's instruction,[28] a careful examination of that opinion shows that the Court merely quoted the trial judge's instruction without approval in order to establish what issues of fact the jury's verdict of guilty necessarily resolved.

(ii) *Culpability.*—The conduct in subsection (a)(1) is adhering to the foreign enemies of the United States and giving them aid and comfort. Since no culpability is specifically designated with respect to the former clause, the applicable state of mind that must be proved is "knowing," i.e., that the offender was aware that he was adhering to the foreign enemies of the United States.[29] In order to be aware that he was dealing with an "enemy," an individual would have to know that open hostilities were in progress. Thus, a person who, unaware that war had broken out, provided assistance to the enemy would not be guilty of treason. On the other hand, the person need not know that war, in a legal sense, existed, provided he was cognizant that hostilities had commenced. Such a person who tendered assistance would act at his peril that a court might later hold that war had begun.[30]

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[25] See *Hanauer* v. *Doane,* 79 U.S. (12 Wall) 342, 347 (1870) (sale of provisions to the Confederate army); *Chandler* v. *United States, supra* note 11 at 943.

[26] *Supra* note 3.

[27] See section 302(c)(2).

[28] See Working Papers, p. 426; Final Report, § 1101.

[29] See sections 303(b)(1) and 302(b)(1).

With respect to the second clause, the culpability standard is set at "intentionally," thus requiring proof that the offender had a conscious purpose or desire to give aid and comfort.[31] Through the combined effect of requiring a "knowing" state of mind as to "adheres" and an "intentional" state of mind as to give aid and comfort, the Committee intends to carry forward existing constitutional doctrine that the crime of treason involves an intent to "betray" the United States.

B. Subsection (a)(2)

(i) *Elements.*—Subsection (a)(2) punishes a person who, "while owing allegiance to the United States", "levies war against the United States." The concept of owing allegiance has been discussed in connection with subsection (a)(1). The conduct of "levying war" recodifies the language of the Constitution and 18 U.S.C. 2381. The *Burr* cases[32] establish that war is levied at some point before the actual shooting commences, but not before men are arrayed in martial order ready to move. The assembling of unarmed men, for a treasonable purpose where the necessity of arming is contemplated but the arms are not immediately available, is insufficient under this provision to amount to levying of war. Similarly, nothing antecedent to the overt levying of war, such as plotting, traveling to the rendezvous, the collecting of arms, or the recruiting of men, is treason in the constitutional sense or under this section. However, such inchoate acts may be punishable under section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation).

The concept of "war" as used in this section, and indeed in this chapter and throughout the Code, is not specifically defined. It is intended to bear its current meaning under prevailing court decisions.[33] While the existing cases, cited below, were decided in differing contexts, all, except the *Latney* and *Averette* decisions,[34] held that "time of war" is not limited to a war formally declared by Congress. The latter cases held that, in light of the constitutional policies disfavoring court martial jurisdiction over civilians, Article 2(10) of the Uniform Code of Military Justice, authorizing court martial authority over civilians in "time of war", should be interpreted narrowly to mean only a war declared by Congress. The rationale of those two decisions is not properly applicable to the offenses described in this bill, which involve trial in a civilian (Federal district) court. Thus, while the precise scope of the term "war" is not settled by judicial decisions, it is clear, and the Committee accordingly intends, that "war", with respect to the imposition of criminal liability, at least extends to certain situations in which American armed forces are engaged in hostilities albeit no formal declaration of war has occurred.[35]

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[30] It seems rather clear that the concept of war in this context does not depend upon a formal declaration of war by one side or the other. See Final Report, Introductory Note, p. 77; *The Prize Cases,* 67 U.S. (2 Black) 635 (1862); *Bas* v. *Tingy (The Eliza),* 4 U.S. (4 Dall.) 32 (1800); 1 Op. Atty. Gen. 50 (1798).

[31] See section 302(a)(1).

[32] *Ex Parte Bollman,* 8 U.S. (4 Cranch) 75 (1807), and *United States* v. *Burr,* 25 F. Cas. Nos. 14,692a–694a (1806–1807).

[33] See, e.g., *Bas* v. *Tingy, supra* note 30; *Montoya* v. *United States,* 180 U.S. 261 (1901); *Hamilton* v. *McClaughry,* 136 Fed. 445 (D. Kans. 1905); *United States* v. *Anderson,* 17 U.S.C.M.A. 588, 38 C.M.R. 386 (Ct. Mil. App. 1968); compare *Latney* v. *Ignatius,* 416 F.2d 821 (D.C. Cir. 1969); *United States* v. *Averette,* 19 U.S.C.M.A. 363, 41 C.M.R. 363 (Ct. Mil. App. 1970).

[34] *Supra* note 33.

(ii) *Culpability.*—The conduct is this offense is levying war. As no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing", i.e., that the offender was aware of the nature of his actions.[36]

As under subsection (a)(1), it is not necessary that the offender know that war, in a legal sense, is being levied. It is sufficient if he is aware that he is taking part in hostilities or engaging in other conduct that in fact amounts to levying war.

The element that the offender engages in conduct under this subsection "while owing allegjanance to the United States" is, as under subsection (a)(1), an existing circumstance as to which the applicable minimum mental state that must be shown is "reckless". Thus a selfproclaimed rebel would not escape liability hereunder if he was aware of but disregarded a substantial risk that he still owed allegiance to the United States.

4. Proof

Subsection (b) provides that a person may not be convicted under this section unless the evidence against him includes the testimony of two witnesses to the same overt act, or unless he makes a confession in open court. This merely codifies in statutory form the proof requirements in the Constitution that are applicable to the treason offense.

5. Jurisdiction

No jurisdictional base is specified for this section. Accordingly, under the principles of section 201(b)(2), there is Federal jurisdiction if the offense is committed within the general or special jurisdiction of the United States, as defined in sections 202 and 203. In addition, extraterritorial jurisdiction—as under present law—exists over the offense by virtue of section 204(b). This is in accordance with current law that treason may be prosecuted without regard to the place of its commission.[37]

6. Grading

An offense under this section is graded as a Class A felony, permitting imposition of any prison term including life imprisonment. This is consistent with 18 U.S.C. 2381.

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[35] See, e.g., *Hamilton* v. *McClaughry, supra* note 33 (Boxer Rebellion in China); *United States* v. *Anderson, supra* note 33 (Vietnam conflict). Although of course cognizant of the recent War Powers Resolution (50 U.S.C. 1541 *et. seq.*), the Committee does not consider that its provisions are necessarily relevant to the definition of "war" under this Code for the quite distinct purpose of determining criminal liability. For this reason, a definition of "war" in section 111 of S. 1437, as introduced in the 95th Congress, patterned upon the War Powers Resolution, was deleted by the Committee during its consideration of that bill. The definition is excluded from the reported bill.

[36] See sections 303(b)(1) and 302(b)(1).

[37] See e.g., *Kawakita* v. *United States, supra* note 5; *Gillars* v. *United States, supra* note 4 at 978–979.

SECTION 1102. ARMED REBELLION OR INSURRECTION

1. In General and Present Federal Law

This section carries forward 18 U.S.C. 2383 and overlaps in part the offense of treason set forth in section 1101. 18 U.S.C. 2383, which is derived from the second section of the Act of July 17, 1862, punishes by up to ten years' imprisonment and a fine of up to $10,000, and atomatic disqualification from holding public office, whoever "incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid and comfort thereto." It was early held in *United States* v. *Greathouse.*[38] that this statute to the extent it condemns one who "assists, or engages in . . . rebellion", etc., effectively defined constitutional treason, thus entitling the defendants charged thereunder to the protection of the two-witness rule while subjecting them only to a ten-year penalty.[39] In this regard, the lact of explicit recognition of the constitutional proof requirement for treason in this section is not intended to cast doubt on application of the *Greathouse* decision to armed rebellion or armed insurrection. The Committee considers, however, that there may be violations of this section that do not rise to the constitutional status of treason, although it recognizes that this issue will be a matter which only the courts can finally resolve. To emphasize its view that this section does not proscribe only treasonous conduct, the Committee has denominated the offense as other than treason, and has excised the phrase "levies war," which is included in the constitutional definition of treason, and which appears in section 1101 (a)(2). In addition, the Committee has omitted the explicit requirement "while owing alleginace to the United States." Since, however, the necessity for such allegiance is probably implicit in the notion of a rebellion or insurrection, its delection here is more a matter of form that a substantive difference from section 1101.

2. The Offense

Subsection (a) provides that a person commits an offense if he engages in "armed rebellion or armed insurrection"— (1) against the authority of the United States or a State with intent to— (A) overthrow, destory, supplant, or change the form of, the government of the United States; or (B) sever a State's relationship with the United States; or (2) against the United States with intent to oppose the execution of any law of the United States."

As is evident, the offense in subsection (a)(1) is subdivided into rebellion directed immediately against the United States and rebellion aimed ultimately against the authority of the United States but directed immediately against a State. Treasonous activities directed exclusively against a State are not punishable under this subsection. This is in accord with the traditional interpretation of the Constitution that such conduct is not treason unless the ultimate objective is to sever the State from the Union.[40] To illustrate, an armed attempt to change the form of the Federal government by abolishing the Congress would violate the subsection. However, a similar foray against a State government would not be an offense[41] unless the revolutionaries further intended to take the State out of the Union or if they resisted Federal armed forces sent into the State to fulfill the Federal government's Article IV obligation of guaranteeing a republican form of government.[42]

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[38] *Supra* note 15.

[39] *Under Greathouse*, the massive armed resistance to the execution of unpopular measures as occurred in the Whiskey and Fries Rebellions, for example, undoubtedly constituted treason.

[40] See *Charge to Grand Jury*, 30 F. Cas. No. 18.275 (C.C.R.I. 1842) (Story, J.).

This subsection does not require that the purpose for which the assemblage is covened involve the overthrow of the central government. It is sufficient if the purpose is to nullify the government's sovereignty over a portion of its territory, whether a State, possession, or lesser enclave, such as a fort, or even to prevent the execution of a general law, such as a revenue measure.[43] However, mere riots, or armed violation of statutes, do not constitute "armed rebellion or armed insurrection,"[44] a concept that is essentially equivalent to levying war, discussed in relation to section 1101. Rather there must be an attempt to nullify the statute generally.[45] The force must be exercised directly against the government's officers, not merely against those entitled to the law's protection, or against persons producing material under government contract.[46] The terms "overthrow, destroy, supplant or change the form of government," derived from the related statute, 18 U.S.C. 2385, are included here to underscore the concept that less than total revolution but more than mere armed violation s of law are envisioned.

The conduct in this subsection in engaging in armed rebellion or insurrection. As no culpability standard is specifically designated, the applicable state of mind that must be proved is "knowing," i.e., that the offender was aware of the nature of his actions.[47] The elements that the conduct is directed, in patagraph (1), "against the authority of the United States or a State" and, in paragraph (2) "against the United States" are existing circumstances. Since no culpability level is specifically indicated, the applicable state of mind that must be established is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[48]

The elements that the conduct be done (1) with intent to overthrow, destroy, supplant, or change the form of the government of the United States or to sever a State's relationship with the United

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[41] The National Commission proposed to make such conduct an offense. See Final Report, Sec. 1103. However, the Committee was of the opinion that State law and power should be adequate to deal with most situations of this kind. In egregious cases the State will undoubtedly call for Federal assistance to suppress the insurrection, and forcible opposition to such Federel forces (troops, guards, or marshals) would constitute a violation of section 1102. Moreover, any question of undermining the States' right to self-defense that the preemption doctrine would raise should be avoided. See *McSurley* v. *Ratliff,* 282 F. Supp. 848 (E.D. Ky. 1967), appeal dismissed, 390 U.S. 412 (1968).

[42] There would be a violation of subparagraph (B) in the first instance and of either subparagraph (A) ("overthrow, destroy, supplant") or section 1101 in the latter.

[43] See *Burr Cases, supra* note 32; *Whiskey Rebellion Cases (United States)* v. *Vigol,* 2 U.S. (2 Dall.) 346 (C.C. Pa. 1795); *United States* v. *Mitchell,* 2 U.S. (2 Dall.) 348 (C.C. Pa. 1795).

[44] For the meanings of the terms "rebellion" and "insurrection" see *Home Ins. Co. of N.Y.* v. *Davila,* 212 F.2d 731, 736–738 (1st Cir. 1954) ; *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.,* 505 F.2d 989, 1017–1018 (2d Cir. 1974).

[45] *United States* v. *Hoxie,* 26 F. Cas. No. 15,407 (C.C. Vt. 1808) ; *United States* v. *Hanway, 26* F. Cas. No. 15,229) (C.C.E.D. Pa. 1851).

[46] See *Baldwin* v. *Franks,* 120 U.S. 678 (1887) ; *Hayward* v. *United States,* 286 F. 795 (7th Cir. 1920).

[47] See sections 303(b) (1) and 302(b) (1).

[48] See sections 303(b) (2) and 302(c) (1).

States, or (2) with intent to oppose the execution of any law of the United States set forth the alternative purposes for which the conduct must be done.

Thus this section does not reach a mere riot or simple violation of law perpetrated with weapons. It is rather aimed at armed rebellion against the enforement of a particular law or laws, such as a Federal tax or civil rights enactment. The term "law of the United States" in this context is meant to include judicial decisions so that, for example, a person could not successfully defend a prosecution hereunder on the ground that he did not intend to oppose a statute intself, but only the interpretation placed upon it by a court.

3. Jurisdiction

No jurisdicitional base is provided base is provided for this section. Accordingly, Federal jurisdiction over the offense is plenary under section 201(b) (2). To the extent that an offense hereunder is found to constitute a form of treason, extraterritorial jurisdiction is also afforded under section 204(b).

4. Grading

An offense under subsection (a) (1) is graded as a Class B felony (up to twenty-five years in prison.) This represents a middle position between the capital penalty allowed under 18 U.S.C. 2381 and the ten year maximum penalty prescribed in 18 U.S.C. 2383 for such conduct. The Committee considers that a lesser penalty for rebels as opposed to those who assist foreign enemies is warranted. The practice in instances of unsuccessful rebellions in this country has been to show leniency. For example, the defendants in the *Whiskey Rebellion* cases, *supra,* and the *Fries Rebellion* case, *supra,* were pardoned after conviction. All participants on the Confederate side of the Civil War were pardoned by the Amnesty Proclamation of December 25, 1868.

An offense under subsection (a)(2) is graded as a Class C felony (up to twelve years in prison). This is similar to the maximum penalty under 18 U.S.C. 2383 but is substantially lower than the penalty applicable under section 1101, indicating the Committee's view that this kind of conduct, whether deemed a form of treason or not, poses less of a threat to the integrity of the nation and is thus deserving of less severe punishment.

SECTION 1103. ENGAGING IN PARA-MILITARY ACTIVITY

1. In General and Present Federal Law

This section is designed to outlaw private armies. It is derived from the recommendation of the National Commission.[49] Current Federal law contains no like provision. The closest statutory analog is 18 U.S.C. 2386, a complex provision requiring registration, enforceable by penalties of fine and imprisonment up to five years, of organizations engaged in "civilian military activities." There have been no registrations under this statute nor any reported cases involving it.[50] The statute may well, because of its device of requirment privilege against compulsory self-incrimination.[51]

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[49] See Final Report § 1104.

[50] See Working Papers, p. 436 n. 1.

The proposal reflects the view that association to accomplish the usurpation of a government function by the use of weapons is a matter of legitimate Federal concern and is not protected by the First Amendment. Other nations, such as Canada, Great Britain, and Norway, have similar provisions in their penal codes.[52]

2. The Offense

Subsection (a) provides that a person commits an offense if he engages in the acquisition, caching, or use of dangerous weapons, or in the training of other persons in the use of such weapons, by or on behalf of an organization or group, of ten or more persons, that has as a purpose the taking over or control of, or the unauthorized assumption of the function of, a Federal or State government agency, by force or threat of force.

It should be noted that the conduct requires that a purpose of the organization or group involve the use of force or threat of force to take over or assume the functions of an agency of the government of a State or the United States. Because of this limitation (not in the National Commission's proposal), and because of the further limitation that the purpose of assuming the function of a government agency must be "unauthorized", the Committee believes that there is no danger that this provision will reach private armed groups whose objective is self-defense or who have armed themselves for protective purposes such as to patrol neighborhoods with high rates of violent crimes.[53]

This section does not purport to reach activities directed against taking over or assuming the functions of an agency of a local government.[54] Whereas currently States and localities are prevented by the preemption doctrine under the Smith Act (18 U.S.C. 2385) from enforcing their laws relating to advocacy and organizational activities directed at overthrowing local governments,[55] with the repeal of the Smith Act by this measure the Committee anticipates that States will be enabled in the future to assume the burden of penalizing such local seditious conduct.

The conduct element in this offense is engaging in the acquisition, caching, use, or training in the use, of weapons on behalf of an organization or group. The culpability level will be "knowingly," thus requiring proof that the offender was aware of the nature of his actions.[56] The facts that the weapons are "dangerous weapons,"[57] and that organization or group consists of ten or more persons and that it has as a purpose the taking over or control of, or the unauthorized assumption of the function of, an agency of the United States government or of any State government, by force or threat of force are existing circumstances. As no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "reckless," e.g., that the offender was aware of but disregarded the substantial risk that the organization or group consisted of more than ten persons and had a purpose of the kind prescribed.[58]

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[51] Compare *Albertson* v. *SACB*, 382 U.S. 70 (1965); *Communist Party* v. *United States*, 384 F.2d 957 (D.C Cir. 1967).

[52] See Working Papers, pp. 437–439.

[53] Compare Final Report, § 1104, Comment, p. 81.

[54] The term "government agency" is defined in section 111 and is similar to the definition of "agency" in 18 U.S.C. 6.

[55] See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Mcsurely* v. *Ratiff*, 282 F. Supp. 848 (E.D. Ky. 1967), appeal dismissed 300 U.S. 412 (1968).

[56] See sections 303(b)(1) and 302(b)(1).

[57] The term "dangerous weapons" is defined in section 111.

3. Jurisdiction

No jurisdictional base is stated as applicable to this section. Accordingly, Federal jurisdiction is governed by the operation of section 201(b)(2).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is consistent with the maximum penalty currently afforded under 18 U.S.C. 2386.

STATUTES REPEALED

As noted in the introduction to this subchapter, the Code does not carry forward 18 U.S.C. 2384 or 2385. The former statute proscribes, insofar as is pertinent here, a conspiracy to overthrow or destroy by force the government of the United States or to levy war against the United States, *et seq.* The Code more appropriately leaves this area to the general conspiracy provision (section 1002), which will make it an offense to conspire to violate either section 1101 (Treason) or 1102 (Armed Rebellion or Insurrection).

18 U.S.C. 2385 punishes the following types of conduct: (1) advocating and teaching the desirability of the overthrow, by force, or by assassination of public officers of the government of the United States, or of a State, territory of possession, or subdivision thereof; (2) publishing such incitements with the intent to cause the overthrow of such government; or (3) organizing societies or groups to teach or advocate the overthrow of the government by violence, or joining such a society or group with knowledge of its purposes. The maximum penalty prescribed is twenty years in prison. Because the statute deals with speech, it has been subjected to rigorous review by the Supreme Court.

In *Dennis* v. *United States,*[59] the Court, in affirming the conviction of leaders of the Communist Party under this statute, held that all of the offenses enumerated therein require a specific intent to overthrow the government.[60] The Court also held that it was the intent of Congress to punish only "advocacy," by which was meant incitement, rather than philosophical discussion or preaching.[61] However, the Court determined that the overthrow contemplated need not be immediate but could be as "speedily as circumstances would permit."[62]

As so construed, the Court held that the statute comported with strictures of the clear and present danger test under the First Amendment,[63] the application of which the Court determined was a judicial rather than a jury question.[64] The Court in considering the clear and present danger test as applied to this statute, observed:[65]

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[58] See sections 303(b)(2) and 302(c)(1).

[59] 341 U.S. 494 (1951).

[60] *Id.* at 499-500.

[61] *Id.* at 502.

[62] *Id.* 509-11.

[63] The version of the test which the Court adopted—and which it has adhered to ever since—was that of Judge Learned Hand, writing for the court of appeals in the *Dennis* case, i.e. "In

> Obviously, the words cannot mean that before the Government may act, it must wait until the *Putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.

In *Yates* v. *United States,*[66] the concept of "advocacy" was further defined as incitement to perform acts rather than merely to believe. This was reiterated in *Noto* v. *United States,*[67] where the Court stated: "There must be some substantial direct or circumstantial evidence of a call to violence now or in the future." These interpretations of legislative intent were given constitutional status in *Brandenburg* v. *Ohio,*[68] in which a State statute the language of which was not so restricted by the Ohio courts was invalidated. The Court in *Brandenburg*[69] summarized its previous decisions as having

> fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

And the Court noted that its prior holdings in *Dennis* and *Yates* sustaining the constitutionality of the Smith Act were premised on the theory that the Act "embodied such a principle".[70]

In *Scales* v. *United States,*[71] the Court upheld a conviction under the so-called membership clause of the Smith Act for joining the

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such case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510.

[64] *Id.* at 512–515.

[65] *Id.* 509.

[66] 354 U.S. 298 (1957). The Court stated (*id.* at 324–325); "The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to *believe* in something." (Emphasis in original.)

[67] 367 U.S. 290, 297–298 (1961).

[68] 395 U.S. 444 (1969).

[69] *Supra* note 68 at 447.

[70] *Supra* note 68 at 447–448, note 2.

[71] 367 U.S. 203 (1961).

the government as soon as circumstances were propitious, and with a specific intent to bring about the forcible overthrow of the government as speedily as circumstances would permit. Significantly, the Court in *Scales* reaffirmed the prior holdings in *Dennis, supra,* and *Yates, supra,* that the advocacy of future action was within the valid purview of the statute, as well as advocacy of immediate action.[72]

With respect to the nature of membership, the Court in *Scales* further held that the Smith Act requires that the person's membership in an organization advocating forcible overthrow be "active," not merely passive or nominal, since a person who merely becomes a member of an illegal organization "need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing." [73]

S. 1 in the 94th Congress contained an offense designed to perpetuate the provisions of 18 U.S.C. 2385 (the Smith Act) insofar as they had been sustained by the Supreme Court. The present bill, as reported, contains no such offense.

SUBCHAPTER B.—SABOTAGE AND RELATED OFFENSES

(Section 1111-1117)

This subchapter deals with certain offenses short of treason and subversion that affect the security of the United States. It is concerned with physical obstruction of national defense, preparation for war, or the conduct of war. Espionage and classified information offenses are dealt with in the following subchapter. This subchapter contains provisions punishing sabotage perpetrated with the intent of interfering with national defense (section 1111); similar conduct in which the offender acted recklessly as to the fact that national defense would be harmed (section 1112); violation of certain anchorage regulations designed to forestall espionage and sabotage (section 1113); evading military service (section 1114); obstructing recruitment and induction (section 1115); inciting mutinies or desertion (section 1116); and aiding escape of prisioners of war and enemy alien internees (section 1117).

SECTION 1111. SABOTAGE

1. In General

Sections 1111 and 1112 are designed principally to replace 18 U.S.C. 2151 and 2153-2157.[1] These statutes, part of chapter 105 of title 18, are concerned with "sabotage," i.e., the willful destruction or deliberate defective production of national defense items with intent to interfere with national defense and similar conduct done with an awareness that defense efforts may be impaired, but without such specific intent. These current statutes focus for grading purposes on whether or not the offense is committed in time of war or declared national emergency.

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[72] *Id.* at 251.

[73] *Id.* at 227-228. *Scales* was cited with approval in *Law Students Research Council* v. *Wadmond,* 401 U.S. 154, 165 (1971).

[1] Section 2152 is genealogically unrelated to its six companions. It was codified into chapter 105 of title 18 because some of its provisions deal with "destruction" of naval facilities. Those aspects are carried forward by the offenses in this subchapter and in subchapter A of chapter 17. The other aspects of section 2152, dealing with trespass on naval facilities, or obstruction of them, and violation of presidential regulations concerning "defensive sea areas," are carried forward in title 18 Appendix. See also section 1713 (Criminal Trespass): *Feliciano* v. *United States,* 422 F.2d 943 (1st Cir.), cert. denied, 400 U.S. 823 (1970).

The bill, as reported, by contrast adds actual results and the significance of the sabotaged material as grading considerations. The subject bill also adds deliberate supplying of defective material to the traditional offense of deliberate destruction and defective production.

2. Present Federal Law

As previously stated, the principal provisions with which this section is concerned are found in chapter 105 (Sabotage) of title 18. Also relevant are 18 U.S.C. 1362 and 47 U.S.C. 606 which deal with sabotage of communication systems related to military or civil defense, and 42 U.S.C. 2276 which deals with "tampering with 'Restricted Data' " under the Atomic Energy Act.[2]

A. The Sabotage Act

18 U.S.C. 2153(a) provides a maximum penalty of imprisonment for up to thirty years and a $10,000 fine for whoever, either "when the United States is at war," or "in times of national emergency as declared by the President or by the Congress," "willfully injures, destroys, contaminates or infects" "any war material, war premises, or war utilities" or attempts so to do, either "with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities" or "with reason to believe his act may" have such effect.

The terms "war material," "war premises," and "war utility" are defined in 18 U.S.C. 2151 by means of exhaustive lists. The words "war material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all articles, parts or ingredients, intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities.

The words "war premises" include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and applicances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States, or any associate nation.

The words "war utilities" include all railroads, railways, electric lines, roads of whatever description, any railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all airconditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which air, water or gas is being furnished, or may be furnished, to any war premises or to the Armed Forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures, and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any war premises or to the Armed Forces of the United States, or any associate nation. The term "associate nation" is also defined in 18 U.S.C. 2151 and means "any nation at war with any nation with which the United States is at war," i.e., a wartime ally.

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[2] This offense is covered in section 1131 (Atomic Energy Offenses) and is discussed more fully in connection with that section.

This statute has recently been sustained against the challenge that it is void for vagueness although the conviction at issue (for arson of an ROTC building) was reversed because of erroneous trial rulings.[3]

18 U.S.C. 2154(a) provides a like penalty for one who, during a war or national emergency, with the identical intent or reason to believe as under section 2153, "willfully makes, constructs, or causes to be made or constructed in a defective manner any war material, war premises or war utility, or any tool, implement, machine, utensil, or receptable, used or employed, in making, producing, manufacturing, or repairing" the same.

In *Schmeller* v. *United States*,[4] the court held that the making of defective war material which is condemned by the statute must be such a making as to interfere with the normal function of the particular product. It also held that "reason to believe" was an alternative standard of culpability to "intent to injure or interfere," so that under an indictment charging conduct committed with "reason to believe," specific intent to injure the war effort of the United States or an associate nation need not be proved.[5]

Sections 2153 and 2154 and the relevant definitions of 2151 were initially enacted in 1917 when this country was in fact at war. They referred only to wartime and to interference with the war effort, and did not mention national emergency or national defense as they do now. Two decades later, in 1940, when war appeared imminent, and stories of "fifth column" activity were rife, it was recognized that no Federal law provided shelter for the large scale preparations for war then underway, comparable to that given in wartime by 18 U.S.C. 2153 and 2154. To fill this gap, sections 2155 and 2156 of title 18 were enacted, prohibiting, respectively, injury or defective production of "national-defense material," "national-defense premises," and "national-defense utilities," perpetrated with the intention of interfering with "national defense." Section 2151 was expanded by the addition of definitions of national-defense material, premises, and utilities, parallel to and almost identical with those of war material, premises, and utilities.

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[3] *United States* v. *Achtenberg*, 459 F.2d 91 (8th Cir.), cert. denied, 409 U.S. 932 (1972); see also *United States* v. *Eisenberg*, 469 F.2d 156 (8th Cir., 1972), cert. denied, 410 U.S. 992 (1973).

[4] 143 F. 2d 544 (6th Cir. 1944).

[5] *Ibid.* This holding would seem equally applicable under the parallel section 18 U.S.C. 2153(a).

The words "national-defense material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words "national-defense premises" include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States.

The words "national-defense utilities" include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which air, water, or gas may be furnished to any national-defense premises or to the Armed Forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any national-defense premises or to the Armed Forces of the United States.

Sections 2155 and 2156 place deliberately faulty production or repair on a par with deliberate injury, as under sections 2153 and 2154, respectively. They also equate such conduct committed with an awareness of the probable adverse consequences but unaccompanied by an actual desire to impair the defense effort, with defective production or repair committed with such intent. (An example would be the filling of naval shells with less than the required quantity of explosive to increase profits.) Apparently not covered under the statutes is the equally serious and reprehensible supplying of material known to be defective, though not intentionally mismanufactured.[6] Violation of 18 U.S.C. 2155 and 2156 is punishable by up to ten years' imprisonment and a $10,000 fine.

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[6] See *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir.), cert. denied, 329 U.S. 742 (1946).

The actual outbreak of World War II brought sections 2153 and 2154 into play. After the war, Emergency Power Continuation Acts were enacted and reenacted, keeping the higher penalty wartime statutes in effect for various periods of time. In 1953, when the "Cold War" promised to go on forever, 18 U.S.C. 2157 was enacted. This section provides that sections 2153 and 2154 with their higher penalties will remain in effect until six months after either the President or Congress declares an end to the national emergency first proclaimed in 1950.[7] In 1976 Congress enacted the National Emergencies Act (P.L. 94-412); 50 U.S.C. 1601 *et seq.*). Under the terms of this statute, all declarations of national emergency (with certain exceptions not here relevant) were terminated effective September 14, 1978. Thus, six months after that date, 18 U.S.C. 2157 was effectively nullified.

B. 18 U.S.C. 1362

Section 1362 punishes, among others, whoever "willfully or maliciously injures or destroys" any means of communication, operated or controlled by the United States, or "used or intended to be used for military or civil defense functions of the United States."

Violation is punishable by up to ten years in prison and a fine of $10,000.

C. 47 U.S.C. 606(b) and (h)

Section 606(a) of title 47 confers upon the President certain powers over radio, telegraph and telephone communications in wartime. Subsection (b) provides that during time of war it is unlawful to "knowingly or willfully, by physical force, . . . obstruct or retard . . . interstate or foreign communication by radio or wire." This would seem to cover sabotage. Subsection (h) provides that the offense is a misdeameanor, punishable by up to one year in prison, unless it is committed with "intent to injure the United States, or with intent to secure an advantage to any foreign nation," in which event the penalty rises to a maximum of twenty years in prison and a fine of $20,000.

D. 42 U.S.C. 2276

This section provides for up to life imprisonment and a fine of up to $20,000 for the removal, concealment, tampering, alteration, mutilation or destruction of any document or appliance "involving or incorporating Restricted Data . . ."[8] "with intent to injure the United States or with intent to secure an advantage to any foreign nation."

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[7] There is a split in authority as to the current efficacy of section 2157. The Eighth Circuit in *United States* v. *Achtenberg, supra* note 3 at 94, applied the statute in sustaining a conviction under 18 U.S.C. 2153. However, Mr. Justice Douglas, in dissenting from the denial of certiorari in that case, questioned the validity of section 2157 and suggested that basing criminality on the existence of a state of emergency proclaimed more than two decades ago might not provide constitutionally adequate notice to prospective defendants. This veiw was adopted recently by the Tenth Circuit in *United States* v. *Bishop*, 555 F.2d 771 (1977), in which the court reversed a conviction under 18 U.S.C. 2153 and indicated that the prosecution should have been brought instead under 18 U.S.C. 2155 which applies in time of peace.

[8] "Restricted Data" is defined in 42 U.S.C. 2014 as data relating to nuclear weapons or the use or manufacture of "special nuclear material," which has not been declassified by the Atomic Energy Commission.

To the extent that the tampering involves physical objects, the conduct prohibited by this statute is sabotage. The penalties, however, are considerably higher than those provided in 18 U.S.C. 2153 or 2155 and no wartime-peacetime distinction is made. The intent required is formulated in the language of the Espionage Act, 18 U.S.C. 793 and 794, and 47 U.S.C. 606(h), *supra*, rather than that of 18 U.S.C. 2153 and 2155.

3. The Offense

A. Elements

Subsection (a)(1) provides that a person commits an offense if, "with intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense acitivites," he damages, tampers with, contaminates, defectively makes, or defectively repairs three enumerated categories of property (discussed below).

This section is designed to carry forward those provisions of existing law, previously discussed, that punish sabotage done with a specific intent to injure the war or war preparation efforts of the United States or an associate nation. The term "associate nation" is defined in Section 111 to mean a "nation at war with a foreign power[9] with which the United States is at war." This is substantially equivalent to the definition of "associate nation" in 18 U.S.C. 2151. Since the concept of associate nation necessarily implies the existence of a war in which that nation is participating, the aspect of this section punishing an intent to "obstruct the ability . . . to *prepare* for . . . war or defense activities" (emphasis added) is only applicable when it is the United States' ability to prepare for war which is sought to be obstructed. Of course the reason for continuing the present coverage for associate nations in wartime is to guard against indirect injury to this country's war efforts through the weakening of an ally.

The conduct in paragraph (1)—i.e., "damages, tampers with, contaminates, defectively makes, or defectively repairs"—is drawn from current statutes and no substantive change is intended. Thus, the term "damages" is designed to cover the term "injures" and "destroys" in 18 U.S.C. 1362, 2153, and 2155. The word "contaminates" is intended to do duty for "contaminates or infects" in 18 U.S.C. 2153, and 2155. The phrase "tampers with" is derived from 42 U.S.C. 2276. The terms "defectively makes" and "defectively repairs" are drawn from 18 U.S.C. 2154 and 2156.

The types of property that subsection (a)(1) protects are: (A) any property used in, or particularly suited for use in, the national defense that in fact is owned by or under the care, custody, or control of, the United States or an associate nation or which is being produced, manufactured, constructed, repaired, transported, or stored for the United States or an associate nation; (B) any facility that is engaged in whole or in part, for the United States or an associate nation, in (i) furnishing defense materials or services; or (ii) producing the raw material necessary to the support of a national defense production or mobilization program; or (C) any public facility that is used in, or designated[10] and particularly suited for use in, the national defense.[11] It should be observed that these categories are somewhat less expansive than the definitions of "war material," "war premises," "war utilities," "national-defense material," "national-defense premises" and "national-defense utilities" presently found in 18 U.S.C. 2151. Although current law covers as sabotage the damaging of any property suitable for use in war or the national defense (a category that would embrace virtually all property) if done with the requisite intent to interfere with or obstruct the ability of the country to prepare for or engage in war or defense activities, the Committee believes that the ordinary offenses of property destruction in chapter 17 are adequate to punish those acts of destruction, albeit accomplished with the above intent, that involve property not used in or particularly suitable for use in the national defense. The lesser harm resulting from, e.g., the damaging of a small town sewer system, as opposed to an aircraft or ball bearing plant, is deemed sufficiently redressed by the lesser but still substantially penalites applicable to the offenses of arson and aggravated property destruction in section 1701 and 1702.

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[9] The term "foreign power" is also defined in section 111.

Paragraph (2) makes it an offense for a person, acting with the identical intent as under paragraph (1), to deliver any property described in paragraph (1)(A) that has been damaged, tampered with, contaminated, defectively made, or defectively repaired. This offense is designed to close the previously mentioned loophole in 18 U.S.C. 2155 and 2156, by punishing the delivery of defective equipment with intent to obstruct the war or defense effort, in addition to paragraph (1)'s punishing of the defective making or repairing of the same property.

B. Culpability

Each of the offenses in this section requires that the offender act with a specific "intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities." The formulation chosen by the Committee is very similar to that found in 18 U.S.C. 2153 and 2154: "intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities." By contrast, 42 U.S.C. 2276 and 47 U.S.C. 606 (whose provisions this section will also replace) speak in terms of an "intent to injure the United States or secure an advantage to any foreign nation," similar to the intent required under the Espionage statutes (18 U.S.C. 793, 794, 798).[12] The Committee deemed the latter formulation more apt in an espionage than a sabotage statute.

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[10] The concept of a designation contemplates some form of official action, e.g., an order or regulation, acknowledging or listing a public facility for use in the national defense.

[11] The term "public facility" is broadly defined in section 111. In addition to the more obviously included things, the term would extend to individual aircraft or merchant marine vessels that are particularly suited for national defense use. Some such facilities are under contingency contracts to the government for use in wartime or other defense emergency, thus virtually demonstrating their particular suitability for national defense purposes, But the existence of such a contract is not a prerequisite for coverage under this section. The word "public' refers to public access, and is not intended to be limited to facilities owned or operated by a government.

[12] 18 U.S.C. 1362, alone of the present statutes covered by this section, does not require a specific intent.

The specific intent required under this section is designed to counterbalance the necessarily broad listing of the classes of property protected, and thus to help insure that the offense as drafted will withstand constitutional challenge.[13] In addition, the specific intent requirement distinguishes this offense from the general property destruction offenses located in chapter 17 of the proposed Code. The saboteur's offense is intended to weaken the nation *vis-a-vis* a foreign power, and thus carries an added dimension beyond the fact of property destruction, contamination, or injury.

The conduct in this section is damaging, tampering with, contaminating, defectively making, or defectively repairing property (paragraph (1)), and delivering property (paragraph (2)). Since no culpability standard is specifically designated, the applicable state of mind that must be proved is "knowing," i.e., that the offender was aware of the nature of his conduct (e.g., that he was damaging property).[14] The remaining elements—setting forth the categories of property (including certain public facilities) protected—are existing circumstances. Certain of those circumstances are specifed, by use of the phrase "in fact," as ones as to which no state of mind need be proved. For the other circumstances no culpability level is specifically prescribed, so the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the property was of the kind covered.[15]

4. Jurisdiction

No jurisdictional base is set forth as applicable to this section. Accordingly, under the principles of section 201(b)(2), Federal jurisdiction exists if the offense was committed within the general or the special jurisdiction of the United States, as defined in sections 202 and 203. In addition, extraterritorial jurisdiction is present by virtue of the operation of section 204(b) if the sabotage was against the United States, as opposed to an associate nation. This is consistent with the unrestricted reach of the current sabotage statutes.

5. Grading

As previously mentioned, the penalty structure of existing law contains a number of anomalies. For example, sabotage of an appliance incorporating restricted atomic energy data in peacetime (42 U.S.C. 2276) carries a possible life sentence, while the maximum for wartime sabotage of a non-atomic energy weapon of facility, no matter how vital (18 U.S.C. 2153), is limited to thirty years. Both penalties are, moreover, unaccountably less than the capital penalty provided for communication of defense secrets to a foreign nation in peacetime (18 U.S.C. 794). Another example of anomalous grading is that deliberate injury to defense communications facilities is subject to equal punishment under 18 U.S.C. 1362 or 2155, but under the latter specific intent to interfere with defense efforts must also be proved. Finally, perhaps the greatest inequity results from the combining, in 18 U.S.C. 2153 and 2154, of offenses involving only recklessness with those requiring specific intent, while subjecting both to the same penalty range.

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[13] See *United States* v. *Achtenberg, supra* note 3.

[14] See sections 303(b)(1) and 302(b)(1).

[15] See sections 303(b)(2) and 302(c)(1).

Subsection (b) is designed to afford a more rational system by making grading depend upon a combination of the time (e.g., wartime) of the offense, the character of the sabotaged property, and the gravity of the injury. Greater consistency is also achieved by separating out the offenses committed "recklessly" and treating them in section 1112.

Subsection (b) provides that an offense described in this section is graded as a Class A felony if it is committed in time of war and if it causes damages to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale attack. The offense is graded as a Class B felony (up to twenty-five years in prison) if committed in time of war in any other case, or in time of national defense emergency,[16] and as a Class C felony (up to twelve years in prison) if committed in peacetime. The general recommendation of the National Commission for greater flexibility dependent in part upon result has thus been followed. The Committee rejected, however, the idea of eliminating altogether the existence of a national defense emergency as a grading factor, although unlike existing law, it has distinguished between the commission of sabotage in wartime and in time of national defense emergency.[17]

SECTION 1112. IMPAIRING MILITARY EFFECTIVENESS

1. In General and Present Federal Law

This offense punishes conduct similar to that reached under section 1111, except that in place of the specific intent to interfere with the war or national defense effort required thereunder, the culpability level in this section is reduced to a reckless disregard of the impact the conduct would have on the war or defense effort. However, unlike present law, the application of the offense is limited to time of war or national defense emergency or to a situation in which damage to or impairment of a major weapons system or means of defense, warning, or retaliation against large scale enemy attack occurs.

This section is designed to carry forward the provisions of 18 U.S.C. 2153 and 2154, discussed in connection with section 1111, *supra,* that punish sabotage if committed with "reason to believe" that the act may injure, interfere with, or obstruct the United States or an associate nation in preparing for or carrying on war or defense activities.

2. The Offense

Subsection (a) of section 1112 provides that a person commits an offense, if in reckless disregard of the fact that his conduct would impair, interfere with or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities, he engages in conduct which is described in paragraph (1) or (2) of section 1111(a): (1) that occurs in time of war or during a national defense emergency; or (2) that causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale enemy attack. Paragraph (2) is not violated unless the damage or impairment specified therein actually occurs.

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[16] The concept of "war" is explained in connection with section 1101 (Treason). The term "national defense emergency" is defined in section 111.

[17] See Working Papers, p. 443 n. 11.

The standard of "reckless disregard" is substituted for the less stringent phrase "reason to believe" in 18 U.S.C. 2153 and 2154 in order to insure that property damaging conduct, such as might occur in the course of a labor dispute, is not swept within the heinous offense described in this section, but rather is subject to prosecution only under chapter 17 or by State law. For similar reasons, the Committee has narrowed the scope of the offense to the circumstances delineated in paragraph (1) or (2) herein.

The conduct in this section is engaging in conduct which is described, respectively, in paragraph (1) or (2) of section 1111(a). Thus, the culpability is the same as for those paragraphs, discussed in the previous section. By operation of section 303(d)(1)(B), no proof of a state of mind is required as to the fact that the prohibited conduct is described in the previous section. The element that the conduct was performed "in reckless disregard," etc., sets forth the specific mental state which must be shown to have accompanied the conduct. The fact that the conduct occurred in time of war or national defense emergency[18] is an existing circumstance. Since no culpability standard is specifically set forth, the applicable mental state is at least "reckless". i.e., that the defendant consciously disregarded a substantial risk that the circumstance existed.[19] The alternative aspect that the offense (irrespective of the time it occurred) caused damage to or impairment of a major weapons system, etc., is a result of conduct. Again, as no culpability level is specifically prescribed, the applicable minimum mental state that must be proved is "reckless", i.e., a conscious disregard of a substantial risk that the result might occur.[20]

3. Jurisdiction

No jurisdictional base is prescribed for this section. Therefore, Federal jurisdiction over an offense hereunder is plenary.

4. Grading

The grading under this section is precisely parallel to that under section 1111, but is fixed at two levels lower because of the markedly decreased culpability standard.[21] Thus, if the offense involves conduct committed in time of war, and causes damage to or impairment of a major weapons system or means of defense, warning, or retaliation against large scale enemy attack, the offense is a Class C felony (up to twelve years in prison). If the offense is committed during wartime in any other instance, or is committed during a national defense emergency, it is a Class D felony (up to six years in prison). If committed under any other circumstances, the offense is a Class E felony (up to three years in prison).

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[18] The term "war" is discussed in connection with section 1101 (Treason). The term "national defense emergency" is defined in section 111.

[19] See sections 303(b)(2), 302(c)(1).

[20] See sections 303(b)(3), 302(c)(2).

[21] This replacement of the parity existing in 18 U.S.C. 2153 and 2154 follows the general recommendation of the National Commission. See Working papers, p. 444.

SECTION 1113. VIOLATING AN EMERGENCY REGULATION

1. In General and Present Federal Law

This section carries forward and transfers to the Criminal Code the penal provisions of chapter 12 of title 50, United States Code, dealing with emergency regulations of vessels. The intertitle transfer is effected to preserve felony treatment. Location in this subchapter is suggested by the design of the regulations as a preventive measure against sabotage and espionage.

Chapter 12 of title 50 (50 U.S.C. 191 *et seq.*) governs control of vessels in territorial waters of the United States. The first paragraph of section 191 provides that upon declaration by the President of a state of emergency occasioned by threat of war, invasion or insurrection, the Secretary of the Treasury, with the President's approval, may make regulations concerning the movement and anchorage of domestic and foreign vessels, and their inspection and supervision, in order to protect them or ports from damage. Since the powers of the Secretary are administered and enforced by the Coast Guard, section 191(a) provides that the Secretary of the Navy shall exercise the powers of the Secretary of the Treasury when the Coast Guard operates as part of the Navy. These powers, first conferred on the President and Secretary by Title II of the Act of June 17, 1915, were augmented by the Act of August 9, 1950, which gave the President the same unlimited power over foreign flag vessels whenever he deemed the interests of national security required it, and also authorized him to take any measures or make any rules necessary to protect vessels and harbors from injury, whether accidental or intentional.[22] Section 192 provides a maximum penalty of ten years in prison and a $10,000 fine for noncompliance with any regulations or interference with the exercise of any power conferred in section 191. Where the violator is the owner or master of the vessel, the vessel is subject to forfeiture. Section 192 has been sustained against constitutional challenge.[23]

2. The Offense

Subsection (a) provides that a person commits an offense if he violates[24] a regulation, rule, or order issued pursuant to Title II of the Act of June 15, 1917, as amended (50 U.S.C. 191 *et seq.*) (relating to regulations concerning the anchorage and movement of vessels during a national emergency). The definition of the offense is thus provided by chapter 12 of title 50. The culpability standard differs in 50 U.S.C. 192 depending upon whether the defendant is an owner, agent, master, officer, person in charge, or member of the crew of a vessel, or any other person. As to the former, the offense is committed if he "fails to comply" with any regulation, rule, or order issued or "obstructs or interferes" with the exercise of any power, under chapter 12. As to the latter, the offense is committed only if the failure to comply or obstruction or interference is done "knowingly." The law thus treats those whose position is related to the vessel as having a duty of awareness and compliance, so that their liability is almost absolute.[25] On the other hand, a requirement of "knowing" is prescribed for outsiders, insuring that their misconduct is the result of some degree of deliberate disobedience. This appraoch seems sound and will be continued by this section.

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[22] Section 191, par. 2.

[23] *United States* v. *Richman*, 190 F. Supp. 889 (D. Conn. 1961).

[24] The term "violate" is defined in section 111.

3. Jurisdiction

This section incorporates the jurisdictional scope of 50 U.S.C. 195,[26] which includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison), somewhat below that authorized by present law.

SECTION 1114. EVADING MILITARY OR ALTERNATIVE CIVILIAN SERVICE

1. In General and Present Federal Law

Section 1114 transfers certain felony violations of selective service law now contained in 50 U.S.C. App. 462 (a) and (b) into the Criminal Code. The remaining offenses are reduced to misdemeanors.

50 U.S.C. App. 462 is an awkwardly drafted provision. In addition to defining specific offenses, often in obscure language, it generally makes it a crime punishable by imprisonment for up to five years, to violate any provision of the statute, or regulation or administrative order issued thereunder.

The principal offenses under section 462 involve failure to register, or to report for or submit to induction; failure to report for a physical examination; and failure to keep one's local selective service board advised of a change of address, or to carry one's selective service card on his person. Offenses can be committed by persons subject to the law (e.g., failure to register), officials of the Selective Service System and other agencies (e.g., false examination reports), and "outsiders" (e.g., making false statements in behalf of registrant, or printing counterfeit selective service cards). The uniform felony classification has led to non-prosecution of many minor violations. Since the purpose of the statute is primarily to encourage men to serve in the armed forces (or alternative civilian work programs) rather than put them in jail, the policy of the Selective Service System and the Department of Justice with respect to registrants has been to punish principally persistent refusals to serve. The bulk of prosecutions have therefore been for disobeying orders of a selective service board to report for induction or civilian work. An exception has been the making of false statements, which is generally considered to warrant prosecution.

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[25] Invalidity of the regulation, rule, or order is, however, a defense. See *United States* v. *Richman, supra* note 23.

[26] See section 201(b)(2).

The statutory culpability standard is "knowning," but the courts have required something more than mere abstract knowledge of the order—i.e., an intent to evade the purpose of the law—where there was some question of the ability of the registrant to perform, e.g., where he was overseas and claimed it was impossible for him to report.[27] However, absent such circumstances casting doubt on the ability to perform, courts have held that mere knowledge of the order and a deliberate decision to disobey it are sufficient for liability; reliance on the advice of counsel that the order was unlawful does not negate the requisite culpability.[28]

2. The Offense

A. Elements

Subsection (a)(1) provides that a person commits an offense if, knowing that he is under a duty pursuant to a Federal statute governing military service or a presidential proclamation, regulation, or administrative order promulgated thereunder, to register for military service, to report for and submit to examination to determine his availability for military or alternative civilian service, to report for and submit to induction into military service, or to report for and perform alternative civilian service, he fails, neglects, or refuses to do so.

The offenses of failing to report for and submit to induction, or to report for and perform alternative civilian service are "ultimate" offenses, involving a refusal to fulfill the final objectives of the selective service system to fairly select persons to serve in the armed forces or, if they are conscientious objectors, to perform alternative civilian work. These offenses are thus carried forward in this section for potential felony treatment. The offense of failing to register similarly is among the most serious derelictions, since it involves a kind of fraud on the system and, like the "ultimate" offenses, requires that another individual be made to serve in the offender's place. It too is thus included in this section.

Contrary to the suggestion of the National Commission,[29] the Committee has also included failure to report for or submit to examination among the offenses brought forward for potential felony treatment. While not an "ultimate" offense, experience has shown that it has such a delaying effect on processing that the need for deterrence is great.[30]

Subsection (a)(2) provides that a person commits an offense if, with intent (A) to avoid or delay the performance of the military or alternative civilian service obligation of himself or another person under the provisions of a Federal statute governing military service, or a presidential proclamation, regulation, or administrative order thereunder; or (B) to obstruct the proper determination of the existence or nature of such an obligation; "he engages in conduct constituting an offense under section 1343(a)(1) (Making a False Statement)."

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[27] *Silverman* v. *United States,* 220 F.2d 36 (8th Cir. 1955); compare *Donato* v. *United States,* 302 F.2d 468 (9th Cir. 1962), reconsidered 314 F.2d 67 (9th Cir.), cert. denied, 374 U.S. 828 (1963).

[28] See *United States* v. *Jacques,* 463 F.2d 653, 657 (1st Cir. 1972).

[29] See Final Report, § 1108.

[30] Prosecutions for failing to report for or submit to examinations are typically brought only after a registrant has exhausted the patience of the authorities after a long history of attempting to avoid his responsibilities under the selective service laws. See, e.g., *United States* v. *Maybury,* 453 F.2d 1233 (9th Cir.), cert. denied, 406 U.S. 960 (1972). In such cases, prosecution for this offense has certain advantages, since many defenses involving claims of incorrect classification of the registrant are unavailable.

This subsection is designed to carry forward that aspect of 50 U.S.C. App. 462(a) which punishes any person who shall "knowingly make, or be a party to the making of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification." The offense, as in current law, may be committed not only by one liable to service under the selective service laws, but by officials charged with duties thereunder (e.g., local selective service board or induction personnel), or by outsiders who volunteer or furnish information (e.g., family members and friends, medical practitioners, and the like).

It has been held under current law that the requirement that the false statement be one "regarding or bearing upon" a classification in effect mandates a showing of materiality of the statement, although it is not necessary to show that the statement proximately caused a particular classification to be awarded.[31] This requirement of materiality is carried forward through the reference in this subsection to conduct constituting a violation of section 1343, which requires that the false statement in fact be material.

B. Culpability

The conduct in paragraph (1) is failing, neglecting, or refusing to fulfill the various duties enumerated in subparagraphs (A) through (D). Since no culpability standard is specifically prescribed, the applicable state of mind is "knowing," i.e., the offender must be proved to have been aware that he was failing, neglecting, or refusing to perform one of the enumerated duties (e.g., to register for military service). This standard is consistent with that under present Federal law, which generally requires merely a deliberate refusal to obey the law, irrespective of the registrant's belief that the particular duty which he refuses to perform is invalid.[32] Thus, the Committee has rejected the suggestion of the National Commission, found also in S. 1, as originally introduced in the 93d Congress, that a specific intent to evade be an element of this offense.[33]

The fact that the person was under a duty to do one of the enumerated things is an existing circumstance. The culpability level is specifically set at "knowing," thus requiring proof that the offender was aware of the duty. The further element that the duty derived from the provisions of a Federal statute governing military service, or a presidential proclamation, regulations, or administrative order promulgated thereunder, is also an existing circumstance. However, by virtue of section 303(d)(1)(A), no mental state need be proved as to this element.[34]

The conduct in paragraph (2) is engaging in conduct constituting an offense under section 1343(a)(1). The applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was engaging in the conduct described in section

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[31] See *United States* v. *Kamber*, 458 F.2d 918, 922 (7th Cir. 1971), cert. denied, 407 U.S. 910 (1972); *United States* v. *Lucke*, 431 F.2d 359 (5th Cir. 1970).

[32] See *United States* v. *Jacques*, *supra* note 28.

[33] See Final Report, § 1108; section 2-5B5 of S. 1, as originally introduced in the 93d Congress.

[34] See sections 303(b)(2) and 302(c)(1).

1343.[35] However, by operation of section 303(d)(1)(A), it is not necessary to show that the offender was aware or had any mental state with regard to the fact that such conduct constituted a violation of section 1343. The specific intents set forth in subparagraphs (A) and (B) state the alternative purposes for which it must be proved that the offender engaged in the prohibited conduct.

Subsection (b) provides, in essence, that the proof and affirmative defense provisions of section 1346 which apply to section 1343(a)(1) apply also to this section. These provisions, which consist of a definition of materiality and an affirmative defense of retraction, are explained in connection with the discussion of subchapter E of chapter 13 herein.

3. Jurisdiction

No jurisdiction base is set forth with regard to this section. Accordingly, Federal jurisdiction is plenary as described in section 201(b)(2).

4. Grading

In contrast to the uniform, five-year maximum penalty prescribed in current law, the Committee has decided to create grading differentials for this offense, depending upon whether it is committed in time of war or in other less exigent circumstances. Thus, an offense under this section is graded as a Class D felony (up to six years in prison) if it is committed in time of war[36] and a Class E felony (up to three years in prison) in any other case, except one. The exception is if the offense consists of a failure to register, under subsection (a)(1)(A), that occurs solely during periods where the authority to induct is suspended. In this situation, the offense is graded as a Class A misdemeanor (up to one year in prison).

SECTION 1115. OBSTRUCTING MILITARY RECRUITMENT OR INDUCTION

1. In General and Present Federal Law

This section combines prohibitions found in 18 U.S.C. 2388(a) and 50 U.S.C. App. 462, with certain modifications designed to meet constitutional objections and correct grading disparities. The conduct prohibited is interference with the raising of armies. The second paragraph of U.S.C. 2388(a) punishes one who, in wartime, "willfully obstructs the recruiting or enlistment service." The maximum penalty is imprisonment for twenty years. A series of cases arising during World War I established, notwithstanding First Amendment claims, that the prohibited obstruction could be accomplished not only by physical means, but also by words calculated to persuade or influence persons to decline to enlist or refuse to be conscripted.[37] The provisions of section 2388 were kept in force after World War II by the Emergency Power Continuation Acts, and they arguably remain in force today by virtue of 18 U.S.C. 2391, enacted in 1953, which provides that section 2388 shall continue in force until the President or Congress proclaims an end to the state of emergency declared in 1950.[38]

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[35] See sections 303(b)(1) and 302(b)(1).

[36] The term "war" is discussed in relation to section 1101 (Treason).

[37] *Schenck* v. *United States*, 249 U.S. 47 (1919) (leaflets); *Debs* v. *United States*, 249 U.S. 211 (1919) (public address); *Frohwerk* v. *United States*, 249 U.S. 204 (1919) (newspaper editorials).

50 U.S.C. App. 462(a) relates only to inteference with conscriptions by the Selective Service System. In addition to dealing with offenses by persons subject to or engaged in administration of the Act, that section specifically punishes one who "counsels" refusals of duty, and, in more general terms, any person "who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise with the administration . . . [of the Act.]" The maximum penalty is five years' imprisonment, without regard to whether the offense is committed in time of war, peace, or national emergency.

It has been held that prosecutions for counseling are not inconsistent with the First Amendment provided that the counseling takes the form of directly advocating and inciting the illegal action and is not merely an expression of sympathy or approval.[39]

Prior to 1948 the statute was restricted to hindering or interfering by "force or violence," which was interpreted to mean assualtive behavior.[40] In 1948 the words "or otherwise" were added. Recently, some courts have held that this broadened scope permits prosecution for entry of board premises followed by either disorderly conduct or destruction of records (e.g., by pouring of blood).[41]

However, one court of appeals has determined that the "or otherwise" phrase is not limited to means similar to force and violence and that the addition of this phrase had rendered the entire hindering or interfering clause unconstitutional on its face as not affording adequate notice of the type of conduct prohibited.[42]

2. The Offense

A. Elements

Subsection (a) of section 1115 provides that a person commits an offense if in time of war, with intent to hinder, interfere with, or obstruct the recruitment, conscription, or induction of a person into the armed forces of the United States, he: (1) creates a physical interference or obstacle to the recruitment, conscription, or induction; (2) uses force, threat, intimidation, or deception against a public servant of a government agency engaged in the recruitment, conscription, or induction; or (3) incites others to engage in conduct constituting an offense under section 1114 (Evading Military or Alternative Civilian Service).

The above provisions have been drafted in an attempt to minimize or obviate constitutional difficulties. Thus, in place of the language "willfully obstructs" in 18 U.S.C. 2388(a) and "knowingly hinder or interfere" in 50 U.S.C. App. 462(a), a specific intent to hinder, interfere with, or obstruct is required. Paragraphs (1) and (2) eschew the general catch-all language of 50 U.S.C. App. 462(a) and punish only "physical interference or obstacle" or the use of "force, threat, intimidation, or deception"[43] as means. Paragraph (3) rejects the broad term "counsels" in 50 U.S.C. App. 462(a) in favor of the more restrictive "incites," which conforms with the Supreme Court's decisions under the Smith Act, 18 U.S.C. 2385, indicating the type of advocacy that can be constitutionally punished.[44] Specifically the term "incite" is defined in section 111 to mean urging other persons to "engage in imminent conduct under circumstances in which there is a substantial likelihood of imminently causing such conduct." In addition, unlike 50 U.S.C. App. 462(a), this section is limited to conduct in wartime when First Amendment activity is subject to more severe curtailment in the interest of national survival. Physically obstructive conduct affecting recruitment, conscription, or induction, not during war, may be prosecuted at a misdemeanor level under section 1302 (Obstructing a Government Function by Physical Interference).[45]

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[38] But see *United States* v. *Bishop*, *supra* note 7, holding that 18 U.S.C. 2157—which is identical in all respects to 18 U.S.C. 2391—cannot be validly applied against a defendant since its terms fail to give adequate notice that a national defense emergency still exists. Contrast *United States* v. *Achtenberg*, *supra* note 3.

[39] *United States* v. *Spock*, 416 F.2d 165, 172-173 (1st Cir. 1969); see also generally *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[40] Compare *Helton* v. *United States*, 143 F.2d 933 (6th Cir.), cert. denied, 323 U.S. 765 (1944), with *Bagley* v. *United States*, 136 F.2d 567 (5th Cir. 1943) (tearing up of questionnaire and making drunken, anti-draft remarks not within the statute).

[41] See *United States* v. *Eberhardt*, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970); *United States* v. *Turchick*, 451 F.2d 333 (8th Cir. 1971).

[42] *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973).

A further narrowing of present law is effected by eliminating obstruction of enlistment by words (currently reached under 18 U.S.C. 2388(a)) from coverage in this section. Such conduct is not within paragraph (3) since the refusal to enlist voluntarily is not an offense under section 1114. In spite of the World War I cases cited above, the Committee does not believe that, merely because the government has the right to raise armies by enlistment, it need punish incitement or advocacy directed against the voluntary joining of the nation's armed forces.[46] In the event the national peril becomes serious, Congress may require service in the armed forces, in which event the prohibition against incitement, as applicable to such compulsory service, would apply.

B. Culpability

The conduct in this section is creating a physical interference or obstacle, using force, threat, intimidation, or deception, or inciting others to engage in conduct constituting an offense under section 1114.[47] Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of what he was doing.[48]

The remaining elements, apart from the specific intent requirement—e.g., that the conduct took place in time of war, and that the use of force was against a "public servant of a government agency[49] engaged in . . . recruitment, conscription, or induction" of a person into the armed forces of the United States—are existing circumstances. As no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that the circumstances existed and his disregard of the risk was such as to constitute a gross deviation from the standard of care a reasonable person would have exercised in the situation.[50]

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[43] The last-quoted words are used in sections 1323 and 1357. The latter is the general section on tampering with a public servant and may be employed to reach the conduct proscribed under paragraph (2) if not done during time of war.

[44] See the cases cited in connection with the discussion of section 1103 in this report; see also *United States* v. *Spock, supra* note 39 at 170–173.

[45] If deception is used, such conduct may also come within section 1301 (Obstructing a Government Function by Fraud), which carries a Class D felony penalty.

[46] See Working Papers, p. 447.

[47] By operation of section 303(d)(1)(A), no state of mind need be proved as to the fact that the conduct incited constitutes a violation of section 1114.

[48] See sections 303(b)(1) and 302(b)(1).

[49] The terms "public servant" and "government agency" are defined in section 111.

The element that the person has an intent to hinder, interfere with, or obstruct the recruitment, etc., of a person into this country's armed forces states the purpose for which the government must prove he engaged in the conduct described in paragraphs (1), (2), or (3).

3. Jurisdiction

No jurisdictional base is set forth in this section. Therefore, Federal jurisdiction is plenary under section 201(b)(2).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This represents a substantial reduction of the twenty-year maximum jail term authorized under 18 U.S.C. 2388(a), and adopts the penalty imposable under 50 U.S.C. App. 462(a).

SECTION 1116. INCITING OR AIDING MUTINY, INSUBORDINATION, OR DESERTION

1. In General and Present Federal Law

The offenses covered in this section—inciting or aiding mutiny, insubordination, refusal of duty, or desertion and interfering with the discovery, apprehension, or prosecution of a deserter or person charged with desertion—consist in the main of conduct accessorial to military offenses where the principal offender would be subject to military jurisdiction while the accessory would generally not be. Counterparts of these offenses are presently found in 18 U.S.C. 2387, 2388, and 1381.

The second paragraph of 18 U.S.C. 2388(a) prescribes up to a twenty-year prison sentence for one who in wartime "willfully causes or attempts to cause insubordination, disloyalty, mutiny or refusal of duty" in the armed forces.

18 U.S.C. 2387 provides up to a ten-year penalty for whoever, in time of peace or war, "with intent to interfere with, impair, or influence the loyalty, morale, or discipline" of the armed forces (1) "urges, or in any manner causes or attempts to cause, insubordination, disloyalty, mutiny, or refusal of duty" in the armed forces, or (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, etc.

Section 2388 was initially enacted as part of the Espionage Act of 1917, shortly after this nation's entry into World War I. Section 2387 was enacted in 1940 as a reaction to efforts of Nazi sympathizers and peace groups to cause disaffection among the crews of naval vessels on convoy duty and in the army which was then being conscripted. It was basically designed to afford the same protections as those provided in wartime by the earlier statute despite some differences in wording.[51]

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[50] See sections 303(b)(2) and 302(c)(1).

18 U.S.C. 1381 punishes with a maximum of three years in prison whoever aids, or "entices or procures, or attempts or endeavors to entice or procure" any person in the armed forces (or who has been recruited for service therein) to desert, and whoever "harbors, conceals, protects, or assists" any person, knowing him to have deserted, or who fails to deliver such person on demand of any officer authorized to receive him. It has been held that this statute requires proof that the person harbored or assisted actually deserted (e.g., as opposed to being absent without leave), but it is not necessary that the person ever have been charged with or convicted of desertion after his apprehension.[52]

The significantly lower penalty provided for aiding deserters compared to the penalties provided for impairing morale in 18 U.S.C. 2387 and 2388 arguably reflects the congressional view that the latter offenses are aimed at persons who foment large-scale disturbances for political or ideological ends, whereas those who assist deserters will often be friends or relatives extending aid to an individual serviceman for personal reasons.

2. The Offense

A. Elements

Subsection (a) defines three distinct offenses. Paragraph (1) punishes whoever, "with intent to bring about mutiny, insubordination, refusal of duty, or desertion by members of the armed forces of the United States," "incite" such members to engage in mutiny, insubordination, refusal of duty, or desertion."

As in the previous section, the term "incites" has been selected in preference to such words as "entices" (18 U.S.C. 1381), "advises, counsels, or urges" (18 U.S.C. 2387) in order to minimize constitutional difficulties and absorb the principles of Supreme Court decisions validating that term.[53] Thus the prohibited conduct is incitement to action, not merely to disaffection. However, the incitement need not be successful to constitute a violation of this section.

Paragraph (2) punishes whoever "aids or abets the commission or attempted commission of mutiny or desertion by a member of the armed forces of the United States."

The concept of aiding or abetting is incorporated through a generic reference that is intended to encompass the entirety of the conduct described in connection with section 401(a) (Liability of an Accomplice), and the discussion of the three paragraphs of that subsection is equally applicable to this paragraph. The reason, of course, that provision is needed in this context is that the offenses aided or abetted—mutiny and desertion—are not punishable under the proposed Code, but only as military offenses under the Uniform Code Military Justice.

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[51] The statute was upheld against First Amendment attack upon its peacetime application in *Dunne* v. *United States*, 138 F.2d 137 (8th Cir.), cert. denied, 320 U.S. 790 (1943).

[52] See, e.g., *Breeze* v. *United States*, 398 F.2d 178, 197–204 (10th Cir. 1968); *Dickey* v. *United States*, 404 F.2d 882 (5th Cir. 1968); see also Working Papers, p. 464, and cases cited therein.

[53] See *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Yates* v. *United States*, 354 U.S. 298, 312–317 (1957); *Dennis* v. *United States*, 341 U.S. 494, 502 (1951). "Incitement" is defined in section 111 to mean urging "other persons to engage in imment conduct under circumstances in which there is a substantial likelihood of imminently causing such conduct."

Paragraph (3) punishes whoever "interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of a member of the armed forces of the United States, knowing that such member has deserted, or is charged with or being sought for desertion, by engaging in any conduct described in subparagraphs (A) through (C) of section 1311(a) (1) (Hindering Law Enforcement)."

Paragraph (4) punishes whoever intentionally interferes with, hinders, delays or prevents the discovery, apprehension, prosecution, conviction, or punishment of a member of the armed forces of the United States, knowing that such member has deserted, or is charged with or being sought for desertion, by engaging in any conduct described in section 1311(a)(2) (Hindering Law Enforcement).

This offense carries forward the provisions of the second paragraph of 18 U.S.C. 1381. It is patterned after and in part incorporates section 1311. However, that section would be inadequate to cover this offense because it is limited to fugitives from justice, a category into which a deserter does not fall. The offense as here drafted is broader than existing law in that it reaches accessorial conduct directed to one who may not in fact have deserted, although he is charged with or being sought for desertion. This is consistent with section 1311, the rationale being that a person who renders assitance to one who is being sought for a crime, while not guilty of being an accessory, is in effect obstructing justice.[54]

B. Culpability

In paragraph (1), the conduct is inciting members of the armed forces of this country to engage in mutiny, insubordination, refusal of duty or desertion. As no culpability standard is specifically designated, the applicable state of mind is "knowing," i.e., that the offender was aware that he was inciting a member of the armed forces to such conduct. The intent element states the purpose—e.g., to bring about mutiny or desertion—for which the government must show that the conduct was performed.

In paragraph (2), the offense consists entirely of conduct. The applicable culpability level is prescribed as "knowing," thus requiring proof that the offender was aware of his conduct. Thus, this offense requires a showing that the defendant was aware of the status of the person aided or abetted (i.e., that he was a member of the armed forces of the United States).

In paragraph (3), the conduct is, by virtue of the cross-references to section 1311(a)(1) (A) through (C), (1) harboring a member of the armed forces of the United States or affirmatively concealing him or his identity; (2) providing such person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension; or (3) warning such person of impending discovery or apprehension. Since no culpability level is specified, the state of mind that must be proved is "knowing", i.e., that the defendant was aware that he was, e.g., harboring, providing a weapon, or giving a warning. By operation of section 303(d)(1)(B), it is not, however, necessary to establish that the offender was aware of or had any mental state as to the fact that the conduct was described in section 1311. The language "interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment" in paragraph (3) states the consequences that must be proved to have resulted from the defendant's conduct. Since no state of mind is specified for this element of the offense, the requisite culpability level is at least "reckless", requiring proof that the defendant was aware of but disregarded a substantial risk that the result would occur.

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[54] See the discussion of section 1311, *infra*; see also 18 U.S.C. 1071, Note that the affirmative defense in section 1311(b) is applicable also under this section to the extent that it incorporates by reference the provisions of subparagraph (a)(1)(C) of section 1311.

The culpability analysis of paragraph (4) is the same as for paragraph (3), with one exception. Under paragraph (4), the defendant's state of mind with respect to the result, i.e., the fact that his conduct interferes with etc., the discovery, etc., of a member of the armed forces, must be shown to have been "intentional". The reason for requiring a higher standard of culpability, i.e., a conscious desire to cause the result, when the conduct consists of altering or destroying documents or records is, as stated in the discussion hereafter with respect to section 1311(a)(2), to avoid imposing criminal liability for what otherwise might be regarded as ambiguous conduct.

Under both paragraphs (3) and (4), the element that the member of the armed forces had deserted, or was charged with or being sought for desertion, is an existing circumstance. The culpability standard is specifically designated as "knowing," as under 18 U.S.C. 1381, thus requiring proof that the offender was aware that the member was in an essentially fugitive status. Since desertion can only be committed by a member of the armed forces,[55] the proof must also show that the offender was aware of the status of the individual whose discovery, etc., was hindered or prevented.

3. Jurisdiction

No jurisdictional base is set forth with regard to this section. Accordingly, through the operation of section 201(b)(2), Federal jurisdiction over an offense hereunder is plenary.

4. Grading

An offense under paragraph (1) is graded as a Class C felony (up to twelve years in prison) if it is committed in time of war[56] or the persons incited are engaged or about to be engaged in combat.

An offense under paragraph (1) committed in any other circumstances and an offense under paragraph (2) are graded as Class D felonies (up to six years in prison).

An offense under paragraph (3) is graded as a Class E felony (up to three years in prison), which maintains the penalty level under 18 U.S.C. 1381.

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[55] See 10 U.S.C. 885.

[56] The term "war" is explained in connection with section 1101 (Treason).

SECTION 1117. AIDING ESCAPE OF A PRISONER OF WAR OR AN ENEMY ALIEN

1. In General and Present Federal Law

This section carries forward the felony provisions of 18 U.S.C. 757, dealing with facilitating the escape of or harboring fugitive prisoners of war or interned enemy aliens. The section does not cover the provisions of 18 U.S.C. 756, a one-year misdemeanor, which punishes similar conduct of aiding or enticing any person belonging to the armed forces of a belligerent nation who is interned in this country in accordance with international law, to escape or attempt to escape. While prisoners of war or interned fugitive enemy aliens presumptively present a serious danger to national security so that assistance to them warrants substantial punishment, the case is otherwise with military personnel of belligerent nations engaged in a war in which this nation is neutral. Accordingly, the Committee believes that the offense described in section 756 should continue to be treated at a misdemeanor level and has transferred that statute to title 18 Appendix, United States Code, where it will be graded as a Class A misdemeanor.

18 U.S.C. 757 punishes whoever, *inter alia,* "procures the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies," or "advises, connives at, aids, or assists in such escape," or "aids, relieves, transports, harbors, conceals, shelters, protects, holds correspondence with, give intelligence to, or otherwise assists" any such prisoner of war or enemy alien after his escape from custody, "knowing him to be such prisoner of war or enemy alien." The maximum penalty for violation of 18 U.S.C. 757 is ten years in prison, but the section specifically provides that this "shall be in addition to and not in substitution for any other provisions of law."[57]

The offense defined in 18 U.S.C. 757 will normally be committed in wartime, although no such limitation appears in the statute, presumably to encompass the situation where the necessity for imprisonment of internment extends beyond the cession of hostilities.[58]

2. The Offense

A. Elements

Subsection (a)(1) provides that a person commits an offense if he aids or abets the escape or attempted escape of a person being held in the custody of the United States or an associate nation as a prisoner of war or an enemy alien.

The "aids or abets" phraseology is, as in the previous section, designed to incorporate all the general complicity concepts set forth in section 401(a). The Committee believes that these words, used generically, embrace the conduct described by all the verbs listed in 18 U.S.C. 757 (e.g., connives at, procures, assists).

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[57] This is perhaps designed to take account of the fact that assisting an escaped prisoner of war may consitute treason, see *Stephan* v. *United States,* 133 F.2d 87 (6th Cir.), cert. denied, 318 U.S. 781 (1943), and it is not improbable that similar assistance extended to an interned enemy alien would qualify as well.

[58] See *Ludecke* v. *Watkins,* 335 U.S. 160 (1948).

The term "associate nation," which is defined in section 111, is also used in place of the less precise word "ally" in current law.

Subsection (a)(2) makes it an offense for a person to interfere with, hinder, delay, or prevent the discovery or apprehension of (A) a prisoner of war or enemy alien, knowing that such prisoner or alien has escaped from the custody of the United States or an associate nation, or (B) an enemy alien, knowing that such alien is being sought for detention by the United States or an associate nation, "by engaging in any conduct described in subparagraphs (A) through (C) of section 1311(a)(1) (Hindering Law Enforcement)."

Subsection (a)(3) makes it an offense for a person to interfere with, hinder, delay, or prevent the discovery or apprehension of (A) a prisoner of war or enemy alien, knowing the such prisoner or alien has escaped from the custody of the United States or an associate nation, or (B) an enemy alien, knowing that such alien is being sought for detention by the United States or an associate nation, by engaging in any conduct described in section 1311(a)(2) (Hindering Law Enforcement).

These provisions are drafted to parallel paragraphs (3) and (4) of section 1116(a) and section 1311(a). The conduct incorporated from that latter section is discussed in this report in connection with the chapter 13 offense, as are the terms interferes with, hinders, delays, and prevents.

B. Culpability

The conduct in paragraph (1) is aiding or abetting the escape or attempted escape of a person. The applicable culpability standard is designated as "knowing," thus requiring proof that the offender was aware that he was aiding or abetting an escape or attempted escape.[59] The element that the person aided was being held in the custody of the United States or an associate nation as a prisoner of war or an enemy alien is an existing circumstance. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the person was such a prisoner or alien being held in such custody.[60]

The conduct in paragraph (2) is described in section 1311(a)(1)A) through (C), while that in paragraph (3) is described in section 1311(a)(2). The conduct so incorporated by cross-reference is harboring such person or affirmatively concealing him or his identity; providing a weapon, money, transportation, a disguise, or other means of avoiding or minimizing the risk or discovery or apprehension; warning of impending discovery or apprehension, or altering, destroying, mutilating, affirmatively concealing, or removing a record, document, or ther object. As no culpability standard is specifically provided, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of his actions. However, under the operation of section 303(d)(1)(B), it is not necessary to establish that the offender harbored any state of mind as to the fact that the prohibited means employed were contained in section 1311.

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[59] See section 302(b)(1).

[60] See sections 303(b)(2) and 302(c)(1).

The words "interferes with, delays, or prevents the discovery or apprehension" in paragraphs (2) and (3) describe the prohibited results of the defendant's conduct. Under paragraph (2), since no culpability level is specified concerning this element, the proof must show that the defendant was at least "reckless," i.e., that he was aware of but disregarded a substantial risk that the result would occur. Under paragraph (3), the culpability level is designated as "intentionally," thus requiring proof that it was the defendant's conscious objective or desire to cause the result. The reason for higher standard under paragraph (2) has been adverted to in the discussion of the comparable provision in section 1116 and will be more fully described in the discussion of section 1311.

The elements that the prisoner of war or enemy alien had escaped from the custody of the United States or an assocate nation (subparagraph (A) of paragraphs (2) and (3)), and that, in subparagraph (B), the enemy alien was being sought for detention by the United States or an associate nation are existing circumstances. The culpability level is prescribed as "knowing," thus requiring proof that the offender was cognizant of the prisoner's or alien's status as a fugitive. This distinction between paragraph (1) and paragraphs (2) and (3) in terms of knowledge of the aided person's status is consistent with 18 U.S.C. 757, which expressly requires knowledge of the person's fugitive status for the post-escape offense, but not for the pre-escape one. The rationale for continung this distinction is that assisting in an escape or escape attempt is more dangerous conduct so that certainty as to the status of the person aided ought not to be a prerequisite for criminal liability. On the other hand, the post-escape accessorial situation does not pose similar dangers of physical injury and accordingly carries a higher degree of awareness as to the enemy status of the indivudual assisted.

3. Jurisdiction

No jurisdictional base is set forth in this section. Therefore, Federal jurisdiction over this offense, as over all offenses in this chapter, exists to the extent described in section 201(b)(2).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison), a reduction from the ten-year maximum presently authorized by 18 U.S.C. 757.

STATUTE REPEALED

The first paragraph of 18 U.S.C. 2388(a) punishes by up to twenty years in prison whoever, in time of war, "willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." The offense is derived from section 3 of Title I of the Espionage Act of 1917.

By its terms section 2388 applies only when the United States is at war, but its provisions were kept in effect after the termination of World War II first by Emergency Power Continuation Acts and then by 18 U.S.C. 2391, enacted in 1953. This section provides that the provisions of section 2388 shall remain in effect until the termination of the national emergency proclaimed December 15, 1950.[61]

Section 2388 has been consistently upheld against constitutional challenge. Moreover, the section has been held to apply to statements colorably factual, but not capable of being disproved. For example, in *Pierce* v. *United States,*[62] the convictions of socialist party members, who distributed some 5,000 copies of an anti-war leaflet were sustained over the dissent of Justice Brandeis (joined by Justice Holmes) that the alleged false statements were actually statements of opinions or prediction, not susceptible of being proved false, e.g., that the war was being fought to protect Morgan investments. The majority held that the statute was violated by declarations made as statements of fact without qualification, even though closer analysis might lead to the conclusion that the statements were an expression of opinion or a prediction.[63] Two decades later, an isolationist pamphleteer was convicted for statements such as "We are bankrupt"—painstakingly disproved by a government economist—and other statements, arguably opinion or predictions, on the authority of *Pierce:*[64]

A version of this offense was included in S. 1, as introduced in the 94th Congress,[65] limited to statements of actual fact and with the grading substantially reducted. On further consideration, however, the Committee has determined to eliminate this offense from the Code and has not included it in the reported bill.

While motivated in part to delete this offense by First Amendment concerns as expressed by civil liberties groups, the principal reason for the committee's action is its conclusion that the offense is unnecessary. The last reported case under the present statute arose more than a quarter of a century ago; no prosecution appears to have been brought under the first paragraph of 18 U.S.C. 2388(a) during that interval despite the involvement, on two separate occasions (Korea and Vietnam), of the country's armed forces in protracted foreign hostilities. While the Committee believes that the Congress has the power, if circumstances render it necessary to do so, to enact valid laws that will protect the nation in wartime against the utterance of at least some deliberate falsehoods made with the intent to impede the success of the United States armed forces,[66] it sees no present or immediately foreseeable need for such an offense.

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[61] See, however, *United States* v. *Bishop, supra* note 7.

[62] 252 U.S. 239 (1920).

[63] See Working Papers, p. 449, setting forth the particular statements in *Pierce*. The Court also indicated that actual knowledge of falsity of the statements was not required; it was held sufficient that the pamphlets had been willfully circulated "disregarding their probable falsity," or that they had been "distributed recklessly, without effort to ascertain the truth." 252 U.S., at 251.

[64] See *United States* v. *Pelley*, 132 F. 2d 170, 177-179 (7th Cir. 1942), cert. denied, 318 U.S. 764 (1943).

[65] See Section 1114 (Impairing Military Effectiveness by a False Statement) of that bill.

[66] E.g., statements concerning losses, plans, operations, or conduct of the military forces of the United States, of an associate nation or of the enemy that, if believed, would be likely to affect the strategy or tactics of our military forces or that would be likely to create general panic or

SUBCHAPTER C.—ESPIONAGE AND RELATED OFFENSES

(Sections 1121-1126)

This subchapter is primarily concerned with those laws designed to deter the unauthorized collection and disclosure of the nation's military secrets—information concerning our national preparedness which would render this country vulnerable to attack and defeat or powerless to achieve victory—and particularly to deter such disclosure to foreign powers.

Former versions of the Code (S. 1 in the 93d and 94th Congresses and S 1400 in the 93d Congress) contained proposals to revise the laws in this area. Some of those proposals were subjected to intense criticism. While some of the sponsors of the bill thought much of this criticism was unjustified and based upon a misunderstanding both of current statutes and of the bills' proposals, the controversy threatended the passage of the entire Code revision measure. Therefore, it was determined by the principal sponsors of S. 1437, prior to its introduction in the 95th Congress, with the concurrence of the Department of Justice, that no reform in this area would be attempted and that the matter would be reserved for future attention by the Congress. The Committee has endorsed and carried forward this approach in the reported bill. Accordingly, present statutes have been retained *in haec verba* in titles 42 and 50, with title 18 statutes on the subject transferred to another appropriate title of the United States Code (generally title 50). Subchapter C thus consists of only a series of sections that cross-reference to the provisions of existing law in other titles.

The offenses in this subchapter are Espionage (section 1121), Disseminating National Defense Information (section 1122), Disseminating Classified Information (section 1123), Receiving Classified Information (section 1124), Failing to Register as a Person Trained in a Foreign Espionage System (section 1125), and Failing to Register as, or Acting as, a Foreign Agent (section 1126).

Because of the close interrelationship among sections 1121-1124, the Committee deems it appropriate to discuss current law in overview, as appliable to all the aforementioned sections.

1. Present Federal Law

The most important provisions of existing law are 18 U.S.C. 793 and 794, which punish the collection of national defense information of any description and its transmission to foreign powers, whether friend or foe, in war or peace (793(a)-(c); 794(a), (b)), and, in addition, proscribe conduct which, while not itself espionage, could lead to compromise of national defense secrets (793(d), (e), and (f)). Sections 793 and 794 have not been modified substantially since their enactment as sections 1 and 2 of Title I of the Espionage Act of 1917. The maximum penalty for violation of 794 is death; that for 793 is ten years' imprisonment.

Other statutes are more restricted in application:

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serious disruption. 18 U.S.C. 2388(a), by contrast, reaches any kind of false statement, irrespective of its improbability of causing adverse results.

(i) 50 U.S.C. 783(b), (c), and (d) and 18 U.S.C. 798 protect only information which, in accordance with security procedures developed during World War II, has been "classified," i.e., affirmatively designated by the executive in the interest of national security, for restricted dissemination. 50 U.S.C. 783 covers any material which has been so classified; while 18 U.S.C. 798 is concerned with the products and methods of our cryptographic system and communications intelligence and counterintelligence. Section 783 of title 50 applies to communication by government employees or employees of government-controlled corporations to foreign agents or members of certain communist organizations, whereas the other statutes generally apply to the communication of the specified classified information to any person not authorized to receive it. 42 U.S.C. 2274, 2275; and 2277 cover "restricted data" under the Atomic Energy Act. 50 U.S.C. 783 and 18 U.S.C. 798 are ten-year offenses; the Atomic Energy Act penalties, depending on the actor's intent, are imprisonment for life or ten years, under sections 2274 and 2275, or simply a fine under section 2277.

(ii) 18 U.S.C. 795–797 are misdemeanor provisions aimed at preventing the unauthorized obtaining of uncensored pictorial representations of military installations, particularly by aerial reconnaissance. Enacted in 1938, they were designed to supplement 18 U.S.C. 793 and 794.

(iii) 18 U.S.C. 799 provides one-year misdemeanor punishment for violations of NASA security regulations.

(iv) 50 U.S.C. App. 3(c) and (d) are wartime provisions, dating from 1917, designed to insure effective censorship of communications with foreign countries. They carry ten-year penalties.

A. 18 U.S.C. 793 and 794

The core provisions of the espionage laws are 18 U.S.C. 793 and 794.[1] Section 793 contains six substantive subsections, (a) through (f), and a conspiracy subsection, (g); section 794 has two substantive provisions, (a) and (b), and a conspiracy subsection, (c).[2]

Subsection 793(a) punishes penetration of various facilities related to national defense "for the purpose of obtaining information respecting the national defense" with "intent or reason to believe" that such information is to be used "to the injury of the United States, or to the advantage of any foreign nation." The list of protected facilities is now all-inclusive. In the Act of 1911 only places of direct military significance were enumerated. The expansion occurred in the Act of 1917, and only a few items are later additions.

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[1] For a further discussion of the present law of espionage, see Hearings, pp. 5429–5491; Bank, *Espionage: The American Judicial Response. An In Depth Analysis of the Espionage Laws and Related Statutes*, 21 Am. U.L. Rev. 329 (1972), reprinted in Hearings, p. 583; Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Col. L. Rev. 929 (1973), reprinted in Hearings, p. 7141; Halperin & Hoffman, *Freedom* vs. *National Security*, 236–289 (1977).

[2] Section 793(a)–(f)(1) and sections 794 (a) and (b) were, with modifications to be discussed below, initially enacted as section 1(a)–(e) and 2 (a) and (b) of title 1 of the Espionage Act of 1917; conspiracy was dealt with in section 4. Sections 1(a)–(e) and 2(a) of the Espionage Act were derived in turn from sections 1 and 2 of the Defense Secrets Act of 1911, the first statute to make espionage a peacetime offense and a violation of the civil code. Theretofore, espionage was exclusively a wartime offense, violative of the Articles of War and punishable only by court-martial or military commission. Spying remains an offense under the Uniform Code of Military Justice, see 10 U.S.C. 906; *Ex parte Quirin*, 317 U.S. 1 (1942), and the ability to prosecute thereunder will not be affected by the passage of the proposed new Federal criminal code. See sections 103 and 206.

The requirement that the offender act with a "purpose of obtaining information respecting the national defense" was brought forward from the Act of 1911, while the elements of intent or reason to believe that the information was to be used to the injury of the United States or another country's advantage were added by the Act of 1917. This was done to insure that only those acting with a criminal intent would be subject to the penalties which were then being raised from demeanor to felony class, since some clauses of section 1 of the 1911 Act were susceptible to entirely innocent violation.[3]

In *Gorin* v. *United States*,[4] the Supreme Court held that although intent to injure the United States and intent to secure an advantage to a foreign nation might sometimes differ, each was intended by Congress as an independent alternative, so that proof of intent to confer a benefit on a foreign country would support a conviction without proof of injury of the United States or intent to effect such injury.[5]

The Court in *Gorin* held that what is now 18 U.S.C. 794 was not void for vagueness because "the obvious delimiting words in the statute are those requiring intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." In that context it held that "national defense" had a "well understood connotation", and described the phrase as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." [6] The Court stated that the relationship of the information to the national defense must be direct and rational, and must be determined by the jury from examination of the material and expert testimony as to its significance.[7]

The Court in *Gorin* further stated that the Espionage Act was designed to protect only "secrets," and not matter made public by the defense establishment. A subsequent lower court decision [8] added that the statute cannot cover information which the services had made public or had never sought to keep secret, collection of material from lawfully accessible sources and its communication within the United States could not be illegal, and a prohibition on transmission abroad in peacetime would be "to the last degree fatuous." [9]

The penalty for violating any subsection of section 793 is now ten years. The prototype offenses carried only a one-year penalty under the 1911 Act, which was doubled by the Act of 1917, and raised to the current level in 1940.

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[3] See H. Rept. No. 30, 65th Cong., 1st Sess., p. 10 (1917), accompanying an earlier version of the 1917 Act; see also 46 Cong. Rec. 2029-2030 (1911).

[4] 312 U.S. 19 (1941).

[5] *Id.* at 29-30.

[6] *Id.* at 28.

[7] *Id.* at 31-33.

[8] *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946). See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975), holding that classified information is not to be deemed in the "public domain unless there has been official disclosure of it."

[9] *Id.* at 816.

Subsection 793(b) prohibits the acquisition of objects relating to the national defense, with like purpose and like intent or reason to believe, as under (a), by taking, copying, or other means. This provision was also derived from the 1911 Act, although that Act presupposed that the actor had committed a trespass forbidden by the prior clause. The Act of 1917 dissolved the bond, rendering each offense independent.[10]

Subsection 793(c) covers receipt of material taken in violation of the "chapter" and requires the same "purpose" as section 793(a) and *means rea* of "knowing or having reason to believe" that the material has been wrongfully obtained. Subsection (c) also punishes conspiring to receive information, a carryover from the 1911 Act and probably an anachronism in view of the later-added conspiracy subsection, 793(g).

Subsections 793(d) and (e) each prohibit "willful" communication of specified types of materials relating to the national defense, or of information which the actor has reason to believe could be used to the injury of the United States or the advantage of a foreign nation, and the "willful" retention of both categories of material. The source provision in section 1 of the Defense Secrets Act covered only communication of the specified items in breach of a fiduciary duty by an official; the 1917 provision, section 1(d), added the prohibition against willful retention of such material in the face of a lawful demand and expanded the offense to cover persons in unlawful as well as lawful possession. In 1950, subsection 793(d) was split into subsections 793(d) and (e), the former covering those in lawful possession, and the latter those whose possession was unlawful. The requirement for a demand was retained in subsection 793(d) but was dispensed with under new subsection 793(e) since the government might not know to whom the demand should be directed and because unlike the case of a person in rightful possession, a demand was unnecessary to render continued possession unauthorized.[11]

The 1950 amendments also added a new category of protected information to the items previously enumerated in 18 U.S.C. 793(d)—i.e., "information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." The punctuation of the statute and the legislative history make it clear that the *scienter* phrase, "which information the possessor has reason to believe," modifies only the addition to the statute, so that in a prosecution concerning the enumerated items which had previously been covered by the statute, including documents, notes, and photographs, it is not necessary to prove that the individual had the indicated reason to believe.[12]

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[10] See *Gorin* v. *United States, supra* note 4: *cf. Boeckenhaupt* v. *United States*, 392 F.2d 24, 28 (4th Cir.), cert. denied, 393 U.S. 896 (1968). All provisions of the 1911 Act were integrated and all underwent the same surgery as subsections (a) and (b) underwent in 1917. Thus, what is now subsection (c) to some extent overlap (b), but only because it was originally aimed at the recipient who have not prepetrated the forbidden trespass and taking, but received information from one who had. Subsection 2 of the Act of 1911, which became 2(a) of the 1917 Act and is now 794(a), which punishes communication to a foreign power, also required that the actor either have committed the forbidden trespass and taking, or have knowingly received the information from one who had, or have been guilty of a breach of trust in violation of section 1.

[11] See S. Rept. No. 2369, 81st Cong., 2d Sess., p. 89 (1950); *New York Times Co.* v. *United States*, 403 U.S. 713, 737-739 (1971) (White, J., concurring).

The present wording of 18 U.S.C. 793(d) and (e), making guilty one who "communicates, delivers, or transmits," originated with the Espionage Act of 1917[13] on June 15, 1917, and has survived without intervening changes. The meaning of that phrase has been a matter of substantial dispute.[14]

Unlike subsections 793(a) and (b), subsections (c) through (f) do not require an intent to injure or give an advantage, but only an awareness of the significance of the information. They are principally prophylactic measures, aimed at deterring conduct which might expose material to foreign eyes rather than against active espionage on behalf of foreigners.

Subsection (f)(1) punishes loss of defense information resulting from "gross negligence." Subsection (f)(2), which was added in 1948, punishes the failure to report a loss.

Conspiracy to violate section 793, perfected by an overt act, was added as an offense in 1950 by subsection (g), and was made punishable equally with the completed offense. Theretofore the penalty would have been the five-year maximum provided by 18 U.S.C. 371. In addition, subsections (b), (c), (d), and (e) of section 793 explicitly include attempts to perpetrate the forbidden acts as offenses of equal gravity.

Subsection 794(a) prohibits communication of national defense information to a foreign nation with intent or reason to believe that it will be used to the injury of the United States or the advantage of a foreign power.[15] The penalty now provided is death, life imprisonment, or any lesser term of years. The statute is derived through section 2(a) of the 1917 Act from section 2 of the Act of 1911, which carried a ten-year penalty. The Act of 1917 added the element of hostile intent, mentioned above, and increased the penalty to twenty years, with the further provision that the death penalty or a maximum of thirty years could be imposed if the offense were committed in time of war. The last raising of the penalty in 1954 was a reaction to the threat of nuclear catastrophe.

Subsection (b) of section 794 was introduced by section 2(b) of the Act of 1917, and provided the death penalty for any espionage activity on behalf of a wartime enemy. Apparently it was believed that an intent to convey useful military information to the enemy implied a desire to injure the United States and assist the enemy, thus rendering unnecessary explicit statement of the formula employed in sections 2(a) and 1(a) and (b). This section does not reflect the grading distinction between collecting and transmitting information that had been employed in sections 1 and 2 of the 1911 Act and carried forward in sections 1 and 2(a) of the Act of 1917, but treats all facets of espionage activity with equal severity.

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[12] S. Rept. No. 427, 80th Cong., 1st Sess., p. (1949); H. Rept. No. 3112, 81st Cong., 2d Sess., p. 52 (1950); *New York Times Co.* v. *United States, supra* note 11, at 737–740 (White, J., concurring); cf. *Coplon* v. *United States,* 88 F. Supp. 910 (S.D.N.Y. 1949), remanded on other grounds, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

[13] 40 Stat. 217.

[14] Compare for example, the opinions in *New York Times Co.* v. *United States, supra* note 13 at 720–722, 733–739, 745, 752, 759. In reenacting these provisions *in haec verba* the Committee intends to perpetuate current law as it may be construed by the courts in light of the prior legislative history. Accordingly, it is noted here with respect to this issue that the Committee does not intend to approve or disapprove any of the various interpretations that may have been urged in the courts, legal publications, or other sources.

[15] The offense is distinguishable from treason in terms of *scienter* and hence does not require proof under the constitutional two-witness rule applicable to the former offense. See *United States* v. *Drummond,* 354 F.2d 132, 152 (2d Cir. 1965) (*en banc..*), cert. denied, 384 U.S. 1013 (1966).

The section is concerned with "any information which might be useful to the enemy." It particularly specifies troop and ship movements, reflecting concern about the need to protect from attack the ships carrying our troops to European battlefields.[16] The section provides that an individual is guilty of the offense if he "collects, records, publishes, or communicates," the information.

Subsection (c) of section 794 carries forward section 4 of title 1 of the Espionage Act, providing that conspiracy to violate subsections (a) or (b) is to be punished as severely as the completed offense. Inasmuch as espionage is generally carried on by rings, persons who have collected information in violation of section 793 would sometimes be subject under section 794(c) to the higher penalty fixed for communicators in section 794(a).

B. 18 U.S.C. 795–797

These provisions were enacted in 1938. The Sino-Japanese War had been underway for several years, and certain incidents, such as the attack on the Panay, threatened the United States with immediate involvement. The airplane had become commonplace, the tourist and his camera were everywhere, and journalists and photographers were scouring the Pacific Theater to satisfy public curiosity aroused by the war. Concern that there were also spies in the area, or that innocently obtained and published sketches or photos could be used by Japanese intelligence, led the War and Navy Departments to request this legislation. The misdemeanor penalty was related to the absence of the hostile intent required by section 793(a) and (b) and section 794(a) which these sections were explicitly intended to supplement.[17]

These sections are noteworthy in that they involve peacetime censorship. The assignment of authority to the President to designate restricted areas followed the usage of Espionage Act, title I, sections 1 and 6. No reported prosecutions under these laws exist.

C. 42 U.S.C. 2274, 2275, and 2277

On August 1, 1946, almost one year to the day after the bombing of Hiroshima which ushered in the Atomic Age and manifested the awesome power of nuclear weapons, the Atomic Energy Act became law. The Act attempts to balance the need for dissemination of information necessary for the development of peaceful uses of atomic energy and weapons development, against the necessity of preventing dissemination of weapons information to foreign powers. To effect this latter objective the Act defines a category of information, "Restricted Data," in 42 U.S.C. 2014 and prohibits its unauthorized communication or receipt in 42 U.S.C. 2274 and 2275, respectively, and in section 2277.

Section 2274(a) provides a maximum sentence of life imprisonment if the communication is with "intent to injure the United

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[16] See 54 Cong. Rec. 3605 (1917).

[17] H. Rept. No. 1650, 75th Cong., 2d Sess. (1937); 83 Cong. Rec. 70–71 (1938).

States" or to "secure advantage to a foreign nation." [18] Subsection (b) provides a ten-year penalty if the communication is without such specific intent but with "reason to believe" that the information "will be utilized" to the injury of the United States or the advantage of a foreign nation.

Section 2277 provides a $2,500 fine for the knowing communication of Restricted Data, without such intent or belief, to any unauthorized person by a present or former member or employee of the Commission, the Armed Forces, or any government agency or contractor or licensee. It also covers conspiracy to commit an unauthorized communication or receipt.

Sections 2274, 2275 and 2277 can be violated by attempts and conspiracies as well as by the completed act of communicating or receiving. Unlike 18 U.S.C. 793(g) and 794(c), there is no requirement for conviction of conspiracy that an overt act be perpetrated.[19]

D. 18 U.S.C. 798

Sometime during the 1930's, according to the proponents of this legislation, the United States succeeded in breaking the Japanese naval code. This enabled the United States to monitor the secret communications of Japan clandestinely until a retired government official disclosed the success of the United States in his memoirs. The Japanese then developed a more difficult code which this country could not crack until 1942, too late to prevent the disaster at Pearl Harbor, but just in time to yield a decisive victory at Midway. These episodes manifested the importance of concealing penetration of foreign communication systems, and, conversely, the need to protect the security of United States communications systems from exposure in peacetime.[20]

The section prohibits the knowing and willful communication, furnishing, transmitting, or otherwise making available to any unauthorized person any classified information concerning communication intelligence.[21] The statute was said to be necessary because mation of this kind can be penalized only if it can be proven that the person making the revelation did so with an intent to injure the United States." [22] The statute establishes criminal penalties without such proof but seeks only to protect a "small category of classified matter . . . which is both vital and vulnerable to an almost unique degree." [23] No reported prosecutions exist under this section and it is not clear whether the government's evidentiary burden is merely to establish that the information communicated was classified information of the specified type, or whether it is also essential to establish, as under 18 U.S.C. 793 and 794, that the information in fact related to the national security, i.e., that it was properly classified. The uncertainty lies in the meaning of "classified information," which is defined in the section to mean information that, at the time of a violation, "is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution." The phrase "for reasons of national security" may be read either as referring solely to the classifier's motives, or as referring to an objective circumstance (i.e., that the national security interests required or permitted the classification). The latter interpretation appears to be the one intended by Congress.[24]

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[18] The original enactment of what is now section 2274(a) contained a further refinement: if the offense was committed with intent to injure the United States, as distinguished from merely an intent to secure an advantage to a foreign power, the punishment could, if the jury so recommended, be death or life imprisonment; otherwise the penalty would be twenty years. In 1954, the more favorable treatment for simply giving an advantage to a foreign nation was abolished, and the higher penalty, subject to jury recommendation, was made applicable. In 1969, after the Supreme Court decision in *United States* v. *Jackson*, 390 U.S. 570 (1968), had announced the unconstitutionality of predicating the death penalty upon jury recommendation, the death penalty and the provisions for jury recommendation for life imprisonment were both dropped. Section 2275, which covers receipt, underwent the same changes as section 2274(a).

[19] *Rosenberg* v. *United States*, 346 U.S. 273, 304–305 n.2 (Frankfurter, J., dissenting). Although the phraseology of the Espionage Act was employed as building blocks in these provisions, the rearrangements created a different statute. A few examples will suffice:

(1) In 1946 the death sentence could be imposed under the Espionage Act only for wartime offenses, section 794(b), while the existence of war was irrelevant under the Atomic Energy Act, sections 2274(a) and 2275.

(2) In those cases when the death penalty could be imposed under the Espionage Act, it was at discretion of the trial judge, whereas the Atomic Energy Act required a jury recommendation.

(3) In 1954 when the dealth penalty could be imposed for peacetime offenses under either act, the Atomic Energy Act retained the requirement for a jury recommendation.

(4) Today, the death penalty is authorized under 18 U.S.C. 794 but not under 42 U.S.C. 2274 and 2275.

[20] See S. Rept. No. 111, 81st Cong., 2d Sess. (1950); H. Rept. No. 1895, 81st Cong., 2d Sess. (1950).

[21] The phrase "communications intelligence" is defined to mean all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.

Somewhat opaquely, section 798 also provides punishment for anyone who "uses . . . [such information] in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States." Perhaps this would apply to an official who threatened to expose secret information in order to blackmail the government into giving him a promotion, paying his unwarranted expense accounts, or forgiving his misconduct. The intent language differs from, but parallels the phrases "injury to the United States" and "advantage to any foreign nation" of section 793. However, the additional requirement that benefit to a foreign government must be accompanied by "detriment to the United States" creates a tautology. The approach seems both to have missed the point of, and denied the government the advantage of, the decisions in *Gorin* and *Heine*, discussed above, which held that advantage could be conferred upon a foreign nation and could be punished regardless of whether injury to the United States was intended or sustained.

In 1945, when this legislation was initially proposed, Congress had scheduled investigation of the Pearl Harbor disaster in which the exchange of coded communications between the several departments of the government and the military and naval forces played a part. Concern that this statute would permit the executive to block such investigation led to the enactment of subsection (c),[25] which provides that the section does not apply to supplying a committee of the House or Senate or a joint committee thereof with information it has requested.

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[22] H. Rept. No. 1895, *supra* note 20 at 2.
[23] See H. Rept. No. 1895, *supra* note 20 at 2.
[24] *Id.* at 3; Working Papers, p. 456 n.26.
[25] See 91 Cong. Rec. 10047-10050 (1945).

E. 50 U.S.C. 783(a)-(d)

50 U.S.C. 783 is part of the Internal Security Act of 1950, a complex series of provisions designed to deal with the problem described by the Congress in section 781 as the existence of a worldwide Communist conspiracy, employing espionage, infiltration, and subversion to achieve its ends.

Section 783(a) prohibits conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship in the United States, the control of which would be in the hands of foreigners.

Section 783(b) prohibits any Federal employee or any employee of corporations whose stock is owned in whole or part by the United States or any department or agency thereof, from knowingly communicating classified material to either a foreign agent or a member of specified Communist organizations without prior authorization. Subsection (c) is the converse provision, prohibiting foreign agents or members of such organization [26] from receiving classified material from any Federal officer without having obtained prior permission. Subsection (d) provides a ten-year penalty for any violation of the section. Attempts to violate subsection (b) or subsection (c) are explicitly dealt with in the subsections themselves.

The conduct punished by section 783(b) would arguably be covered by section 793(d), if not section 794(a). The principal distinction is that, as a result of judicial interpretations, the actual relevance of the information to the national defense need not be proved to the jury in a section 783 case as it would have to be under sections 793 or 794, the court finding that Congress intended to hold employees of the United States—the limited class to which this statute is addressed—to a more rigorous standard.[27] This makes it unnecessary for the government to disclose at trial the very information it seeks by the law to protect. An equally important distinction is that 18 U.S.C. 793 and 794 deal with information relating to the "national defense," whereas 50 U.S.C. 783 speaks of material that has been restricted in the interest of "national security," a seemingly somewhat broader concept.

2. The Offenses (Sections 1121–1124)

As noted previously, the offenses in this subchapter cross-reference to provisions located in other titles. All the offenses in sections 1121–1124 are couched in terms of a person committing an offense if he "violates" a section of the cross-referenced provision. By this drafting device, the precise elements and jurisdictional scope [28] of the current offenses are preserved. This policy decision is further implemented, as to culpability, by including in the conforming amendments, a provision rendering the provisions of chapter 3 of the Code inapplicable to the cross-referenced crimes.[29] To the extent that present laws in this area specifically cover a conspiracy or an attempt, that coverage is retained by the cross-reference device. Otherwise the offenses in chapter 10 of the Code apply as they do to most other offenses defined outside title 18. This would carry forward the conspiracy coverage that exists today by virtue of 18 U.S.C. 371 where there is no specific inclusion of a conspiracy offense in one of the cross-referenced offenses.

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[26] The statute has been held to include the Communist Party of the United States. See *Communist Party of the United States* v. *SACB*, 367 U.S. 1 (1967). See also *National Council of American-Soviet Friendship, Inc.* v. *SACB*, 322 F.2d 375 (D.C. Cir. 1963); *American Committee for Protection of Foreign Born* v. *SACB*, 331 F.2d 53 (D.C. Cir. 1964), vacated on other grounds, 380 U.S. 503(1965).

[27] See *Scarbeck* v. *United States*, 317 F.2d 546, 558–560 (D.C. Cir. 1962), cert. denied, 374 U.S. 856 (1963) compare *Gorin* v. *United States, supra* note 5; United States v. *Rosenberg*, 108 F. Supp. 798, 807–808 (S.D.N.Y.), aff'd, 200 F.2d 666 (2d Cir. 1952), cert, denied, 345 U.S. 965 (1953).

[28] See section 201(b)(2).

Section 1121 (Espionage) provides that a person commits an offense if he violates section 201 of the Espionage and Sabotage Act of 1954, as amended by section 182 of the Code or section 224(a) or 225 of the Atomic Energy Act of 1954, as amended. This carries forward the offenses, discussed above, in current 18 U.S.C. 794(a), (b), and (c), and 42 U.S.C. 2274(a) and 2275. The grading levels in each of those offenses is likewise continued via the provision in section 1121(b).

Section 1122 (Disseminating National Defense Information) provides that a person commits an offense if he violates section 18 of the Subversive Activities Control Act of 1950, as amended by section 181 of the Criminal Code, or section 224(b) of the Atomic Energy Act of 1954, as amended. This carries foward the offenses, discussed above, in 18 U.S.C. 793 and 42 U.S.C. 2274(b). Again, the grading levels now applicable to these offenses are preserved via section 1122(b) of the Code.

Section 1123 (Disseminating Classified Information) provides that a person commits an offense if he violates section 24 of the Act of October 31, 1951, as amended by section 183 of the Criminal Code, or section 4(b) of the Subversive Activities Control Act of 1950, as amended. This carries forward the offenses, discussed above, in 18 U.S.C. 798 and 50 U.S.C. 783(b). The grading levels in those statutes are likewise carried forward via section 1123(b) of the Code.

Section 1124 (Receiving Classified Information) provides that a person commits an offense if he violates section 4(c) of the Subversive Activities Control Act of 1950, as amended, or section 227 of the Atomic Energy Act of 1954. This brings forward the offenses, discussed above, in 50 U.S.C. 783(c) and 42 U.S.C. 2277. Again, the grading levels now applicable to those offenses are continued through section 1124(b) of the Code.

SECTION 1125. FAILING TO REGISTER AS A PERSON TRAINED IN A FOREIGN ESPIONAGE SYSTEM

1. General and Present Federal Law

This section carries forward the provisions of 50 U.S.C. 851, 854, and 855, principally punishing the failure to register by certain persons trained in foreign espionage systems. The National Commission proposed a similar statute.[30]

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[29] Under section 303(a) (2), it is implicit that a state of mind must be proved as to an offense described as a violation of a statute outside title 18, if the decription of the non-title 18 offense specifies a state of mind (as all of the cross-referenced offenses in sections 1121-1124 do). The purpose of the inapplicability-of-chapter-3 provision is to insure that culpability under these statutes will continue to be governed by the current law interpretation of the words used to describe the requisite mental state, rather than by the culpability definitions in chapter 3.

[30] See Final Report, § 1122.

50 U.S.C. 851 provides that, except as stated in section 852, every person who has knowledge of, or has received instruction or assignment in, the espionage, or sabotage service, or tactics of a government of a foreign country or of a foreign political party, shall register with the Attorney General by filing a registration statement under oath, in such form and containing such information as the Attorney General by regulation prescribes. Section 852 contains a number of exemptions from the registration requirement for, *inter alia,* persons who have obtained knowledge of or received instruction in espionage, etc., by reason of employment by the United States or any State or local government, persons obtaining such knowledge solely by reason of academic or personal interest, persons who are duly accredited diplomatic or consular officers of a foreign government, who are recognized by the Department of State, while they are engaged in activities recognized by that Department as being within the scope of their functions, civilian or military personnel of a foreign government coming to this country pursuant to arrangements made under a mutual defense treaty or agreement, etc.

50 U.S.C. 854 provides that the Attorney General may at any time make, amend, prescribe, and rescind such rules, regulations, and forms as he deems necessary to carry out the provisions of the subchapter.

50 U.S.C. 855 is the penalty section. It provides in part that whoever willfully violates any provisions of this subchapter or any regulation thereunder shall be subject to imprisonment for up to five years.[31]

No reported prosecutions under this statute exist. Although there is a question as to the validity of the registration requirement in terms of the Fifth Amendment privilege against compulsory self-incrimination,[32] since the statute serves a prophylactic purpose, the Committee has retained it in the proposed new criminal code. S. 1722 of the 96th Congress, S. 1437 of the 95th Congress, S. 1, as originally introduced, and the Final Report,[33] also continued the offense.

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) fails to register with the Attorney General as required by section 2 of the Act of August 1, 1956 (50 U.S.C. 851) (relating to registration of persons trained in foreign espionage systems), or (2) violates a regulation or rule issued pursuant to the authority conferred in section 5 of the Act of August 1, 1956 (50 U.S.C. 854) (relating to promulgation of regulations and rules for registration of persons trained in foreign espionage systems).

The above formulation does not purport to modify the essential elements of the offenses in current law.[34] On the contrary, the existing statutes (50 U.S.C. 851 and 854) will be retained in their present form, with this section serving the function of supplying the penalty for a violation—on the theory that all significant criminal statutes should be located in the new Federal criminal code.

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[31] Section 855 also proscribes the making of any false, material statement, or the omission of any material statement, in a registration statement under this subchapter. This offense is carried forward in the general perjury and false statements sections (1341 and 1343) of the proposed Code.

[32] See Working Papers. p. 466; compare *California* v. *Byers*, 402 U.S. 424 (1971).

[33] See Final Report, § 1122.

[34] It might be noted that the provision substitutes a "knowing" standard for the term "willfully" in 50 U.S.C. 855.

Paragraph (1) brings forward 50 U.S.C. 851. The conduct is failing to register with the Attorney General. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his conduct.[35] Because the conduct involves an omission, in order to be found "aware" of one's failure to register, it is necessary to show some knowledge of the obligation to register. Indeed, such a showing may well be mandated by due process.[36]

The element that the registration was required by 50 U.S.C. 851 is an existing circumstance. However, by virtue of section 303(d)(1)(A), no mental state need be shown as to this element. Thus, it is necessary to prove only that the defendant was conscious of his obligation to register, but not that the obligation had its source in a particular statute.

Paragraph (2) brings forward 50 U.S.C. 854. The term "violates" is defined in section 111 to mean, *inter alia*, in fact engaging in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. Hence, whatever elements are contained in the regulations promulgated under 50 U.S.C. 854 will comprise the offense under this paragraph, the sole purpose of which is to transfer the offense from title 50 to title 18.[37]

3. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction exists. Accordingly, Federal jurisdiction is governed by the provisions of section 201(b)(2).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison), commensurate with the current five-year felony status of the offense.

SECTION 1126. FAILING TO REGISTER AS, OR ACTING AS, A FOREIGN AGENT

1. In General and Present Federal Law

This section brings forward and consolidates the penal provisions of three separate statutory schemes devised to identify and control the agents of foreign powers. The statutes which this section is designed to cover, in whole or in part, are 18 U.S.C. 951, 22 U.S.C. 611 *et seq.*, and 18 U.S.C. 219.

18 U.S.C. 951 punishes by up to ten years in prison whoever, other than a diplomatic or consular officer or attaché, acts in the

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[35] See sections 303(b)(1) and 302(b)(1).

[36] See *Lambert* v. *California*, 355 U.S. 225 (1957).

[37] Whether a mental state need be shown as to the fact that the conduct violated a regulation or rule issued under 50 U.S.C. 854 is to be determined by reference to such provision and not by section 303(d)(1)(A).

United States as an agent of a foreign government without prior notification to the Secretary of State.

The statute has been sustained against Fifth Amendment challenge[38] and, although not frequently utilized, has served as an important weapon against clandestine espionage operations.[39]

The term "agent" in 18 U.S.C. 951 is not defined. It has, however, been interpreted broadly to encompass anyone who acts directly or indirectly for a foreign government; for example, proof of a contractual relationship between the individual and the foreign power is not required.[40]

The term "foreign government" is defined in 18 U.S.C. 11 to include any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.[41]

22 U.S.C. 612 provides that no person shall act as an agent of a foreign principal within the United States unless he has filed a registration statement with the Attorney General under oath and that every person who becomes such an agent must file such a registration statement within ten days thereafter, irrespective of whether he "acts as an agent." The section lists in detail the type of information to be furnished, which includes the particulars concerning the agreement with the foreign principal and any activities under the foreign principal-agent relationship.

The terms "agent of a foreign principal" and "foreign principal," among others, are defined in 22 U.S.C. 611. The definitions are broad enough to reach agents of non-governmental foreign principals (e.g., a domestic partnership subsidized by a foreign principal) as well as agents of governmental foreign principals covered under 18 U.S.C. 951.

22 U.S.C. 613 contains various exemptions from the registration requirement, which are similar to some of those under 50 U.S.C. 852, discussed in connection with section 1125, e.g., a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, while he is engaged exclusively in activities recognized by that Department as within the scope of his functions. Section 613 also exempts, *inter alia,* any person engaging or agreeing to engage solely in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts, and any person qualified to practice law insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the United States.[42]

22 U.S.C. 614(a) provides that persons required to register under section 612 who transmit or cause to be transmitted any political propaganda (a term defined in section 611) must send, within forty-eight hours, copies of such propaganda to the Attorney General, along with a statement as to the times, places, and extent of such

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[38] See *United States* v. *Melekh,* 193 F. Supp. 586 (N.D. Ill., 1961).

[39] E.g. *United States* v. *Butenko,* 384 F.2d 554 (3d Cir. 1967), vacated on other grounds *sub nom. Alderman* v. *United States,* 394 U.S. 165 (1969); *United States* v. *Heine, supra* note 9.

[40] See *United States* v. *Butenko, supra* note 39 at 565-566, and cases cited therein.

[41] See generally *United States* v. *Gertz,* 249 F.2d 662, 665-666 (9th Cir. 1957).

[42] Prior to the amendment in 1966, adding this exception, section 612 was construed to require registration by an attorney for a foreign principal. See *Robinowitz* v. *Kennedy,* 376 U.S. 605 (1964).

transmittal. This provision is clearly designed to frustrate foreign propaganda efforts.[43]

22 U.S.C. 615 requires every agent of a foreign principal registered under section 612 to keep books of account and written records of his activities, which shall be open to inspection by the Attorney General at all reasonable times. The section makes it unlawful to willfully conceal, destroy, mutilate, or falsify such books or records or attempt to do any of the foregoing.

22 U.S.C. 617 provides, *inter alia,* that each officer or director, or person performing the functions of an officer or director, of an agent of a foreign principal which is not an individual is obligated to cause such agent to file a registration statement under section 612 and to comply with all the requirements of sections 614 (a) and (b) and 615 and all other requirements of this subchapter. In the case of the failure of any such agent of a foreign principal to comply, each of its officers and directors (or persons performing the duties of the same) is made subject to prosecution.

22 U.S.C. 618(a) is the penalty provision. In relevant part, it punishes by up to five years in prison whoever willfully violates any provision of this subchapter or any regulation thereunder.[44]

Like 18 U.S.C. 951, the registration requirements of 22 U.S.C 612 and 618 have been sustained against Fifth Amendment challenge.[45]

It has also been held that there is no inconsistency between 18 U.S.C. 951 and the registration provisions of 22 U.S.C. 612 and 618.[46] However, except for the difference as regards the identity of the official with whom an agent of a foreign government or principal must register, it seems evident that the provisions of 22 U.S.C. 611 *et seq.* overlap and are broader than those in title 18. Moreover, there seems no justification for the sharp divergence in penalty between the two statutes (i.e., a ten-year maximum prison sentence in 18 U.S.C. 951 as opposed to a five-year maximum term under 22 U.S.C. 618).[47]

The other enactment covered by this proposed section is 18 U.S.C. 219. It is essentially a conflict of interest statute and punishes by up to two years in prison whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the government or in any agency of the United States, including the District of Columbia, is or acts as an agent of a foreign principal required to register under 22 U.S.C. 612. No reported cases under this statute exist.

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[43] 22 U.S.C. 614(b) makes it unlawful for an agent of a foreign princpal to transmit or cause to be transmitted in this country any political propaganda unless it is conspicuously accompanied by a statement setting forth that the person transmitting it is registered under section 612.

[44] The section also punishes whoever willfully makes a false material statement in or omits a material fact from a registration statement or supplement thereto under section 614(a). These offenses are carried forward in the proposed Code in the general perjury and false statement sections (1341 and 1343).

[45] See *United States* v. *Peace Information Center,* 97 F. Supp. 255 (D.D.C. 1951).

[46] See *United States* v. *Melekh, supra* note 38.

[47] See Working Papers, pp. 498–499. The sole area in which 18 U.S.C. 951 may have scope unmatched by the title 22 offenses is the class of persons covered, since the undefined term "agent" in 18 U.S.C. 951 could conceivably reach some person not within the definitions of "agent of a foreign principal" and "foreign principal" in 22 U.S.C. 611.

2. The Offense

Subsection (a) of section 1126 provides that a person commits an offense if (1) being an agent of a foreign principal, he fails to register with the Attorney General as required by section 2 of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 612), (2) he violates a provision of section 4(a) or 5, or a provision of section 7 relating to a violation of section 4(a) or 5, of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 614(a), 615, or 617), or a regulation, rule or order issued pursuant thereto, (3) he violates section 152 of the Criminal Code Reform Act of 1981 (22 U.S.C. ——), or (4) being a Federal public servant, he is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration act of 1938, as amended (22 U.S.C. 611 *et seq.*), in violation of 5 U.S.C. 9109.

The third paragraph carries forward 18 U.S.C. 951 which has been moved verbatim to title 22, except that the Attorney General has been substituted for the Secretary of State as the official to whom notification must be given by an agent of a foreign government before he "acts in the United States." Although, in view of the partial overlap with 22 U.S.C. 612, the National Commission recommended that 18 U.S.C. 951 not be perpetuated,[48] the Department of Justice urged its retention since the overlap is not complete and 18 U.S.C. 951 has served as an important tool for successfully prosecuting several foreign agents suspected of having engaged in espionage.

The conduct in paragraph (1) is failing to register with the Attorney General. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[49] As under section 1125, since the conduct involves an omission, it is necessary by implication to show that the defendant had some consciousness of his obligation to register in order to establish that his failure to do so was "knowing." The substitution of the culpability standard "knowing" for the vague term "willfully" in current law should achieve greater clarification of the offense.

The element that the offender is an "agent of a foreign principal" is an existing circumstance. Since no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that he was such an agent.[50] The terms "agent of a foreign principal" and "foreign principal" are defined in subsection (b) as having the same meaning as in 22 U.S.C. 611, thus preserving current law.

The element that the duty to register was "required" by 22 U.S.C. 612 is also an existing circumstance. However, by the operation of section 303(d)(1)(A) no mental state as to this element need be established. Thus, it is not necessary to show that the defendant knew the particular source of the obligation to register, even though, in order to prove the requisite culpability as to his conduct, it is essential to show some consciousness of the legal duty to register.

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[48] See *Id.* at 498–499.

[49] See section 303(b)(1) and 302(b)(1).

[50] See section 302(c).

It should be emphasized that, by incorporating the provisions of 22 U.S.C. 612, this section preserves the substantive definition of the offenses there described—i.e., that the duty to register extends to the situation of a failure to register within ten days after becoming an agent of a foreign principal, as well as the situation where a person "acts" as such an agent irrespective of how recently he acquired his status. By contrast the National Commission proposed to alter the offense so that failure to register would only be a felony if the defendant also "surreptitiously" engaged in the activity to which the registration requirement is imposed or sought to conceal his status as a foreign agent.[51] The Committee considers that current law is preferable to that approach.

Paragraph (2) carries forward the existing felony provisions of 22 U.S.C. 614(a), relating to the transmission of propaganda within this country; 22 U.S.C. 615, relating to the keeping of books of account and records by agents of foreign principals; and 22 U.S.C. 617, relating to the duty of officers, directors, or persons performing the functions of those officers, or agents of foreign principals to be responsible for the compliance by such agents with the requirements of the subchapter, insofar as compliance with sections 614(a) and 615 is concerned. The Committee considers that these proscriptions are sufficiently important to warrant retention at a felony level in the new Federal Criminal Code.

The term "violates" is defined in section 111 to mean in fact engaging in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Thus, by using this term and referring to the enumerated sections of title 22, the prescise elements of the offenses in those sections are preserved.

Paragraphs (3) and (4) adopt a similar technique as to 18 U.S.C. 219 and 951. Since that statute is currently in title 18, however, it was necessary to transfer it to another title in order to effect its incorporation by reference herein. Accordingly, the Committee has moved section 219 to title 18 Appendix, United States Code and section 951 to title 22.

The conduct in this offense is being, or acting as, an agent of a foreign principal. Since no culpability standard is set forth in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of his status as such an agent or that he was acting in that capacity.[52]

The fact that the offender was a Federal public servant is an existing circumstance. As no culpability level is specifically assigned, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that he was a Federal public servant.[53] The term "Federal public servant" is broadly defined in section 111 (see the definition of "public servant"), but excludes District of Columbia public servants. In view of the dearth of Federal prosecutions under 18 U.S.C. 219, the Committee sees no reason to perpetuate the somewhat anomalous coverage of District of Columbia officials and employees in this regard in the proposed Federal Criminal Code.

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[51] See Final Report, § 1206.

[52] See sections 303(b)(1) and 302(b)(1).

[53] See sections 303(b)(2) and 303(c)(1).

The element that the agent of a foreign principal is "required" to register under 22 U.S.C. 612 is also an existing circumstance. However, by the operation of section 303(d)(1)(A), no mental state need be shown as to this element.

3. Jurisdiction

This section contains no subsection setting forth the extent of Federal jurisdiction. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

4. Grading

An offense under paragraphs (1), (2), and (3) is graded as a Class D felony (up to six years in prison). This is consistent with the grading of the related offenses in section 1125 as well as the five-year level in 22 U.S.C. 618.

An offense under paragraph (4) is graded as a Class E felony (up to three years in prison). This represents a slight increase in the two-year maximum prison sentence currently imposable under 18 U.S.C. 219.

SUBCHAPTER D.—MISCELLANEOUS NATIONAL DEFENSE OFFENSES

(Section 1131)

This subchapter consists of a single section punishing miscellaneous national defense offenses relating to atomic energy. No attempt has been made to redefine these offenses. Rather, the Committee has exercised its judgment in the area of grading, transferring to title 18, United States Code, those offenses presently in title 42 that are most serious and deserving of continued felony treatment. Other offenses will be retained by reduced in grading to misdemeanors.

SECTION 1131. ATOMIC ENERGY OFFENSES

1. In General and Present Federal Law

This section punishes various conduct relating to atomic energy. The concept underlying this offense is that substantial criminal sanctions are warranted to conserve vital nuclear materials, equipment, and technological information for this nation's domestic use and to prevent such materials and information from reaching foreign countries or unauthorized persons that might use them against the United States.

This section covers offenses currently defined in 42 U.S.C. 2272. S. 1, as originally introduced,[1] and the Final Report [2] also included coverage of 50 U.S.C. 167c, a felony offense,[3] governing the licensing and reacquisition of helium. The Committee determined not to carry this offense forward into title 18, on the ground that helium is not as sensitive as atomic energy material and has lost the military significance it once had. Accordingly, the helium offenses will be retained in title 50 and reduced in grading to misdemeanors.

42 U.S.C. 2272 provides that "willful" violations of sections 2077, 2122, and 2131 of title 42 and unlawful interference with recapture of entry under section 2138 of title 42 are punishable by imprisonment for up to ten years. If, however, the offense is committed with "intent to injure the United States or . . . to secure an advantage to any foreign nation," the maximum penalty is imprisonment for life.

The specified provisions prohibit unlicensed dealing in "special nuclear mateiral" (or production thereof) (2077), dealing in atomic weapons (2122), and dealing in "utilization or production" facilities (2131)). Section 2138 provides for retaking of material if a license is suspended during war or national emergency.[4]

42 U.S.C. 2273 provides that willful violations of any provision of chapter 23 (development and control of atomic energy) for which no penalty is otherwise prescribed are punishable by up to two years' imprisonment and a $5,000 fine, except that, if the offense is committed with intent to injure the United States or secure an advantage to a foreign nation, the maximum punishment is imprisonment for twenty years and a fine of $20,000.

42 U.S.C. 2276 provides for up to life imprisonment and a fine of up to $20,000 for the removal, concealment, tampering, alteration, mutilation or destruction of any document or applicance "involving or incorporating Restricted Data . . ." [5] "with intent to injure the United States or with intent to secure an advantage to a foreign nation."

To the extent that the tampering involves physical objects, the conduct prohibited by this statute is sabotage.

Other offenses described in title 42 will either be retained there as misdemeanors or are covered in other sections of the proposed Code.[6]

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[1] See section 2-5B12.

[2] See Final Report § 1121.

[3] Willful violation of 50 U.S.C. 167c is made punishable by up to two years' imprisonment and a $5,000 fine under 50 U.S.C. 167k. The penalty rises to a maximum of twenty years in prison and a $20,000 fine if the offense is committed with intent to injure the United States or to secure an advantage to any foreign nation.

[4] Section 2138 was not included in S. 1, as originally introduced in the 93d Congress. It is included here in response to the recommendation of the Atomic Energy Commission.

[5] "Restricted Data" is defined in 42 U.S.C. 2014 as data relating to nuclear weapons or the use or manufacture of "special nuclear material," which has not been declassified by the Atomic Energy Commission.

[6] E.g. 42 U.S.C. 2274, 2275, and 2277, which deal with unlawful disclosure and receipt of "restricted data," will be covered by sections 1121 to 1125 of the subject bill dealing with espionage and related offenses. 42 U.S.C. 2278a, authorizing punishment for violation of regulations prohibiting unauthorized entry onto property subject to the jurisdiction of the Atomic Energy Commission, is covered by section 1713 (Criminal Trespass) of the proposed Code.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates any of several specified provisions of the Atomic Energy Act of 1954, as amended. The enumerated provisions are, as previously indicated, 42 U.S.C. 2077, 2122, 2131, 2138, 2273, and 2276.

The use of the term "violates" means that the elements of the offense and culpability are incorporated precisely as they exist in the designated provisions.[7]

3. Grading

As is the case with the espionage offenses (section 1121–1124), the Committee has further implemented its decision to carry forward present law in this area by providing, in subsection (b), that the same sentence now applicable under the cross-referenced statutes shall apply under the new Criminal Code.

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[7] The same is true of jurisdiction. See section 201(b)(2).

CHAPTER 12.—OFFENSES INVOLVING INTERNATIONAL AFFAIRS

Offenses involving international affairs are divided into two major categories. Subchapter A concerns offenses involving foreign relations, and subchapter B concerns offenses involving immigration, naturalization, and passports.

SUBCHAPTER A.—OFFENSES INVOLVING FOREIGN RELATIONS

(Sections 1201–1207)

This subchapter is concerned with offenses affecting international relations. The gist of these offenses is that nations are obligated to see that their territory is not used as a base for military operations or serious depredations against peaceful neighbors, and that when two foreign states are at war, strict neutrality is maintained. Criminal sanctions are justified since failure to honor these obligations may result in a serious deterioration of relations or even war. Moreover, if the United States does not protect the interests of other nations in this regard, they will not protect ours.

The various sections in this subchapter deal with specific aspects of foreign relations offenses and in general carry forward existing laws. Section 1201 substantially reenacts 18 U.S.C. 960 which prohibits military operations against foreign states with which this country is not at war. Section 1202 brings forward 18 U.S.C. 956, which punishes conspiracies to cause damage to property of a foreign power located within its jurisdiction, and also creates a new offense of conspiring to murder or to commit certain other serious felonies against a foreign official of a foreign power with which the United States is not at war. Section 1203 penalizes the conduct of recruiting for, or enlisting in, foreign armies, now prohibited by 18 U.S.C. 958 and 959. Section 1204 deals with belligerent warships, now regulated by 18 U.S.C. 963–967. Section 1205 punishes the disclosure of foreign codes and diplomatic correspondence and brings forward 18 U.S.C. 952. Section 1206 incorporates into title 18 by reference several statutes governing international transactions. Finally, section 1207 proscribes interfering in controversies between the United States and a foreign power, an offense now found, in a broader form, in the Logan Act (18 U.S.C. 953). While some of these measures deal with economic or diplomatic weapons, or are protective of domestic interests, others fit more closely into the general pattern of this subchapter as measures designed to fulfill our international obligations or maintain our neutrality with respect to belligerent nations.

SECTION 1201. ATTACKING A FOREIGN POWER

1. In General

This section brings forward 18 U.S.C. 960 which punishes the launching from the United States of any kind of attack upon a foreign power with which the United States is a peace. Certain preparatory conduct now covered by 18 U.S.C. 960 would be covered by the general attempt and conspiracy provisions (sections 1001-1002).

2. Present Federal Law

International law obligates a nation to prevent the use of its territory as a base for military operations against another nation with which it is not at war. The obligation to prevent such attacks applies regardless of the citizenship of the defendant. Thus it applies whether the hostile conduct is committed by a native of the country from which the attack is launched, by a rebellious citizens of the attacked nation, or by a citizen of a third country, whether or not a state of beligerency exists between it and the state attacked.[1]

18 U.S.C. 960 was enacted in part to fulfill these international obligations. It punishes by up to three years in prison whoever within the United States knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for or takes part in, any military or naval expedition or enterprise to be carried on from thence "against a foreign nation with which the United States is at peace."[2]

It has been held that the term "enterprise" is slightly broader than the term "expedition," although, as noted by the National Commission, no satisfactory definition has been given to the former concept.[3] In *Wibory* v. *United States,*[4] the Court stated:

> The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. The word "enterprise" is somewhat broader than the work "expedition"; and, although the words are synonymously used, it would seem that, under the rule that every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute.

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[1] See generally Working Papers, p. 485 and authorities cited therein.

[2] Under 18 U.S.C. 959(c), this section does not apply to a foreign citizen transiently in the United States who enlists or recruits another such foreign transient to enlist in the service of a foreign nation with which the United States is at peace, provided formalities occur aboard a warship of the foreign nation.

[3] See Working Papers, pp. 489, 506-509.

[4] 163 U.S. 632, 650 (1896).

The courts that have relied on the notion of "enterprise" have condemned, e.g., the sending of a single spy from the United States to a foreign nation[5] and a raid by a single aircraft.[6]

The concept of an "expedition" has been held to require an already "organized force," as distinguished from a group of individuals not yet organized into a fighting force who travel abroad together to join a foreign military force.[7] Thus, pursuant to a traditional tenet of United States foreign policy, this statute does not prohibit an individual from traveling abroad to fight for a cause in which he believes.[8]

The expedition or enterprise must be organized from the United States. Thus, where a group of insurgents is already at war with a foreign country, their sending of a vessel to this country to acquire arms and ammunition does not violate this statute.[9] However, if there is sufficient nexus with the United States, it is immaterial that the actual attack was launched from another country,[10] or that there was a pretextual use of international waters beyond the three-mile limit.[11] The statute is violated at the inception of the activity and its progress or success is not relevant.[12]

3. The Offense

A. Elements.

Subsection (a) provides that a person commits an offense if he "launches or carries on, from the United States, a military attack or expedition against a foreign power with which the United States is not at war." The term "military attack or expedition" against a foreign power is defined in subsection (b) to mean (1) any manned or unmanned warlike assault upon (A) the territory of such foreign power, (B) the inhabitants or property in the territory of such foreign power, or (C) the vessels or aircraft of such foreign power, or (2) any organized warlike invasion of the territory of such foreign power whether launched from or carried on by land, sea, or air. This section does not proscribe the conduct, presently outside the purview of 18 U.S.C 960, of individuals not constituting an organized military force traveling abroad in order to join a foreign army.

The terms "launches or carries on" have been substituted for the lengthier and less precise list of terms in 18 U.S.C. 960. Some of the more inchoate of those terms, such as "prepare a means for" [13] or "furnishes the money for," while not meant to be encompassed within the notion of "launches," will be punishable either under the general attempt (section 1001), conspiracy (section 1002), or complicity (section 401) provisions of the proposed Code.

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[5] See *United States* v. *Sander*, 241 F. 417 (S.D.N.Y. 1917).

[6] See *Casey* v. *United States, 413 F.2d 1303 (5th Cir. 1969), cert. denied, 397 U.S. 1929 (1970).*

[7] *United States* v. *Tauscher*, 233 F. 597, 599–600 (S.D.N.Y. 1916); *United States* v. *Hughes*, 75 F. 267; 268–270 (D.S.C. 1896).

[8] See, e.g., *United States* v. *Hart*, 78 F. 868, 870 (E.D. Pa. 1897), aff'd, 84 F. 799 (3d Cir. 1898); *United States* v. *Hughes, supra* note 7; Working Papers, p. 487.

[9] See *United States* v. *Trumbull*, 48 F. 99 (S.D. Cal. 1891).

[10] *Casey* v. *United States, supra* note 6.

[11] See *Wiborg* v. *United States, supra* note 4 at 658.

[12] See *United States* v. *Nunez*, 82 F. 599 (S.D.N.Y. 1896); *United States* v. *Murphy*, 84 F. 609 (D. Del. 1898).

[13] See *United States* v. *Chakraberty*, 244 F. 287, 292–293 (S.D.N.Y. 1917).

The above definition of "military attack or expedition" eliminates the vague term "enterprise" in current law and, it is believed, will furnish a clearer expression of the forbidden conduct. For example, the term "warlike," which is taken from *Wiborg* v. *United States, supra,* is designed to exclude attacks or expeditions which are not military in nature but the work of bandits or thieves.[14]

Similarly, the words "by land, sea, or air" are included in the definition of "military attack or expedition" to make clear what is presently not clear under 18 U.S.C. 960, i.e., that the conduct covered extends to the launching of missiles, aircraft, and poisonous substances through the air from the United States.[15] It would also cover, for example, the launching of a missile under control from the United States, from a satellite in space, through the atmosphere.

The Committee does not, following present law, intend to preclude application of this section to the instances where the military attack or expedition involves a single individual. However, the Committee does not intend to perpetuate, as a violation of this section, the existing case law interpretation of 18 U.S.C. 960, extending that law's coverage to the sending of a spy to a foreign nation.[16] The contours of the obligation of one nation under international law to protect another from such damage are unclear and, in the absence of any demonstrated need, the Committee does not believe that it should be a crime to launch or carry on spying activities against a foreign power from within this country. Accordingly, such activities are not embraced within the definition of "military attack or expedition."[17]

As under current 18 U.S.C. 960, the military attack or expedition must be launched or carried on from the United States. The Committee intends that existing decisions interpreting this requirement apply to this section. This requirement excludes from coverage in this section the conduct made punishable under 18 U.S.C. 961 of strengthening a foreign warship which enters a domestic port, where the warship is in the service of a foreign power already at war with a nation with which this country is at peace. This offense accordingly will be retained but transferred to title 22 as a misdemeanor.[18]

The military attack or expedition must be against a "foreign power with which the United States is not at war." The term "foreign power" is defined in section 111 to include, *inter alia,* "a foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States," as well as an "international organization" (a term also defined in section 111). This definition makes it clear that the offense may be committed even though the attack is launched against an insurgent force or unrecognized government. This result is consistent with current law.[19] To implement this aspect of the statute, the Committee deemed it appropriate to substitute the phrase "with which the United States is not at war" for the language in 18 U.S.C. 960, referring to a foreign State or people "with whom the United States is at peace," since there may be some question under the international law whether it is possible to be at peace with other than a government entity. (The concept of "war" is discussed in connection with section 1101 (Treason).)

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[14] See *United States* v. *Bopp,* 230 F. 723 (N.D. Cal. 1916).

[15] See Working Papers, p. 487.

[16] E.g., compare *United States* v. *Sander, supra* note 5.

[17] The National Commission, by contrast, would have proscribed such conduct, but only in the case of a conspiracy where the spying related to the gathering of national defense information of a friendly nation while such nation was at war, with intent to reveal such information to the injury of such nation. See Final Report, § 1202(a); Working Papers, p. 489.

[18] The conduct punished in 18 U.S.C. 962 of arming a vessel within the United States with intent that it be employed in the service of a foreign power to commit hostilities against another foreign power with which the United States is at peace, might constitute an attempt to violate section 1201. In any event, the conduct reached by 18 U.S.C. 962 will also be retained as a separate offense and transferred to title 18 Appendix, United States Code, as a misdemeanor.

B. Culpability

The conduct in this section is launching or carrying on a military attack or expedition. Since no culpability standard is specifically indicated, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware that he was, e.g., launching an attack.[20]

The elements that the military attack or expedition is launched or carried on "from the United States" and "against a foreign power with which the United States is not at war" are existing circumstances. As no culpability level is specifically designated, the applicable state of mind that must be proved is at a minimum "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[21] This carries forward the essential holding in *Wiborg* v. *United States, supra,* that ship's officers who were unaware when they left port and territorial waters that the ship was carrying a military expedition, and remained unaware until they met another ship with arms and men in international waters, were not guilty of violating what is now 18 U.S.C. 960.

4. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches to an offense described herein. Hence, Federal jurisdiction over an offense in this section is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). Although this is higher than the three-year penalty authorized under 18 U.S.C. 960, it is only slightly greater than the penalty imposable under 18 U.S.C. 371 for conspiring to violate section 960. The Final Report[22] and S. 1, as originally introduced in the 93d Congress,[23] each contained a comparable penalty, evidencing a recognition that a three-year maximum was insufficient to reflect the potential gravity of the offense.

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[19] See *De Orozco* v. *United States*, 237 F. 1008, 1012 (5th Cir. 1916).
[20] See sections 303(b)(1) and 302(b)(1).
[21] See sections 303(b)(2) and 302(c)(1).
[22] See Final Report, § 1201.
[23] See section 2-5C1.

SECTION 1202. CONSPIRACY AGAINST A FOREIGN POWER

1. In General and Present Federal Law

This section in part brings forward 18 U.S.C. 956, which prohibits a conspiracy to commit certain acts of sabotage or property destruction in foreign countries with which the United States is at peace. A new offense of conspiracy to assassinate a foreign official of such foreign country outside the United States has also been created.[24] Seperate treatment of this conspiracy offense is required (rather than under section 1002), because the proposed Code, like existing law, does not purport to penalize the substantive conduct of destroying property of a foreign nation, leaving such punishment to the laws of the injured nation.

18 U.S.C. 956 punishes by up to three years in prison persons who conspire within the United States to injure or destroy specific property situated within a foreign country with which the United States is at peace and belonging to such country, or other property so situated constituting a public facility such as a bridge, railroad, or canal. An overt act to effect the object of the conspiracy, performed within the United States, is also required.

Only one prosecution appears ever to have been brought under this statute. It involved a plot to blow up a railroad bridge in Zambia in order to halt the supply of Zambian copper to the world market and thus increase the price of that commodity. The court in that case[25] rejected a variety of attacks on the statute, including a contention that the term "at peace" was unconstitutionally vague and that the statute had become void through desuetude. The court also upheld the power of Congress to enact the law, on the ground that the need, in aid of controlling this nation's foreign policy, to manifest lack of complicity with the plotters was sufficient governmental interest to justify punishment of such conspiracies. In addition, the court sustained the constitutional power of Congress to punish the conspiracy, even if the United States lacked jurisdiction to punish the completed offense.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, within the United States, he agrees with one or more persons to engage in conduct outside the United States, the performance of which would constitute: (1) an offense under section 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), or 1621 (Kidnapping) involving a victim who is a foreign official of a foreign power with which the United States is not at war, or (2) an offense under subchapter A of chapter 17 (Arson and Other Property Destruction Offenses) involving property owned by, or under the care, custody, or control of, a foreign power with which the United States is not at war, or a public facility located within the jurisdiction of such foreign power, and in either case, the defendant, or one of the other conspirators in fact, engages in any conduct with intent to effect any objective of the agreement.

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[24] Where the conspiracy is to destroy property of a foreign government or to kill a foreign public servant, *within the* United States, the conduct is punishable under the general conspiracy statute (section 1002), since the completed offense would be a crime under chapter 16 or 17 of the proposed Code.

[25] *United States* v. *Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967).

Paragraph (2) is the aspect of this offense that carries forward 18 U.S.C. 956. It is not, like the previous section, limited to activities of a military nature and would clearly encompass a case such as *United States* v. *Elliott.*[26] Unlike the National Commission, the Committee has confined the offense to its present bounds of damage to or destruction of property either belonging to a foreign power or constituting a public facility. It should be noted that the property destruction offenses in the Code (sections 1701–1703) cover the destruction of property in this country that belongs to a foreign power, foreign official or dignitary, or an official guest of the United States. The National Commission's suggested extension to an agreement to commit theft of property owned by a foreign government seems defective in that such conduct lacks the inherent dangerousness of sabotage and therefore would not appear to jeopardize sufficiently this nation's foreign relations as to warrant penal sanctions.

However, the Committee has broadened 18 U.S.C. 956 in one respect by eliminating the requirement, contained in the present statute, that an overt act (as well as the agreement) occur "within the . . . United States". This limitation is quite clearly not a constitutional requirement.[27] In the Committee's view, there is ample need for the Federal Government to punish such agreements occurring in this country, even where they contemplate that all action to implement them be undertaken abroad.[28]

It is noteworthy that the offense here proposed distinguishes between the required situs of the property to be destroyed or damaged, depending upon whether it is property owned by (or under the care, custody, or control of) a foreign power, or is a public facility. If it is the latter, the property must be located in that foreign power's jurisdiction. If the former, however the property may be situated anywhere outside the United States.[29]

The terms "public facility", "war," and "foreign power" are defined in section 111. The latter term is also discussed in connection with the previous section.

The elements in this statute dealing with the nature of the agreement and the overt act required to constitute the conspiracy are defined in terms identical to the general conspiracy provision (section 1002) and the discussion of those elements in connection with that section is incorporated here.

Paragraph (1) creates a new offense[30] limited to a conspiracy to kill, maim, or kidnap a foreign public servant. The Committee, like the National Commission which recommended a similar offense,[31] deems this new offense to be warranted not only because of the increased use of this political, terrorist method, but because the spawning of such a plot in this country could have severely deleterious effect on our foreign relations which prosecution of the conspiracy could help to alleviate.

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[26] Ibid. See Working papers, pp. 489–490.

[27] See the discussion in connection with section 204 (Extraterritorial Jurisdiction); and cf. *Braverman* v. *United States,* 317 U.S. 49, 53 (1942).

[28] This would permit Federal prosecution, for example, of individuals who consummated an agreement to destroy or damage a foreign embassy in a foreign country where the agreement was reached via a letter or telephone conversation between two parties, one of whom was outside the United States and where all overt acts to implement the agreement were then taken by the foreign-situated party.

[29] See Working Papers, p. 491.

[30] The National Commission felt that the conduct here proscribed would presently be punishable under 18 U.S.C. 960, discussed in relation to the preceding section, when a war or rebellion was involved. See Working Papers, p. 490.

The term "foreign official" used in this paragraph is defined in section 111 to mean a foreign dignitary or a person of foreign nationality who is duly notified to the United States as an officer or employee of a foreign power. The term "foreign dignitary" is also defined in section 111 to mean (a) the chief of state or head of government, or the political equivalent, of a foreign power; (b) an officer of cabinet rank or equivalent or higher rank, of a foreign power; (c) an ambassador of a foreign power; (d) the chief executive officer of an international organization; or (e) a person who has previously served in any such capacity. Thus, this section is, as noted, essentially confined to high ranking public servants. This limitation (rather than the broader coverage of any foreign "public servant" suggested by the National Commission's proposal) is deemed appropriate by the Committee, since a plot within this country to kill or kidnap a minor public servant of a foreign power, even if the crime was motivated by the performance of such public servant's official duties, would not be likely to have a significant adverse impact on this country's foreign relations with the country which the foreign official serves.

B. Culpability

The conduct in this offense is agreeing with one or more persons to engage in conduct outside the United States the performance of which would involve either of the circumstances described in paragraphs (1) and (2), and the engaging in any conduct by the defendant or one of such persons. As no culpability level is specifically designated, with respect to the agreeing, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was agreeing with one or more persons to engage in such conduct.[32] The aspect that a member of the conspiracy other than the defendant thereafter engaged in conduct is preceded by the phrase "in fact". Therefore, by operation of section 303(a)(2), no mental state of the defendant need be proved as to this element.

The element that the latter conduct, if by the defendant, be done "with intent to effect any objective of the agreement" states the purpose for which the post-agreement conduct must be performed. Normally, the conduct will in fact further an objective of the conspiracy. However, under this section (as under section 1002) there is no requirement that it actually do so.[33] The element that the agreement occur within the United States is an existing circumstance. Since no culpability standard is prescribed in this section, the applicable state of mind that must be shown is at a minimum "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that the circumstance existed.[34] The "involving" phrase in each paragraph, describing the victim or the type of property, also consists of existing circumstances, as to which the requisite mental state to be proved is "reckless". The further element in each paragraph that the conduct "would constitute" an offense under one of the enumerated sections of the Code is likewise an existing circumstance. However, by operation of section 303(d)(1)(A), no state of mind need exist as to this element.

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[31] See Final Report, § 1202(b): Working Papers, p. 490.

[32] See sections 303(b)(1) and 302(b)(1).

[33] See the discussion in connection with section 1002.

3. Defense Precluded

Subsection (c) provides that it is not a defense to a prosecution under this section that one or more of the alleged coconspirators has been acquitted, has been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution. This provision is meant to be interpreted identically to that in section 1002(c), applicable to the general conspiracy section. Accordingly, the discussion of that provision should be consulted here.

4. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of every crime that was an objective of the conspiracy. This provision is identical to that in section 1002(b), applicable to the general conspiracy offense. Therefore, the discussion of that provision should be consulted here.

5. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction over the offense attaches. Accordingly, Federal jurisdiction over an offense under this section is governed by the provisions of section 201(b)(2).

6. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is commensurate with the sanction deemed appropriate by the National Commission.[35]

SECTION 1203. ENTERING OR RECRUITING FOR A FOREIGN ARMED FORCE

1. In General and Present Federal Law

This section combines elements of 18 U.S.C. 958, which prohibits accepting a commission from a foreign belligerent, and 18 U.S.C. 959, which prohibits enlisting in or recruiting for a foreign army. These provisions preserve our neutrality where the foreign country is at war or later goes to war.

18 U.S.C. 958 prohibits any citizen of the United States from accepting and exercising, within the United States, a commission to serve a foreign nation in war against any foreign nation with

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[34] See sections 303(b)(2) and 303(c)(1).

[35] See Final Report, § 1202.

which the United States is at peace. The penalty is imprisonment for up to three years.

18 U.S.C. 959 penalizes by up to three years in prison whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign nation as a soldier, marine, or seaman on board a vessel of war.

The section provides that it does not apply to citizens of wartime allies of the United States who enlist or recruit other non-citizens to enlist in the armed forces of a foreign nation, nor to any foreign citizen who is transiently within the United States provided he enlists (or hires or retains another foreign citizen to enlist) on board a warship of the foreign nation (which is within the United States) and that the United States is at peace with the foreign nation.

Under section 959 (unlike section 958) there is no requirement that the recruiting nation be engaged in a war.[36] The statute is designed to reach persons who recruit individuals for service in foreign armed forces, notwithstanding that the individuals themselves would not be prohibited, either under this section or 18 U.S.C. 960 (discussed in connection with section 1201) from going abroad with intent to enlist. The terms "hires or retains" in 18 U.S.C. 959 have been held to reach conduct falling short of a formal contract and reaching the engaging of another to enlist in the armed forces of a foreign power by promising him a benefit in the future. It is not necessary that the benefit be pecuniary in nature or that it be paid at once.[37] Thus in *Gayon* v. *McCarthy,*[38] the Supreme Court held that an indictment charged a "retaining" under what is now 18 U.S.C. 959 by alleging that the defendant, a citizen of Mexico, had promised one Averitt, a United States citizen, a commission in the insurgent forces of Feliz Diaz, then in revolt against the government of Mexico, when he (Averitt) arrived there, and that he probably would be reimbursed for his expenses. The Gayon, case also stands for the proposition that the foreign government may include a faction or colony in revolt and need not be a government recognized by the United States.[39]

2. The Offense

Subsection (a) provides that a person commits an offense if, within the United States, he (1) contracts to enter the armed forces of a foreign power or (2) induces another person to contract to enter the armed forces of a foreign power.

The term "contracts to enter" is intended to cover both agreeing to accept a commission (now proscribed by 18 U.S.C. 958) as well as agreeing to enlist (now penalized under 18 U.S.C. 959). The requirement of 18 U.S.C. 958 that the foreign power be in a state of belligerency, not found in U.S.C. 959, has not been carried forward here since the same embarassment to this country's foreign relations would take place should the commission or enrolling nation subsequently go to war.

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[36] See *United States* v. *Blair-Murdock Co.,* 228 F. 77, 79 (N.D. Cal. 1915), rev'd on other grounds, 241 F. 217 (9th Cir.)., cert. denied, 244 U.S. 655 (1917).

[37] *Id.* at 84–85.

[38] 252 U.S. 171 (1920).

[39] See also *Chacon* v. *Eighty-Nine Bales of Cochineal,* 5 F. Cas. No. 2568 (C.C. Va 181), aff'd 20 U.S. (7 Wheat.) 283 (1822).

The term "contracts" is narrower than the phrase "hires or retains" in 18 U.S.C. 959. However, the recruiter who engages in inducement-type conduct such as occurred in the *Gayon* case, *supra,* without a formal contract being consummated, will be[40] punishable under the proposed Code for an attempt (section 1001).

The term "foreign power" is defined in section 111 to include, *inter alia,* a foreign government, faction, party, or military force, whether or not recognized by the United States. This definition preserves the current scope of 18 U.S.C. 959 as applying to enlisting or recruiting for a foreign insurgent armed force.

The enlisting or recruiting must be to enter the "armed forces" of a foreign power. Thus, merely recruiting pilots to enter the forces of a foreign power in order, e.g., to make humanitarian flights involving such things as delivering medical supplies or food, would not violate this section.

The conduct in this section is contracting to enter the armed forces of a foreign power or inducing another person to contract to enter such forces. Since no culpability standard is prescribed in the section, the applicable state of mind that must be proved is at a minimum "knowing," i.e., that the offender was aware of the nature of his actions.[41] The element that the conduct take place within the United States is an existing circumstance. As no culpability level is specifically designated, the applicable state of mind to be proved is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[42]

3. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that (1) the foreign power was an associate nation and the person who contracted to enter its armed forces was not a citizen of the United States, or (2) the foreign power was not then at war[43] with the United States and the person who contracted to enter its armed forces was a citizen of the foreign power, and, in the case of a prosecution under subsection (a)(2), the person who induced the other person to contract to enter its armed forces was also a citizen of the foreign power.

These provisions carry forward, in essence, the non-applicability provisions of 18 U.S.C. 958. With respect to the first affirmative defense, the term "associate nation" is defined in section 111 to mean a nation at war with a foreign power with which the United States is at war. The second affirmative defense is broader than that provided in 18 U.S.C. 958(c). Thus, it is not limited to foreign citizens who are "transiently within" the United States, but applies to all foreign citizens who are present here; and there is no condition that the enlisting or recruiting occur on board a warship of the foreign power.

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[40] Compare Working Papers, pp. 497-498.

[41] See sections 303(b)(1) and 302(b)(1).

[42] See sections 303(b)(2) and 302(c)(1).

[43] The term "war" is explained in connection with section 1101 (treason).

4. *Jurisdiction*

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches to an offense. Therefore, Federal jurisdiction over an offense herein is governed by the provisions of section 201(b)(2).

5. *Grading*

An offense under this section is graded as a Class E felony (up to three years in prison). This is consistent with current law.

SECTION 1204. VIOLATING NEUTRALITY BY CAUSING DEPARTURE OF A VESSEL OR AIRCRAFT

1. *In General and Present Federal Law*

This section is designed to provide the same protection for this nation's neutrality during a war as do 18 U.S.C. 963-967, which control the movement of belligerent vessels and cargo. The section extends coverage also to belligerent aircraft.

18 U.S.C. 963-967 deal with "vessels * * * during a war in which the United States is a neutral nation." They are intended to vindicate the international obligation of neutral nations to remain aloof from conflicts and avoid becoming embroiled in ongoing hostilities through an offense against one of the belligerents.

18 U.S.C. 963 permits the President to prevent any vessel that has been built as, or converted into, a warship from leaving port until satisfactory proof has been given that the ship will not be employed in the service of a belligerent. An exception is made for foreign warships which under international law have certain rights of entry and departure which do not compromise neutrality. The penalty for taking or attempting to take such a vessel out of port or authorizing its departure in violation of this section is up to ten years in prison and forfeiture of the ship.

18 U.S.C. 964 prohibits, under identical penalty, the sending out of any vessel built as or converted into a warship, with intent to deliver it to a belligerent or with reasonable cause to believe that it will be employed in the service of a belligerent.

18 U.S.C. 965 requires masters of all vessels to declare under oath, prior to departure of their vessel, the destination and disposition of their cargo in addition to the filing of the manifest mandated under title 46, United States Code. Similar declarations are required of cargo owners, shippers, and consigners. Departure without filing such declaration carries the same penalty as under section 963.

18 U.S.C. 966 provides that the collector of customs may detain a ship when it is not entitled to clearance, or when there is reasonable cause to believe that false information has been supplied in the declaration required under section 965. Departure in violation of the detention order carries the previously specified penalties.

18 U.S.C. 967 permits the President to withhold clearance from, or when clearance is not required, to detain, any ship when there is reasonable cause to believe that it is carrying fuel, arms, ammunition, men, supplies, dispatches, or information to a belligerent

warship. Sailing in violation of the detention order is punishable to the same extent as in the foregoing sections.

2. *The Offense*

Subsection (a) states that a person commits an offense if, during a war in regard to which the United States is a neutral nation,[44] he engages in conduct that causes the departure from the United States of a vessel or aircraft,[45] under any of the circumstances enumerated in the following paragraphs.

Paragraph (1) refers to a vessel or aircraft that is equipped as, or that is capable of service as, a warship or warplane, with knowledge that it may be used in the service of a belligerent foreign power. This offense carries forward 18 U.S.C. 964.

Paragraph (2) refers to a vessel or aircraft that is the subject of a detention order issued pursuant to a statute of the United States designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation or rule issued pursuant thereto. This preserves the offenses in 18 U.S.C. 963, 965, 966, and that part of 967 dealing with vessels not required to secure clearances. The above sections, to the extent they confer the power to restrict or control the delivery of vessels, etc., are retained and transferred to title 22, with provisions added conferring like power with respect to aircraft.

Paragraph (3) refers to a vessel or aircraft that, in fact, has not been issued the clearance required by a Federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation, rule, or order issued pursuant thereto. This carries forward the aspect of 18 U.S.C. 967 dealing with vessels required to secure clearances.

The conduct element in this section is engaging in any conduct. Since no culpability standard is specifically prescribed, the applicable state of mind to be proved is at a minimum "knowing," i.e., that the offender was aware of the nature of his actions.[46] The fact that the conduct caused the departure from the United States of a vessel or aircraft is a result of conduct. As no culpability level is specifically designated, the applicable state of mind that must be shown is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the result would occur.[47] The element that the conduct occurs during a war in regard to which the United States is a neutral nation is an existing circumstance. Since no culpability level is set forth in the section, the applicable state of mind to be shown is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.

In paragraph (1) the fact that the aircraft or vessel is equipped or capable of service as a warship or warplane is an existing circumstance as to which, under the principles just reviewed, the applicable mental state is at least "reckless."[48] The element of knowledge that the warship or warplane may be used in the service of a belligerent foreign power states the particular type of knowledge that must be shown to accompany the conduct in this offense. This is intended to carry forward the similar *scienter* provision in 18 U.S.C. 964 requiring proof that the defendant had "reasonable cause to believe" that the vessel would be used in the service of a belligerent nation.

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[44] The concept of "war" as discussed in relation to section 1101 (Treason) presupposes belligerent status by the United States and thus is not applicable here.

[45] The terms "vessel" and "aircraft" are defined in section 111.

[46] See sections 303(b)(1) and 302 (c)(1).

[47] See sections 303(b)(3) and 302 (c)(2).

[48] See sections 303(b)(2) and 302 (c)(1).

In paragraph (2) the fact that the vessel or aircraft is the subject of a detention order is an existing circumstance as to which the mental state that must be shown is at a minimum "reckless."

In paragraph (3) the fact that the vessel or aircraft has not been issued the clearance required is an existing circumstance. However, since this element is preceded by the words "in fact," no proof of any mental state is required.[49] The Committee believes that whereas an offender would be bound to know of the lack of any required clearance, he would not necessarily be aware of the existence of a detention order under paragraph (2).

Subsection (b) provides that it is a question of law, in a prosecution under this section, whether a detention order was issued pursuant to, or whether a clearance was required by, a Federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation, rule, or order issued pursuant thereto. Thus, by operation of section 303(d)(3), no proof of a state of mind is required with respect to these elements.

3. Jurisdiction

This section contains no subsection prescribing the circumstances in which Federal jurisdiction attaches to the offenses herein. Accordingly, Federal jurisdiction over an offense under this section is governed by section 201(b)(2).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is a decrease from the ten-year penalty of current law.

SECTION 1205. DISCLOSING A FOREIGN DIPLOMATIC CODE OR CORRESPONDENCE

1. In General and Present Federal Law

This section brings forward the prohibitions of 18 U.S.C. 952 against the divulging of intercepted communications between foreign nations and their diplomatic missions by government officers.

18 U.S.C. 952 penalizes by up to ten years in prison whoever, by virtue of his employment by the United States, "obtains from another or has or has had custody of or access to" any official diplomatic code or any matter prepared or which purports to have been prepared in such code, and without authority "willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between

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[49] See section 303(a)(1).

any foreign government and its diplomatic mission in the United States."

No reported cases under this statute apparently exist. The legislative history reflects that this statute was designed to protect from disclosure the fact that this nation had penetrated the security arrangements of other nations. The generating incident for the law was the publication in 1929 by a former State Department officer of memoirs revealing the breaking of the Japanese code a decade earlier.[50] This same incident was later cited in support of the passage of 18 U.S.C. 798, punishing disclosure of classified information,[51] which is carried forward in chapter 11 of the proposed Code. Although the coverage of 18 U.S.C. 952 is arguably encompassed by 18 U.S.C. 798 and by chapter 11 of this proposed Code, the prohibitions of the former statute serve also to effectuate the obligations owed by a host sovereign to the offical representatives of another nation and, in the opinion of the Committee, warrant retention of the statute and its placement in this subchapter.[52]

2. The Offense

Subsection (a) provides that a person commits an offense if he communicates[53] matter that he knows is (1) a diplomatic code of a foreign government, or any information[54] or matter prepared in such a code, or (2) any information or matter intercepted[55] while in the process of transmission between a foreign government and a diplomatic mission of that government, to which code, information, or matter he obtained access as a Federal public servant. The offense set forth in subsection (a)(2) is somewhat broader than the corresponding offense in current law in that the transmission intercepted need not be to or from a foreign government's diplomatic mission in the United States, but may also involve that government's mission in a third country. The Committee believes that this modest expansion is plainly warranted by many of the same interests that prompted the current statute, and by the interest in protecting from disclosure material that indicates the interception of communications in other parts of the world.

The conduct in this section is communicating matter. Since no culpability level is specifically prescribed, the applicable state of mind is at a minimum "knowing," thus requiring proof that the offender was aware that he was communicating material.[56] The element that the material was a diplomatic code of a foreign government or other information or matter described in paragraphs (1) or (2) is an existing circumstance. The culpability level is prescribed as "knowing," thus requiring a showing that the offender was aware or believed that the material was of the pertinent type. The element that the code, information, or matter was such that the defendant obtained access to it as a Federal public servant is also an existing circumstance. Since no degree of culpability is specifically set forth, the applicable mental state to be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that his access was the product of his employment as a Federal public servant.[57]

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[50] See 77 Cong. Rec. 5333 (1933); see also H. Rept. 1895, 81st Cong., 2d Sess., pp. 2-3 (1950).

[51] See S. Rept. 111, 81st Cong., 1st Sess. (1949); H. Rept. No. 1895, *supra* note 51.

[52] The very different proscriptions of the so-called Logan Act, 18 U.S.C. 953, against private citizens communicating with any foreign government or officer or agent thereof, with intent to influence the measures or conduct of such government, officer, or agent in relation to any disputes or controversies with the United States, or to defeat the measures of the United States are carried forward, in a more limited form, in section 1207 (Interfering with Foreign Relations).

[53] The term "communicate" is defined in section 111.

[54] The term "information" is defined in subsection (b) to include property from which information may be obtained.

[55] The term "intercept" is defined in subsection (b) to have the meaning set forth in section 1526(d), i.e., to acquire the contents of a communication in the course of its transmission to a party to the communication or before its receipt by the intended recipient, including such acquisition by simultaneous transmission or by recording.

[56] See section 302(b)(1). This culpability standard reflects the Committe's view that the term "willfully" in 18 U S.C. 952 is intended to be read as "deliberately" and not as importing any requirement of evil motive.

The requirement in 18 U.S.C. 952 that the disclosure or communication be done without authority is deleted in view of the fact that a defense of public authority is applicable to such conduct under section 501.[58]

3. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches to the offense. Hence, Federal jurisdiction over an offense in this section is governed by the provisions of section 201(b)(2).

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This reduction from the current ten-year level reflects the Committee's recognition that violations of the provisions of this section that present a threat to national security may be prosecuted under subchapter C of chapter 11 (Espionage and Related Offenses) at a more severe level. The present grading scale is designed to vindicate only the national interest in retaining good foreign relations.

SECTION 1206. ENGAGING IN AN UNLAWFUL INTERNATIONAL TRANSACTION

1. In General and Present Federal Law

Existing law contains a number of statutes regulating international transactions and providing felony penalties for violations. This section proposes to carry forward as felonies only those provisions deemed most serious; other such regulatory provisions will have their criminal sanctions eliminated or will be retained as misdemeanors.

This section carries forward the felony penalties of 22 U.S.C. 287c(b), relating to economic and communication sanctions called for by the United Nations Security Council and ordered by the President; 22 U.S.C. 447(c), relating to transactions involving securities or obligations of belligerent foreign powers; 22 U.S.C. 2778(c), relating to the regulation of the export and import of arms, ammunition, and war implements; 50 U.S.C. 1705(b), relating to transactions involving foreign exchange, transfers of credit or payments of interest, and importing currency and securities; 50 U.S.C. App. 16, relating to trade with an enemy or an ally of an enemy of the United States without license; and 50 U.S.C. App. 2405(b), relating to the export of prohibited goods and technological information to certain Communist nations.[59]

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[57] See sections 303(b)(2) and 302(c)(1). The term "federal public servant" is defined in section 111 (see "public servant") so as to exclude District of Columbia public servants.

[58] This defense, or conceivably a defense of reliance upon an official misstatement of law, would, in the Committee's view, properly insulate from prosecution under this section a member of a Federal intelligence agency who communicated a diplomatic code or information to another person in the course of his official duties.

22 U.S.C. 287c provides that whenever the United States is called upon by the United Nations Security Council to apply measures to give effect to its decisions under article 41 of the United Nations Charter, the President of the United States may, through any agency that he may designate, and under such orders, rules, and regulations as may be prescribed by him, "investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States." Any person who "willfully violates or evades" such orders, rules, etc., or attempts to do so, is punishable by up to ten years in prison and a $10,000 fine.

22 U.S.C. 447 provides that whenever the President has issued a proclamation under 22 U.S.C. 441 that there exists a state of war between specified foreign nations, it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any nation named in the proclamation, or of any subdivision thereof, or to make any loan or extend any credit to any such government or subdivision. This section does not apply to a renewal or readjustment of indebtedness that exists on the date of a proclamation, or when the United States is at war. Whoever "knowingly" violates any of the provisions of this section is subject to five years' imprisonment and a $50,000 fine.

22 U.S.C. 2778 provides that the President is authorized to control the export of arms, ammunition, and implements of war, including technical data relating thereto, other than by a United States government agency, and is authorized to designate those items which shall be considered as arms, ammunition, etc. In addition, this section requires that persons engaged in the business of manufacturing, exporting, or importing, arms, ammunition, etc., register with the agency charged with the administration of this section pursuant to regulations. By executive order, the agency in charge is the Department of the Treasury. The penalty for any "willful" violation of this section is up to two years in prison and a $100,000.[60] The term "willful" under this statute has been interpreted to require proof that "the defendant voluntarily and intentionally violated a known legal duty not to export the proscribed articles."[61]

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[59] The National Commission recommended also retention as a felony of 12 U.S.C. 95a, relating to embargo on gold bullion. See Final Report, § 1204.

[60] The same penalty is imposed for the willful making of any false statement in a registration or license application. This proscription is carried forward in the general false statements section of the proposed Code (section 1343).

[61] See *United States* v. *Lizarraga-Lizarraga*, 541 F.2d 826, 829 (9th Cir. 1976).

This statute has been sustained against a challenge that it is an unconstitutional delegation from Congress to the executive,[62] and the regulations promulgated with respect to materials for which export licenses are required have also withstood similar attack.[63]

50 U.S.C. 1701–1706, the International Emergency Economic Powers Act, enacted in 1977, grants authority to the President, in dealing with an externally caused "unusual and extraordinary threat with respect to which a national emergency has been declared", that involves the national security, foreign policy, or economy of the United States, to investigate, regulate, or prohibit, under regulations as may be prescribed and by means of licenses or otherwise, transactions in foreign exchange, transfers of credit or payments to the extent they involve any interest of a foreign country or a foreign national, importing or exporting of currency or securities, and any possession or manner of transaction concerning property in which any foreign country or foreign national has an interest. Under 50 U.S.C. 1705(b), a willful violation of any license, order, or regulation issued under the Act subjects the violator to a ten-year prison term and a $50,000 fine.

50 U.S.C. App. 3(a) provides that it shall be unlawful for any person in the United States, except with the license of the President, to trade, or attempt to trade, directly or indirectly, with, to, from, for, on account of, for the benefit of, or on behalf of, any other person, "with knowledge or reasonable cause to believe that such other person is an enemy or an ally of an enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of an enemy." The penalty for a willful violation of this section is imprisonment for up to ten years and a $10,000 fine.[64] To constitute an offense under this statute the party traded with must in fact have been an enemy or an ally of an enemy; trade with a person not an enemy, even though the defendant believed and had cause to believe that he was, does not violate this section.[65]

50 U.S.C. App. 5(b) provides that during time of war or any other period of national emergency declared by the President, the President may, through any agency he may designate, and under such rules and regulations as he may prescribe, in effect regulate foreign trade by prohibiting financial transactions and freezing foreign assets. Under 50 U.S.C. App. 16, a "willful" violation of this section is punishable by up to ten years in prison and a $10,000 fine.

This statute has been upheld against a claim that it represents an unconstitutional delegation of power to the executive[66] and its validity was sustained in the context of a refusal by an importer to obtain a license, required under the section, for the importation from North Vietnam of materials subject to First Amendment protection.[67]

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[62] See *Samora* v. *United States* 406 F.2d 1095 (5th Cir. 1969).

[63] See *United States* v. *Stone*, 452 F.2d 42 (8th Cir. 1971).

[64] See 50 U.S.C. App. 16.

[65] See *United States* v. *Leiner*, 143 F.2d 298 (2d Cir. 1944). However, the circumstances in *Leiner* could give rise under this Code to a prosecution for an attempt to violate this statute. See section 1001.

[66] See *Teague* v. *Regional Commissioner of Customs, Region II*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969).

50 U.S.C. App. 2410(b) provides that whoever "willfully exports" anything contrary to the provisions of the Export Administration Act of 1979, 50 U.S.C. App. 2401-2420, with "knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security of foreign policy purposes," may be punished by up to ten years in prison and fined up to $100,000 or five times the value of the exports involved, whichever is greater.

2. The Offense

Subsection (a) provides that a person commits an offense if he "violates" any of the sections discussed above. The term "violate" is defined in section 111 to mean in fact to engage in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Thus this section incorporates the elements of the various provisions referred to in paragraphs (a)(1) through (a)(6). The jurisdictional scope of these present laws is also continued through the operation of section 201(b)(2).

With respect to culpability, the Committee endorses the interpretation of the term "willful" under 22 U.S.C. 2778 in *United States* v. *Lizarraga-Lizarraga, supra* note 61, and believes that this interpretation is appropriate with respect to the other offenses carried forward in this section. While the standard of intentional violation of a known legal duty is very strict, it is nonetheless apt to define the class of regulatory offenses involving international transactions that are suitable for serious felony treatment. Accordingly, this culpability standard has been incorporated into each of the statutes cross-referenced in this section via the conforming amendments.

The National Commission (as well as S.1 in the 94th Congress) would have modified the prevailing culpability test by requiring an intent to conceal any matter from a government agency authorized to administer the statute, or knowledge that the actor's conduct obstructed or impaired the administration of the statute or any Federal government function.[68] The purpose was to penalize only those violations that caused or were likely to cause significant adverse results. The Committee believes, however, that prosecutorial discretion may be relied upon to prevent a prosecution from being commenced where the violation, although intentional and in contravention of a known legal duty, is nevertheless trivial.

3. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is below the ten-year maximum authorized by each of the statutes here covered, with the exception of 22 U.S.C. 2778.

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[67] See *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs, Region II*, 459 F.2d 676 (3d Cir. 1972), cert. denied, 409 U.S. 933 (1972); see also *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970).

[68] See Final Report, § 1204.

SECTION 1207. INTERFERING WITH FOREIGN RELATIONS

1. In General and Present Law

18 U.S.C. 953, the so-called Logan Act, punishes by up to three years in prison the unauthorized communication by a citizen of the United States with a foreign government or an officer or agent thereof, with "intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." Applications for redress of any injury that the communicator may have sustained from a foreign government or its agents or officers are exempted from the prohibition.

2. The Offense

Subsection (a) provides that a person commits an offense if, while owing allegiance to the United States, he interferes with the foreign relations of the United States by communicating with a foreign power without authorization of the United States and with intent to influence the outcome of a controversy between the United States and the foreign power. The section thus requires, unlike the Logan Act, a showing of actual interference with the foreign relations of the United States. Moreover, the intent component of the offense—"to influence the outcome of a controversy between the United States and the foreign power"—is far more clear and focused than the counterpart element in the present Logan Act, which speaks of an "intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." Whatever the phrase "measures of the United States" may mean under existing law, it is plain that there can be no offense under section 1207 unless the intent is to influence the outcome of a controversy between this country and the foreign power communicated with.

The term "foreign power" is defined in section 111 to include (1) a foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States, and (2) an international organization (a defined term, in section 111). The reference in the Logan Act to communicating with an "officer or agent" of a foreign power has been deleted as unnecessary, since one may communicate with a foreign power only by communicating with its officers or agents, and it is only such communications with the officers and agents of foreign powers that are meant to be covered by this section.

It should be noted, as a final point of difference between this section and the Logan Act, that subsection (a) reaches any person who owes allegiance to the United States, whereas the Logan Act covers only citizens. The concept of "owing allegiance" is discussed in this Report in connection with section 1101 (Treason) and that discussion should be consulted here.

The conduct in this offense is communicating with an entity. Since no culpability level is specifically set forth, the mental state that must be proved is at least "knowing."[69] The elements that the communication was "without authorization of the United States," was with a "foreign power," and was made while owing allegiance to the United States, are existing circumstances. As no culpability standard is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "reckless," *i.e.*, that the defendant consciously disregarded a substantial risk that the circumstances existed and that such disregard was a gross deviation from the standard of care that a reasonable person would have exercised.[70] The element that the communication interferes with the foreign relations of the United States is a result of conduct. Since no culpability level is specifically set forth, the applicable state of mind is again at least "reckless." Finally, the element that the conduct was with intent to influence the outcome of a controversy between the United States and the foreign power states the purpose for which it must be shown that the communication was made.

3. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that the communication constituted an application for redress of an injury inflicted directly upon the person by the foreign power. This is similar in substance to the last paragraph of the Logan Act, which excludes applications by citizens for redress of injury at the hands of the foreign government from the prohibitions of the Act. The committee has transformed this provision into an affirmative defense, on which the defendant will bear the burden of proof by a preponderance of the evidence. The Committee believes it unlikely that a communication with intent to influence a controversy between this country and a foreign power will also constitute an application for redress of an injury inflicted on the communicator by the foreign power. Nevertheless, the Committee has retained this defense so as not to deter legitimate communications seeking only such redress.

4. Jurisdiction

This section contains no subsection indicating the extent of federal jurisdiction. Accordingly, federal jurisdiction is governed by the provisions of section 201(b)(2). Extraterritorial jurisdiction exists under the generic reference in section 204(c)(7).

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison), thus carrying forward the penalty level in the Logan Act.

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[69] Section 303(b)(1).

[70] Sections 303(b)(2) and 302(c)(1).

SUBCHAPTER B.—OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

(Sections 1211–1217)

The offenses within this subchapter include the unlawful entry of an alien into the United States (section 1211); the smuggling of an alien into the United States (section 1212); the hindering of the discovery of an alien unlawfully in the United States (section 1213); unlawfully employing an alien (section 1214); the fraudulent acquisition or improper use of evidence of citizenship (section 1215); and fraudulently acquiring or improperly using a passport (section 1216). Section 1217 contains some general provisions for the foregoing sections. The purpose of these sections is to consolidate the many existing offenses designed to assist government regulation of immigration, citizenship, and foreign travel by citizens. Generally speaking, an effort was made (1) to avoid interfering with existing policy; (2) to identify the parts of those present offenses which are covered by broader offenses such as bribery, perjury, false statements, forgery, etc., and to eliminate those aspects from coverage under this subchapter; and (3) to distinguish between the offenses which ought to remain in title 18 and those offenses which are regulatory in nature and should be transferred to other titles.

SECTION 1211. UNLAWFULLY ENTERING THE UNITED STATES AS AN ALIEN

1. In General and Present Federal Law

This section combines into one offense the conduct currently embraced by 8 U.S.C. 1325, covering unlawful entry by an alien into the United States, and 8 U.S.C. 1326, covering reentry by an alien into the United States after deportation.

8 U.S.C. 1325 provides that any "alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact" is guilty of a misdemeanor punishable by up to six months in prison for the first offense; a subsequent conviction is a felony punishable by up to two years in prison.

With respect to the obtaining entry by concealment branch of this statute the courts have held that the entering by an alien into a sham marriage with a United States citizen in order to effect entry into this country violates the statute, irrespective of the validity of the marriage under State law.[1] In addition, it has been held that there is extraterritorial Federal jurisdiction over the offense under the "protective" principle[2] where the false representations were made to a United States consular official abroad.[3]

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[1] See *Lutwak* v. *United States*, 344 U.S. 604 (1953); *United States* v. *Rubenstein*, 151 F.2d 915 (2d Cir.), cert. denied, 326 U.S. 766 (1945); *United States* v. *Pantelopoulous*, 336 F.2d 421 (2d Cir. 1964). But compare *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963), construing more narrowly the false statement branch.

[2] See the discussion of jurisdiction generally in connection with chapter 2 of the proposed Code.

[3] See *Rocha* v. *United States*, 288 F.2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961).

8 U.S.C. 1326 provides that "any alien who (1) has been arrested and deported or excluded and deported and thereafter (2) enters, attempts to enter, or is at any time found in the United States" is guilty of a felony punishable by up to two years in prison unless "prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior act."

With respect to the meaning of the term "deported," it has been held that an alien's voluntary departure from this country following the issuance of an order of deportation constitutes a deportation within the intent of this statute, notwithstanding that the alien was unaware of the existence of the deportation order.[4] Similarly, it is no defense to a charge of illegal entry that the prior deportation was to the wrong country[5] and an alien may not defend on the ground that the prior deportation order was unlawful.[6] It is also clear that a specific intent to reenter the United States illegally is not an element of the crime.[7]

Recently in *United States* v. *Wong Kim Bo,*[8] the Fifth Circuit adopted a restrictive and novel interpretation of the word "arrest" in this statute, while intimating that Congress might wish to amend the law. The requirement for an "arrest" as well as an exclusion or deportation of an alien apparently arises from the fact that prior to 1956 a physical arrest of an alien was a prerequisite to a deportation proceeding. Thereafter, however, the Immigration and Naturalization Service by regulation instituted a show cause order procedure under which an alien would not necessarily be placed under arrest or have his liberty restrained even after he was found deportable.[9] In *Wong Kim Bo,* the show cause order procedure was followed, the alien was ordered to depart, and did so without having been subjected to formal restraint. On appeal from his conviction for reentering the country he raised the novel argument that he could not be found guilty under 8 U.S.C. 1326 because he had never been "*arrested and* deported" as required under law. The court of appeals upheld the contention, holding that the "arrest" language had to be given substantive effect and pointing out that Congress had not amended the law since 1956 when the new procedure was adopted. It held in effect that, in order for a conviction to lie under this section, the I.N.S. must issue a warrant of deportation following a deportation order.

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[4] See *Corsetti* v. *McGrath,* 112 F.2d 719 (9th Cir. 1940); see also *Arriaga-Ramirez* v. *United States,* 325 F.2d 857 (10th Cir. 1963); *United States* v. *Maisel,* 183 F.2d 724 (3d Cir. 1950).

[5] See *United States ex rel. Bartsch* v. *Watkins,* 175 F.2d 245 (2d Cir. 1949).

[6] See *United States* v. *Gonzalez-Parra,* 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); *United States* v. *Bruno,* 328 F. Supp. 815 (W.D. Mo. 1971); compare *United States* v. *Bowles,* 331 F.2d 742 (3d Cir), rehearing denied, 334 F 2d 325 (1964).

[7] See *Pena-Cabanillas* v. *United States,* 394 F.2d 785, 788–790 (9th Cir. 1968); see also *Arriaga-Ramirez* v. *United States, supra* note 4; *United States* v. *Maisel, supra* note 4.

[8] 466 F.2d 1298 (5th Cir.), rehearing denied, 472 F.2d 720 (5th Cir. 1972).

[9] See *id.* at 723.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, "being an alien, he (1) enters the United States at a time or place other than a time or place designated for such entry under a federal statute, or a regulation, rule, or order issued pursuant thereto; (2) eludes examination or inspection by an immigration officer; (3) obtains entry into the United States by fraud; or (4) enters, or is present in, the United States after having been deported from the United States under an order of exclusion or deportation."

As under present law, it is an element of the offense that the defendant is an alien. The Committee intends that existing evidentiary doctrines under 8 U.S.C. 1325 and 1326 continue in effect as to this element. Thus, if the government proves that the status of the defendant as an alien was established at a prior proceeding, that status is presumed to have continued until the contrary is shown.[10] Moreover, if the defendant's alienage was litigated at a prior criminal trial, the government can invoke the doctrine of collateral estoppel and thereby establish the defendant's alien status up to the date of the prior conviction.[11]

Paragraph (1) is a recodification of 8 U.S.C. 1325(1) except that the words "under a federal statute, or a regulation, rule, or order issued pursuant thereto" have been substituted for the words "by immigration officers." The reason for the change is to make clear that the standard for determining whether an alien properly entered the country is to be found in the statute and the rules and regulations issued pursuant thereto and not in the actions of an immigration officer. Thus where an alien bribes an immigration officer to permit him to enter, it would not be a defense to a prosecution under this subsection that the alien entered at a time and place designated by the immigration officer.

Paragraph (2) is identical to existing 8 U.S.C. 1325(2) and no substantive change in construction is intended.

Paragraph (3) codifies 8 U.S.C. 1325(3). The current language "willfully false or misleading representation or the willful concealment of a material fact" has been replaced by the simpler phrase "by fraud." This term is defined in section 1217 to include conduct described in sections 1301(a) (which includes defrauding the government in any manner) and 1343(a)(1)(A) through (F). This amply covers the conduct proscribed by 8 U.S.C. 1325(3) and perpetuates the interpretations of that current provision as including such schemes as sham marriages in order to gain entry into the United States.

Section 1217 also provides that, to the extent conduct described in section 1343(a)(1)(A) through (F) is an element of an offense described in this subchapter, the provisions of section 1346(b)(2) and (c)(2) that apply to section 1343 (Making a False Statement) apply also to this subchapter. Those portions of section 1346 contain a definition of materiality and an affirmative defense of retraction, and are discussed in connection with subchapter E of chapter 13.

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[10] See e.g., *Farrell* v. *United States*, 381 F.2d 368 (9th Cir.), cert. denied, 389 U.S. 963 (1967).

[11] See *Pena-Cabanillas* v. *United States*, *supra* note 7 at 786–788.

Paragraph (4) is designed to replace 8 U.S.C. 1326. In the main, the Committee intends no substantive change from existing law. Thus, knowledge of the issuance of an order of deportation prior to the alien's departure is not an element of the offense,[12] and the invalidity of the deportation order may not be raised as a defense to the prosecution.[13]

The Committee, however, has eliminated the requirement of an "arrest and" deportation now found in 8 U.S.C. 1326. As the court in *United States* v. *Wong Kim Bo, supra,* noted in light of the show cause procedure adopted by the Immigration and Naturalization Service, there is no necessity for a formal arrest to accompany a deportation. Consequently, there is no reason to include such an element in the statute. The gravamen of the offense is reentering the United States after having been deported; whether or not the alien was arrested as part of the deportation procedure is of no moment in terms of effectuating the policy of the statute.

The branch of this paragraph referring to an alien being "present in" the United States carries forward the similar provision in 8 U.S.C. 1326 punishing an alien who is "found in" the United States after having been deported. The significance of this provision is principally procedural. For one thing, the defendant may be prosecuted in any judicial district where he is found and need not be returned to the district where he entered.[14] In addition, the language makes clear that the offense is to be deemed a continuing one for purposes of the statute of limitations, so that an alien merely by remaining concealed for a number of years cannot escape prosecution for his illegal entry. This accords with current law.[15]

B. Culpability

The common element of "being an alien," applicable to each of the offenses in this section, is an existing circumstance. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that he was an alien.[16]

In paragraph (1), the conduct is entering the United States. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is at a minimum "knowing," i.e., that the offender was aware that he entered the United States.[17] Hence if the defendant was drugged and transported across the international boundary in the course of a kidnapping, he would not be guilty under this section, although still liable to deportation.[18]

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[12] E.g., *Corsetti* v. *McGrath, supra* note 4.

[13] As pointed out in *United States* v. *Gonzalez-Parra, supra* note 6, this seems clearly to have been Congress' intention in 8 U.S.C. 1326 since, in enacting a comprehensive system for judicial review of all deportation orders in 8 U.S.C. 1105, including such a system in regard to some criminal proceedings, it failed to provide for such review in relation to a prosecution under 8 U.S.C. 1326. The court in *Gonzalez-Parra* further held that failure to permit collateral attack on the deportation order in the criminal prosecution was not invalid, since aliens wishing to contest the legality of their deportation have ample opportunity for judicial review in the form of a direct appeal from the deportation order. If they instead leave the country without challenging the order, they may not in effect obtain a delayed decision on its validity by illegally reentering the United States. The Committee specifically endorses this construction of the statute and intends that it be carried forward under section 1211(a)(4).

[14] Cf. *United States* v. *Cores,* 356 U.S. 405 (1958).

[15] *United States* v. *Bruno, supra* note 6 at 825; see also section 511 (Time Limitations).

[16] See sections 303(b)(2) and 302(c)(1). Current case law does not appear to address the question of the mental state that must be shown as to the alienage element.

[17] See sections 303(b)(1) and 302(b)(1).

The element that the entry into this country was at a time or place other than designated for such entry in a Federal statute, or a regulation, rule, or order issued pursuant thereto, is an existing circumstance. Since no culpability standard is specifically set forth, the applicable mental state that must be shown is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that his entry was at a time or place not designated by law.

In paragraph (2) the conduct is eluding examination or inspection. The applicable mental state is at least "knowing." The fact that the examination or inspection eluded was by an "immigration officer" is an existing circumstance as to which the applicable state of mind is "reckless."

In paragraph (3) the offense consists entirely of conduct and the applicable state of mind that must be proved is at least "knowing."

In paragraph (4) the conduct is entering or being present in the United States. Since no culpability standard is specifically designated, the applicable state of mind that must be shown is at a minimum "knowing." The element that the entry or presence occur after the alien was deported from the United States under an order of exclusion or deportation is an existing circumstance. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that he was ordered deported. Thus, where an alien leaves the country after the conclusion of deportation proceedings and after the issuance of a deportation order, but without having received actual notice of such order, he could nevertheless be guilty under this section if he reentered the United States, if it were determined that he was aware of the risk that a deportation order had been issued but disregarded that risk and his disregard constituted a gross deviation from the standard of care a reasonable person would have exercised. As previously noted, this is consistent with existing law which holds that knowledge of the issuance of an order of deportation is not required.

3. Affirmative Defenses

Subsection (b) retains two existing defenses to prosecution under this section except that, instead of characterizing these defenses as exclusions, as done in 8 U.S.C. 1326, they are made affirmative defenses. Thus, there is an affirmative defense to a prosecution under subsection (a)(4) if, prior to the alien's reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the alien obtains the express consent of the Attorney General to reapply for admission into the United States or if the alien had previously been deported under an order of exclusion (not deportation) and was not required by a Federal statute, or a regulation, rule, or order issued pursuant thereto, to obtain the advance consent of the Attorney General. By stating these situations as affirmative defenses (i.e., defenses as to which the alien bears the burden of proof by a preponderance of the evidence), the issues of burden of proof and mistake are resolved with greater precision than under 8 U.S.C. 1326.[19]

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[18] On the other hand, an alien who intended to enter the United States illegally but who was asleep or unconscious when the vehicle in which he was a passenger crossed the international boundary would be guilty, since proof of the higher mental state—intentionally—also satisfies this culpability requirement. See section 303(c)(1).

4. Jurisdiction

No jurisdictional subsection is included in connection with this section. Therefore, Federal jurisdiction over an offense hereunder is governed by the provisions of section 201(b)(2). Under section 204(e), extraterritorial jurisdiction also extends to these offenses. This accords with present law.

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the offender uses a "passport, certificate of naturalization or citizenship, immigrant, or nonimmigrant visa, border crossing identification card, alien registration receipt card, or other document prescribed by statute or regulation for entry into, or as evidence of authorized stay in, the United States, that is counterfeited or forged or that pertains to another person." Class E felony grading (up to three years in prison) applies where the offense is committed under subsection (a)(4) and the alien previously has been convicted of that same offense or of any Federal, State, or foreign felony.[20] In any other case, an offense under this section is graded as a Class B misdemeanor (up to six months in prison).

This grading scheme departs significantly from current 8 U.S.C. 1325 and 1326. Instead of all first offenses under 8 U.S.C. 1325 being six-month misdemeanors and any subsequent offense being a felony, and instead of all violations of 8 U.S.C. 1326 being felonies, this section accords felony treatment only in the most serious types of section 1325 violations (i.e., where the defendant uses a forged or counterfeit entry document) and only in the section 1326 kind of circumstance in the event the offender is a recidivist or has a prior felony conviction. The enumeration of the types of documents whose improver use will lead to enhanced grading under this section is set forth in detail to overcome the possibility of a restrictive reading such as was given to similar but less precise language in *United States* v. *Campos-Serrano,*[21] as not including an alien registration receipt card.

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[19] See *United States* v. *Lazarescu,* 104 F. Supp. 771, 778 (D. Md.), aff'd, 199 F.2d 898 (4th Cir. 1952); see also Working Papers, p. 512.

[20] These terms are defined in section 111 (see the definition of "felony" therein).

[21] 404 U.S. 293 (1971). The Court so held for purposes of 18 U.S.C. 1546, which proscribes, *inter alia,* possession of a forged or counterfeit "immigrant or nonimmigrant visa, permit or other document required for entering into the United States." Although it is by no means certain that the Court would interpret that identical language in the same way in the context of this section, where the language is used for grading purposes, the Committee deemed it wise to resolve all doubt as to its intent by describing with precision the types of documents whose misuse it considers most serious.

SECTION 1212. SMUGGLING AN ALIEN INTO THE UNITED STATES

1. In General

This section embraces conduct currently covered by 8 U.S.C. 1324(1), the basic alien smuggling provision, as well as 8 U.S.C. 1327 (concerning aiding aliens excludable as subversives in entering the United States) and 8 U.S.C. 1328 (concerning importation of aliens for immoral purposes). These sections are consolidated in section 1212 by a single offense that prohibits any person from knowingly bringing into the country any alien not properly admitted into the United States or lawfully entitled to enter or reside here.

2. Present Federal Law

8 U.S.C. 1324(1) punishes by up to five years in prison any person who "brings into or lands in the United States, by any means of transportation or otherwise," or attempts so to do, "any alien, including any alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens."[22]

It has been held that the words "brings into" are more comprehensive than the word "lands in" and are intended to cover those cases where an actual landing or placing of aliens on shore could not be effected (e.g., where the aliens are brought only to within the territorial waters of the United States).[23]

Moreover even if an alien has proper entry papers and is entitled to enter the United States, it is a violation of this section to bring such an alien into this country if he has not been duly admitted by an immigration officer.[24] In addition, while this statute is strictly construed to require active conduct on the part of the defendant, there can be a violation of this section even if the defendant does not personally transport the alien into this country. Thus, where a person takes money from aliens, gives them false identification, purchases commercial airline tickets, and accompanies them to the United States, such conduct is sufficient to constitute a violation of this section.[25] Furthermore, it is not necessary that the aliens be transported in a vehicle or other conveyance. It would, for example, be a violation of this section to provide a guide to bring aliens across the border on foot.[26]

8 U.S.C. 1327 makes it an offense punishable by up to five years in prison to aid, assist, or procure the entry into the United States of certain aliens characterized as subversives.

8 U.S.C. 1328 makes it a separate offense punishable by up to ten years in prison to import any alien into the United States "for the

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[22] This section defines three other offenses as well. Paragraph (2) prohibits the transporting of aliens known to be illegally in this country; paragraph (3) prohibits the concealment or harboring of aliens illegally in this country; and paragraph (4) prohibits the encouragement or inducement of an alien to enter this country illegally. Paragraphs (2) and (3) are essentially carried forward in the following section (1213). Paragraph (4) will be covered by the general complicity section (401).

[23] See *Middleton* v. *United States*, 32 F.2d 239 (5th Cir. 1929).

[24] See *Bland* v. *United States*, 299 F.2d 105 (5th Cir. 1962).

[25] See *United States* v. *Washington*, 471 F.2d 402 (5th Cir.) cert. denied, 412 U.S. 930 (1973).

[26] See *Carranza-Chaidez* v. *United States*, 414 F.2d 503 (9th Cir. 1969).

purpose of prostitution or for any other immoral purpose," or to hold any alien for such purpose in pursuance of such illegal importation, or to keep, maintain, control, support, employ, or harbor any alien in any house or other place for such purpose in pursuance of such illegal importation.

Since the classes of aliens covered by these two statutes are not entitled to enter the United States,[27] any person bringing such aliens into this country would of necessity violate 8 U.S.C. 1324. The sole apparent reason for separate treatment is the higher grading permitted under 8 U.S.C. 1328.

3. The Offense

Subsection (a) provides that a person is guilty of an offense if he "brings into the United States an alien who he knows is: (1) not admitted for entry into the United States by an immigration officer; or (2) not lawfully entitled to enter or reside within the United States."

This section is intended to carry forward the proscriptions in 8 U.S.C. 1324(1), as well as the judicial interpretations previously discussed that have been given to that statute.[28] It should be noted that the existing statute contains the phrase "including an alien crewman." This was added in 1952 to overcome prior rulings that alien crewmen were not within the class of aliens covered.[29] Although proposed section 1212 does not itself refer to alien crewmen, the definition of "alien" in section 1217 explicitly provides that the term includes alien crewmen. The Committee deems that the phrase "under the terms of . . . any . . . law relating to the immigration or expulsion of aliens" in 8 U.S.C. 1324 is implicit in the concept of "not entitled to enter or reside within the United States" and thus may be omitted without creating any problem of statutory vagueness.[30]

The conduct in this section is bringing into the United States an alien. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "knowing," i.e., that the offender was aware of the nature of his actions. Thus, for example, where an alien stows away on a vessel or aircraft, there would be no violation of this section since the operator of the vessel or aircraft would not know that he was bringing the person into this country.

The element that the alien has not been admitted to the United States by an immigration officer or is not lawfully entitled to enter or reside within the United States is an existing circumstance. The culpability level is specifically designated as "knowing," thus requiring proof that the offender was aware or believed that the circumstance existed.[31] This is in accordance with the current law.[32]

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[27] See 8 U.S.C. 1182.

[28] The phrase "or lands in," which appears in 8 U.S.C. 1324, was deleted as unnecessary in view of the judicial construction of the term "brings into" as incorporating "lands."

[29] See *United States ex rel. Rios* v. *Day*, 24 F.2d 654 (2d Cir.), cert. denied 277 U.S. 604 (1928): *Weedin* v. *Banzo Okada*, 2 F.2d 321 (9th Cir. 1924).

[30] See *United States* v. *Bunker, 532 F.2d 1262 (9th Cir. 1976); Bland* v. *United States, supra* note 24 at 109.

[31] See section 302(b)(2).

[32] See *Bland* v. *United States, supra* note 24 at 107-108

The element that the person brought into the United States is an "alien" is an existing circumstance. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed. In view of the offense's specific requirement of knowledge of the fact that the individual has not been admitted to the country by an immigration officer or is not lawfully entitled to enter or reside within the United States, however, in a practical sense the offense also requires "knowledge" of his status as an alien. For, since it is common knowledge that a citizen has a right to enter and reside in this country,[33] if an offender knows that the person he is bringing into the country has not been admitted by an immigration officer or is not lawfully entitled to enter or reside in the country, he will in all likelihood also know him to be an alien.

4. Jurisdiction

No subsection relating to jurisdiction is contained in this section. Accordingly, by the operation of section 201(b)(2), there is Federal jurisdiction over an offense herein if it is committed within the general or special jurisdiction of the United States as defined in sections 202 and 203. In addition, section 204(e) extends extraterritorial jurisdiction over this offense as one involving the entry of persons into the United States.[34]

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the actor engages in the described conduct either (1) for profit[35] or (2) with knowledge that the alien intends to engage in conduct in the United States constituting a Federal or State felony. This highest grading level is designed in part to carry forward the increased penalties under 8 U.S.C. 1328. However, the specific prohibitions of that statute with regard to crimes of prostitution or related offenses are here broadened to include knowledge that the alien intends to engage in conduct constituting any Federal or State felony.[36] The *scienter* element applies only to the alien's intended conduct; the fact that the conduct known to be intended by the alien is a felony under Federal or State law is, by the operation of section 303(d) (1) (A), not a circumstance as to which any mental state need be shown.

An offense under this section is graded as a Class E felony (up to three years in prison) if the actor engages in the conduct knowing that the alien is a member of the class of aliens that, in fact, is excludable from the United States under 8 U.S.C. 1182(a) (27), (28), or (29). These sections cover aliens classified as subversives, whose entry into the United States 8 U.S.C. 1327 makes it a separate offense to assist, aid, or procure.

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[33] *Worthy* v. *United States*, 328 F.2d 386. 394 (5th Cir 1964).

[34] See *Claramont* v. *United States*, 26 F.2d 797 (5th Cir. 1928); but see *Yenkichi Ito* v. *United States*. 64 F.2d 73, 75 (9th Cir.), cert. denied, 289 U.S. 762 (1933).

[35] The term "for profit" is intended to be construed more narrowly than the phrase used in the corresponding grading provision of section 1213 "as consideration for the receipt . . . of anything of pecuniary value." The narrower language has been adopted by the Committee in order to avoid imposing felony liability on persons who may be reimbursed for their expenses in bringing aliens into the United States but who do not engage in the prohibited activity for financial gain.

[36] Compare *United States* v. *Baker, 136 F. Supp. 546, 549–550 (S.D.N.Y. 1955).*

All other violations of this section are graded as Class A misdemeanors (up to one year in prison).

The purpose of this three-tiered grading system, which is similar to that recommended by the National Commission,[37] is to distinguish between conduct deserving of felony treatment and that for which misdemeanor treatment will suffice. Thus professional smugglers who derive income from illegally bringing aliens into the United States are dealt with most severely.

Under this section, the bringing in of multiple aliens, if charged in only a single count, will be subject to only a single sentence.[38] However, if charged in separate counts, the Committee intends, as under present law, that a separate sentence may be imposed for each count, regardless of whether all the aliens were brought in at the same time and in the same vehicle.[39]

SECTION 1213. HINDERING DISCOVERY OF AN ALIEN UNLAWFULLY IN THE UNITED STATES

1. In General

This section is designed to proscribe conduct that assists an alien illegally in the United States from being discovered and apprehended. This provision is essentially an accessory-after-the-fact statute and its language incorporates that employed in the general section dealing with hindering law enforcement (section 1311(a)(1)(A) through (C) and (a)(2)). Section 1213 is given separate treatment because of complex grading distinctions that exist between the two sections and the need to apply special definitions as set forth in section 1217.

2. Present Federal Law

Section 1213 covers conduct currently proscribed by 8 U.S.C. 1324(2) and (3).

Paragraph (2) of the present statute makes it an offense punishable by up to five years in prison for any person, "knowing" that an alien not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States "is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, [such alien] within the United States by means of a transportation or otherwise, in furtherance of such violation of law."

Despite its rather inartful draftsmanship, this statute has been sustained against an attack for vagueness as well as against a claim of invalidity as applied to an intrastate transportation.[40] It has been construed as not forbidding the transportation of an alien, entitled to be in the United States to work in a certain area, to another area where he was not entitled to be.[41]

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[37] See Final Report, § 1222(2).

[38] Compare *Serentino* v. *United States*, 36 F.2d 871 (1st Cir. 1930).

[39] See *Vega-Murrillo* v. *United States*, 264 F.2d 240 (9th Cir.), cert. denied, 360 U.S. 936 (1959).

[40] See *United States* v. *Gonzalez-Hernandez*, 534 F.2d 1353 (9th Cir. 1976); *Herrera* v. *United States*, 208 F.2d 215 (9th Cir.), cert. denied, 347 U.S. 927 (1945); *Vega Murrillo v.* United States, supra note 39.

Paragraph (3) punishes by up to five years in prison any person who "willfully or knowingly conceals, harbors, or shields from detection," or attempts to do so, in any place, including any building or means of transportation, "any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States." The statute contains a proviso that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

Although some older cases indicated that "harbor" was limited to acts of a clandestine or surreptitious nature,[42] the statute following its revision in 1952 has been uniformly construed, in light of its legislative history, as reaching any furnishing of shelter or refuge and as not confined to clandestine sheltering only.[43]

8 U.S.C. 1324 has been interpreted to require knowledge that the alien is illegally in the United States.[44] The proviso has been challenged as creating an arbitrary and discriminatory classification, but its validity has been sustained (although some courts have commented critically on the apparent lack of fairness of punishing only the alien and not the employer).[45]

3. The Offense

Subsection (a)(1) provides that a person commits an offense if he "interferes with, hinders, delays, or prevents the discovery or apprehension of an alien, knowing that such alien is unlawfully within the United States, by engaging in any conduct described in subparagraphs (A) through (C) of section 1311(a)(1) (Hindering Law Enforcement)."

Subsection (a)(2) penalizes a person who intentionally interferes with, hinders, delays, or prevents the discovery or apprehension of an alien, knowing that such alien is unlawfully within the United States, by engaging in any conduct described in section 1311(a)(2) (Hindering Law Enforcement).

The conduct referred to in section 1311(a)1 is discussed in connection with that section and that discussion is incorporated here.[46] Unlike 8 U.S.C. 1324, this section does not include an express exclusion of "employment" from the prohibition against harboring. However, the Committee intends that the term "harboring" as used in section 1311(a)(1)(A) not extend to employment, or the usual and normal practices incident thereto. Thus, the Committee intends no change from current law in this regard.[47] Similarly, although the employment of an alien may aid him in that it provides him with money, the money is furnished in compensation for the alien's services and does not constitute the "providing" punishable under section 1311(a)(1)(B).

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[41] See *United States* v. *Orejel-Tepeda*, 194 F. Supp. 140 (N.D. Cal. 1961).

[42] See *Susujar* v. *United States*, 27 F.2d 223 (6th Cir. 1928); *United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940).

[43] *United States* v. *Lopez*, 521 F.2d 437, 430-441 (2d Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Acosta DeEvans*, 531 F.2d 428-430 (9th Cir. 1976); *United States* v. *Clantu*, 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

[44] See *Bland* v. *United States*, *supra* note 24; *United States* v. *Mack*, *supra* note 42; *United States* v. *Holley*, 493 F.2d 581 (9th Cir.), cert. denied, 419 U.S. 861 (1974).

[45] See *United States* v. *Lopez*, *supra* note 43 at 441-442; *United States* v. *Acosta DeEvans*, *supra* note 43 at 430.

[46] Note that the affirmative defense in section 1311(b) is applicable here to the extent that this section incorporates by reference the conduct in section 1311(a)(1)(C).

[47] The Committee also intends that "harboring" be given the construction announced in the *Lopez*, *Cantu*, and *Acosta DeEvans* cases, *supra* note 43. While this broader construction (not limited to conduct of a clandestine or secret nature) underscores the apparent inconsistency in

With respect to the transporting offense in 8 U.S.C. 1324, this section eliminates the restriction therein that the transportation must occur within three years of the alien's last known entry into the United States, under this section, providing transportation to any alien known to be illegally in the United States will be an offense, regardless of how long the alien has been in this country, if the transportation interferes with, hinders, delays, or prevents the alien's discovery or apprehension. As under current law, however, this section does not penalize the transportation of an alien lawfully admitted to this country to work in a particular place to another place where he is not entitled to be.[48]

The conduct in this section is incorporated by reference from section 1311. Under section 1311(a)(1), that conduct is harboring or affirmatively concealing an alien or his identity; providing him with a weapon, money, transportation, a disguise, or other means of avoiding discovery or apprehension; or warning him of impending discovery or apprehension. Under section 1311(a)(2) the prohibited conduct is altering, destroying, mutilating, affirmatively concealing, or removing a record, document, or other object. Since no culpability standard is specifically set forth, the applicable state of mind that must be proved is at a minimum "knowing," i.e., that the offender was aware of the nature of his actions.[49] Thus, a truck driver who unwittingly transported an alien who secreted himself in the vehicle would not be guilty under this section.

The language "interferes with, hinders, delays, or prevents the discovery or apprehension of an alien" describes the prohibited result of the defendant's conduct. Since no culpability is specified concerning such a result in subsection (a)(1), the applicable culpability level is "reckless," *i.e.*, an awareness of but disregard of a substantial risk that the result would occur. Under subsection (a)(2), however, the culpable state of mind with respect to the results is specifically designated as "intentionally," thereby requiring proof that the defendant had a conscious purpose or desire to cause the result. The reason for the distinction in culpability levels is discussed in the analysis of section 1311.

The element that the alien is unlawfully in the United States is an existing circumstance. The culpability level is specifically prescribed as "knowing," thus requiring proof that the offender was aware or believed that the circumstances existed.[50] This is consistent with present law.

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excluding employment from the prohibitions of this section and section 1311, the Committee believes that this issue is better suited for separate resolution outside the context of the new Criminal Code, and notes that, insofar as employment of illegal aliens is concerned, both the Executive and the Congress are actively studying the matter.

[48] Of course, if the transportation were to prevent the alien's discovery or apprehension with respect to a crime he committed, the conduct would violate section 1311; but such transportation bears little relevance to the purposes of this section dealing with the control of illegal alien entry. See *United States* v. *Orejel-Tejeda*, *supra* note 41.

[49] See sections 303(b)(1) and 302(c)(1).

[50] See section 302(b)(2).

4. Jurisdiction

This section contains no subsection specifying jurisdictional bases applicable thereto. Therefore, Federal jurisdiction over an offense herein is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison) if the defendant engages in the conduct as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, or with knowledge that the alien intends to engage in the United States in conduct constituting a Federal or State felony.[51] It is also a Class E felony if the defendant committed the offense with intent to obtain anything of value for placing the alien in the employ of another, or with intent that the alien be employed or continued in the employ of an enterprise operated for profit.[52] Otherwise, the offense is graded as a Class A misdemeanor (up to one year in prison). This grading system is designed to distinguish fairly between offenses deserving of felony treatment and those (e.g., committed by a relative for no consideration) which are not. It follows closely the recommendations of the National Commission.[53]

SECTION 1214. UNLAWFULLY EMPLOYING AN ALIEN

1. In General and Present Federal Law

This section carries forward the felony offense created by Public Law 93-518 (December 7, 1974) involving the employment of ineligible aliens by an unregistered farm labor contractor.

7 U.S.C. 2045(f) requires every farm labor contractor[54] to "refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." 7 U.S.C. 2048(c) supplies the penalty. It imposes up to three years' imprisonment upon any farm labor contractor who violates section 2045(f) "if the person committing such violation has failed to obtain a certificate of registration pursuant to this Act or is one whose certificate has been suspended or revoked by the Secretary [of Agriculture]."[55]

2. The Offense

Subsection (a) provides that a person commits an offense if, being a farm labor contractor who has failed to obtain a certificate of registration, or whose certificate has been suspended or revoked, pursuant to the Farm Labor Contractor Registration Act of 1963, as amended (7 U.S.C. 2041 *et seq.*), he violates section 6(f) of that Act (7 U.S.C. 2045(f)) (relating to employing the services of an alien not entitled to accept employment).

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[51] The latter provision is identical to the second of the two grading circumstances set forth in the prior section (1212) and the analysis there is pertinent also in this context.

[52] The terms "anything of value" and "enterprise" are defined in section 111.

[53] See Final Report, § 1223(2).

[54] The term "farm labor contractor" is defined in 7 U.S.C. 2042.

[55] 7 U.S.C. 2043 and 2044 govern the obtaining, suspension, and revocation of certificates of registration.

The term "violates" is defined in section 111 to mean, *inter alia*, in fact to engage in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Hence, this section preserves the elements (including culpability elements) contained in section 2045(f). The requirement that the violator be a farm labor contractor who has failed to register or whose certificate of registration has been suspended or revoked brings forward 7 U.S.C. 2048(c) which defines the class of potential offenders. The fact that a person is within the class is an existing circumstance. Since no culpability level is specifically set forth, the applicable state of mind to be proved is at least "reckless," i.e., that the person was aware of but disregarded the substantial risk that he was in one of the categories described.[56]

3. Jurisdiction

This section contains no subsection specifying jurisdictional bases. Under section 201(b)(2), since the offense is described outside title 18, jurisdiction of the offense is as provided for in the statute outside title 18.

4. Grading

An offense is a Class E felony (up to three years in prison). This is the same as to existing law.

SECTION 1215. FRAUDULENTLY ACQUIRING OR IMPROPERLY USING EVIDENCE OF CITIZENSHIP

1. In General

Section 1215 deals with the knowing obtaining for any person of certain citizenship-related actions or documents by means of fraud, the knowing use of official documentary evidence of naturalization or citizenship which has been unlawfully obtained, and the knowing use of lawfully issued documentary evidence of naturalization or citizenship in order to establish the naturalization or citizenship of any person other than the one for whom such documents were lawfully issued. The purpose of this section is to protect the naturalization process and the documents that are generated in the course of that process from misuse.

2. Present Federal Law

Currently, there are several provisions in title 18 which deal with nationality and citizenship. Some of the acts proscribed by these provisions will be covered herein while other such acts will be covered by different provisions of the new Code.[57] Other sections, currently in title 18, will be retained but transferred to title 18 Appendix.[58]

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[56] See sections 303(b)(2) and 302(c)(1).

[57] For example, 18 U.S.C. 1421, which deals with accounts of court officers in naturalization proceedings, will be covered by the theft provisions in chapter 17. Likewise, 18 U.S.C. 1922, which covers the payment and solicitation of fees in naturalization proceedings in excess of those required by law, will now be covered by the bribery and graft provisions in chapter 13. 18 U.S.C. 1426 which covers reproduction of naturalization or citizenship papers, will now be covered by the forgery and counterfeiting provisions of chapter 17. 18 U.S.C. 1429, which covers the neglect or refusal to answer a subpoena in a naturalization proceeding, will now be covered by the contempt provisions in chapter 13.

18 U.S.C. 1423 punishes by up to five years in prison whoever knowingly uses for any purpose any unlawfully issued or made order, certificate, judgment, decree, or exemplification, showing any person to be naturalized or admitted to be a citizen, or any copy of such a document. No recent prosecutions under this statute have been reported.

18 U.S.C. 1424 makes it an offense punishable by up to five years' imprisonment for anyone in a naturalization or citizenship proceeding (including an applicant, declarant, petitioner, or witness) knowingly to impersonate another or to use the name of a deceased or fictitious person.[59] It also penalizes the knowing and unlawful use or attempted use, as showing naturalization or citizenship of any person, of any order, certificate, judgment, decree or exemplification, or copy of any such document, issued to another person or in a fictitious name, or to a deceased person.

The first, or false impersonation, offense is not covered in this section unless the person, by such impersonation, actually obtains naturalization or the creation of a record of permanent residence or other evidence of naturalization or citizenship. However, in those cases where the impersonation was unsuccessful, the conduct would be reachable as an attempt under section 1001.

18 U.S.C. 1425 punishes by up to five years in prison whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary evidence of naturalization or of citizenship. This statute will be carried forward by this section to the extent that the procuring is by means of fraud. Where, however, other means such as bribery are used, the conduct would be covered under other provisions of the proposed Code (e.g., section 1351 (Bribery), section 1352 (Graft), and section 1357 (Tampering with a Public Servant)).[60]

18 U.S.C. 1015 makes it an offense punishable by up to five years in prison to use or attempt to use any certificate of naturalization or other documentary evidence of naturalization or citizenship, "knowing the same to have been procured by fraud or false evidence . . . or otherwise unlawfully obtained." This statute also proscribes a variety of felonies relating to the making of false statements or denials, which will be encompassed in sections 1341 (Perjury), 1342 (False Swearing), and 1343 (Making a False Statement).

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he engages in either of three proscribed types of activity.

Paragraph (1) punishes whoever "obtains for any person, by fraud, United States naturalization, the creation of a record of permanent residence in the United States, or the issuance of any certificate or other documentary evidence of United States naturalization or citizenship."

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[58] For example, 18 U.S.C. 1427, which punishes the sales of naturalization or citizenship papers, and 18 U.S.C. 1428, which punishes the failure to surrender a cancelled naturalization certificate, will be transferred to title 18 Appendix.

[59] See *Latgis* v. *United States*, 97 F.2d 588 (4th Cir. 1938).

[60] 18 U.S.C. 1425 also prohibits the issuance to any person not entitled thereto of any evidence of naturalization, citizenship, or other related documents. This offense will be covered under the subject bill in section 1743 (Criminal Issuance of a Written Instrument).

This carries forward, in part, the provisions of 18 U.S.C. 1424 and 1425. The words "or other documentary evidence" were included to insure a wide scope of application as under current law.[61]

Since the statute is written in terms of punishing the obtaining "by" fraud, materiality of the fraudulent conduct is clearly implicit. Under section 1217, which defines the term "fraud" as including any conduct described in section 1301(a) and 1343(1)(A) through (F), the provisions of section 1346(b)(2) apply. Those provisions define materiality as meaning any falsification, omission, etc., which could have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter in which it was made, or in the case of a government record, any falsification, omission, etc., which could have impaired the integrity of the record in question. Materiality in a given factual situation is a question of law for the court. Section 1217 also provides, in effect, that the affirmative defense of retraction in section 1346(c)(2) applies here to the extent that conduct described in section 1343(a)(1) (A) through (F) is incorporated in this section. This affirmative defense is discussed in relation to subchapter E of chapter 13. Section 1217 also defines the term "fraud" as including any conduct described in section 1301(a) or section 1343(a)(1) (A) through (F).

Paragraph (2) punishes whoever uses any certificate or other documentary evidence of United States naturalization or citizenship, or a copy or duplicate thereof, that was unlawfully obtained.

This carries forward the current prohibitions of 18 U.S.C. 1423 (in part), as well as 8 U.S.C. 1015. Unlike paragraph (1), this offense is not limited to fraudulent means but applies to the use of any "unlawfully obtained" documentary evidence of United States citizenship or naturalization. The term "uses" similarly is intended to cover any purpose for which the document may be employed. Thus a person who uses an unlawfully obtained certificate of citizenship for identification purposes in cashing a check would be equally guilty as a person who uses such certificate to gain entry into the United States.[62] The reason for this breadth of coverage is to protect the integrity of citizenship documents so that persons may confidently rely on them.

Under this paragraph the documents must have been unlawfully obtained. Thus, if obtained by bribery, theft, fraud, or extortion, the statute would be violated, but the prescription does not extend to the use of documents obtained through mistaken issuance by an official.

Paragraph (3) punishes whoever uses any certificate or other documentary evidence of United States naturalization or citizenship that was issued to another person, or a copy or duplicate thereof, as showing naturalization or citizenship of any person other than the person for whom it was lawfully issued.

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[61] See *Dolan* v. *United States,* 133 F. 440 (8th Cir. 1904), cert. denied, 196 U.S. 636 (1905); compare *United States* v. *Adielizzio,* 77 F.2d 841 (2d Cir. 1935).

[62] In the latter case, the person, if an alien, would be guilty also of an offense under section 1211, discussed *supra.*

This carries forward (in part) the provisions of 18 U.S.C. 1423 and 1424 and is designed to insure that, once documentary evidence of naturalization or citizenship is lawfully issued, it is not misused by another as showing his naturalization or citizenship.

B. Culpability

The offense in paragraph (1) consists entirely of a conduct element, i.e., obtaining by fraudulent means for any person United States naturalization or the creation of a record of permanent residence, etc. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his action.[63]

In paragraph (2) the conduct is using a certificate or documentary evidence (or a copy or duplicate thereof) of United States naturalization or citizenship. Since no culpability standard is specifically set forth, the applicable state of mind is again at least "knowing," so that the actor must be proved to have been aware of his use of such a certificate or document. The element that the document or certificate was unlawfully obtained is an existing circumstance. Since no culpability level is specifically set forth, the applicable state of mind to be shown is at a minimum "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that the circumstances existed.[64] As compared to 18 U.S.C. 1015, this represents a slight lessening of the *scienter* requirement from the "knowing" standard there required. However, the Committee deems the change justified since a person who disregards the risk that the document was unlawfully issued, where the disregard is a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances,[65] should be punished for his use of it even if he did not "believe"[66] that the document had an unlawful origin.

The analysis of culpability in paragraph (3) is very similar. Thus, the conduct is using a certificate or documentary evidence (or a copy or duplicate thereof) of United States naturalization or citizenship as showing naturalization or citizenship of any person. Since no culpability level is specifically prescribed, the applicable state of mind to be proved is at least "knowing." The elements that the certificate dor documentary evidence was issued to another and was used as showing naturalization or citizenship of a person other than the person for whom it was lawfully issued are existing circumstances, as to which the applicable mental state to be shown is at least "reckless."

4. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches. Accordingly, Federal jurisdiction is governed by the provisions of section 201(b)(2).

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[63] See sections 303(b) (1) and 302(b)(1).

[64] See sections 303(b) (2) and 302(c) (1).

[65] See section 302(c)(1).

[66] See Section 302(b)(2).

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This is less than the maximum penalty for the equivalent offenses under present law, which carries a maximum five-year prison term.

SECTION 1216. FRAUDULENTLY ACQUIRING OR IMPROPERLY USING A PASSPORT

1. In General

The purpose of this section is to insure the integrity of passports issued by the United States by making it a felony to fraudulently acquire or improperly use such a passport. The seriousness of such conduct arises in part from the fact that the fraudulent acquisition or improper use of a United States passport could lead to embarrassing international incidents involving the United States.

While much of the codnduct covered in this section could be reached under the section on false statements (section 1343) in the proposed Code, the Committee believes that treating this conduct separately is warranted to emphasize the importance of maintaining the integrity of this important document.

2. Present Federal Law

Currently, there are several provision in title 18 which deal with passports and visas. Some of the acts proscribed by these provision will be covered by this section, while other such acts will be encompassed by different provisions of the new Code.[67] Other sections or parts thereof, currently in title 18, will be transferred as misdemeanors to title 18 Appendix.[68]

18 U.S.C. 1542 punishes by up to five years in prison whoever willfully and knowingly makes any false statements in an application for a passport with intent to induce or secure the issuance of a

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[67] For example, 18 U.S.C. 1541 makes it an offense for anyone acting or claiming to act in any office or capacity under the United States to wrongfully issue or verify any passport or, being a consular officer, to knowingly issue or verify such passport to or for any person not owing allegiance to the United States. Under the subject bill, such conduct will be covered by section 1744 (Criminal Issuance of a Written Instrument). 18 U.S.C. 1543 makes it an offense to falsely make, forge, counterfeit, mutilate, or alter any passport or to use or to furnish to another for their use any such passport. Conduct violating this provision will now be covered by proposed sections 1741–1743. 18 U.S.C. 1546 makes it an offense to forge, counterfeit, alter, or falsely make any immigrant or nonimmigrant visa or other entry document or to use possess, or receive such document. This conduct will also be covered by sections 1741–1743. In addition, 18 U.S.C. 1546 makes it an offense to possess or sell any implements designed for counterfeiting such documents. This conduct will be covered in the subject bill by section 1745. Furthermore, 18 U.S.C. 1546 makes it an offense for a person, when applying for such documents, to personate another or make a false statement in his application. Such conduct will be covered by sections 1343 (Making False Statements) and 1303 (Impersonating an Official). Finally, 18 U.S.C. 1546 makes it an offense to sell or otherwise dispose of such visa, permit, or other document to any person not authorized by law to receive it. Under the proposed Code, a person who engaged in such conduct will be guilty under section 401 as an accomplice to a violation of section 1211(a)(3), if the person to whom he gives such document obtains entry into the United States thereby, or attempts to enter the United States by using such document.

[68] For example, that part of 18 U.S.C. 1543 which makes it an offense to use any passport validly issued but which has become void by the occurrence of any subsequent condition invalidating the same, will be transferred to title 18 Appendix, United States Code. Likewise, that part of 18 U.S.C. 1544, which makes it an offense to use a passport in violation of the conditions or restrictions contained therein or the rules prescribed pursuant to the laws regulating the issuance of passports, will be transferred to title 18 Appendix, United States Code. Finally, 18 U.S.C. 1545, which covers safe conduct violations, will be transferred to title 18 Appendix, United States Code.

passport under the authority of the United States, either for his own or another's use, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws.

It also punishes whoever willfully and knowingly uses or attempts to use, or furnishes to another for use, any passport the issuance of which was secured by reason of any false statement.

The first branch of this statute relating to the making of false statements is primarily carried forward under section 1343 (Making a False Statement) of the subject bill, although such conduct would violate this section if the passport were actually obtained. In addition, if the passport were not obtained, the conduct would probably constitute an attempt (under section 1001) to violate this section. Furthermore, a person who furnished to another for his use a passport that had been obtained by false statements would be guilty as an accomplice under proposed section 401.

It has been held under the second branch of 18 U.S.C. 1542 that a knowing use of a passport, whose issuance was obtained by false statement, to reenter this country was a prohibited "use" and that this statute is not limited to use of the passport in foreign lands.[69] However, not every use of a passport is proscribed by this statute. The use must be one to which passports are customarily put, such as for purposes of identification, or be one of those uses in travel which are a part of the ordinary incentives for obtaining passports. Thus a use of a passport in order to establish citizenship for purposes, e.g., of voting would probably not violate this provision. The term "willfully" has been construed by the Supreme Court to mean in this context no more than that the use was deliberate as opposed to inadvertent; no proof of evil motive is required.[70]

18 U.S.C. 1544 penalizes by up to five years in prison whoever "willfully and knowingly uses, or attempts to use, any passport issued or designated for the use of another."[71]

Neither the types of uses proscribed by this statute nor the scienter requirement have been the subject of judicial analysis. However, it seems likely that this section would be interpreted in the same manner as 18 U.S.C. 1542.

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he (1) obtains the issuance or verification of a United States passport by fraud; (2) uses a United States passport, the issuance or verification of which was unlawfully obtained; or (3) uses a United States passport that was issued for the use of another person.

Paragraph (1) in part carries forward the first branch of 18 U.S.C. 1542, but instead of focusing on the making of a false statement, proscribes the result of obtaining a passport. In this regard, the offense is not limited to false statements, but includes "fraud," defined in section 1217 as encompassing any conduct described in sections 1301(a) and 1343(a)(1) (A) through (F). In addition, since the offense is defined in terms of the obtaining of a passport *by* fraud, materiality is plainly implicit and thus by operation of section 1217(b), the provisions of section 1346(b)(2) that apply to section 1343, apply also to the offense in paragraph (1) of this section. Those provisions have been discussed in connection with the previous section in this subchapter.[72]

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[69] See *Browder* v. *United States*, 312 U.S. 335 (1941).

[70] *Id.* at 340-342.

[71] The same statute also punishes whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed. This offense will be carried forward in this proposed Code via section 401 (Liability of an Accomplice) as aiding and abetting the use or attempted use of the passport.

The term "issuance" (and its variant "issued") in this and the following two paragraphs is intended to embrace not only the original issuance of a passport but also any subsequent renewals thereof.

Paragraph (2) carries forward the use offense in the second branch of 18 U.S.C. 1542 but broadens the crime to include the use of a passport the issuance or verification of which was "unlawfully obtained" (as opposed to having been obtained by false statement). Hence, under this section, if the issuance or verification was procured by bribery, theft, or extortion, the offense herein of using the passport could be committed. However, if the issuance were the result of a mistake on the part of the issuing official, use of the passport would not violate this paragraph.

Paragraph (3) carries forward the offense in the first paragraph of 18 U.S.C. 1544 and is designed to insure that once a passport is properly issued to an individual it is not used by someone else. The term "uses" in this paragraph is intended to have the same meaning as in the preceding paragraph.

B. Culpability

The offense in paragraph (1) consists entirely of a conduct element. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was obtaining the issuance or verification of a United States passport by one of the means included within the term "fraud."[73]

In paragraph (2), the conduct is using a United States passport. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is again "knowing," i.e., that the offender was aware of his use of such a passport. The element that the issuance or verification of the passport was unlawfully obtained is an existing circumstance. As no culpability level is specifically set forth, the applicable state of mind that must be shown is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the passport was unlawfully obtained.[74]

The analysis of culpability for paragraph (3) is similar to that in paragraph (2). Thus, the conduct is using a United States passport and the applicable state of mind to be proved is at a minimum "knowing." The element that the passport was issued for the use of another person is an existing circumstance, as to which the applicable state of mind to be shown is at least "reckless."

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[72] In addition, section 1217 makes applicable to this offense the affirmative defense of retraction in section 1346(c)(2). This defense is discussed in relation to subchapter E of chapter 13.

[73] See sections 303(b)(1) and 302(b)(1).

[74] See sections 303(b)(2) and 302(c)(1).

4. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches to the offense. Accordingly, by operation of section 201(b)(2), there is Federal jurisdiction over an offense described in this section if it is committed within the general or special jurisdiction of the United States, as defined in sections 202 and 203. In addition there is extraterritorial jurisdiction under section 204 over most of the possible offenses involving this section (e.g., where the fraudulent obtaining occurred outside the United States[75] or the offense involved the entry of a person into the United States).[76]

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This is less than the comparable offenses under current law, which carry a five year maximum prison term.

SECTION 1217. GENERAL PROVISIONS FOR SUBCHAPTER B

This section contains general provisions for this subchapter. The first part of this section contains definitions of various immigration terms such as "alien" and "immigration officer," which are specified as having the meaning prescribed in 8 U.S.C. 1101, as well as a definition of "fraud," which is defined by reference to other sections of this proposed Code. Most of these definitions have been alluded to in the discussion of the foregoing sections, and no further discussion is warranted. The second part of this section deals with proof of materiality and an affirmative defense of retraction of a false statement to the extent that conduct described in section 1343(a)(1) (A) through (F) is an element of an offense in this subchapter. This provision has been discussed in connection with those offenses. Subsection (c) of this section makes applicable to the subchapter the provisions of section 289 of the Act of June 27, 1952 (8 U.S.C. 1359). It is designed to preserve intact the current right of American Indians born in Canada to pass the borders of the United States. Also made applicable to this subchapter are relevant sections of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. These provisions generally exempt the Northern Mariana Islands from the immigration and naturalization laws of the United States, with certain stated exceptions.

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[75] See section 204(c)(5).

[76] See section 204(e).

CHAPTER 13.—OFFENSES INVOLVING GOVERNMENT PROCESSES

This chapter is divided into six subchapters. Subchapter A concerns general obstructions of government functions; subchapter B concerns obstructions of law enforcement; subchapter C concerns obstruction of justice; subchapter D concerns contempt offenses; subchapter E concerns perjury, false statements, and related offenses; and subchapter F concerns official corruption and intimidation.

SUBCHAPTER A.—GENERAL OBSTRUCTIONS OF GOVERNMENT FUNCTIONS

(Sections 1301-1303)

This subchapter is concerned with three forms of obstruction of governmental functions. The scope of the subchapter is as broad as the range of governmental functions, but the obstruction must be caused in one of three particular ways to be within the purview of this subchapter. Obstructions of government functions in general are made criminal here if the obstructions are engineered by any manner of fraud or by physical means or if an impersonator purports to exercise governmental authority.

Following this subchapter are subchapters covering the specific and more familiar forms of obstruction of governmental processes that have been made criminal. Considering especially the size of modern government, the prominent role it plays, and its far-reaching effects, it is vital to impose criminal sanctions to safeguard the integrity of government operations so as to assure the effective transaction of the public's business and ultimately to maintain the highest degree of public confidence in government.

SECTION 1301. OBSTRUCTING A GOVERNMENT FUNCTION BY FRAUD

1. In General

This section creates a new substantive offense, patterned after the conspiracy provision in 18 U.S.C. 371, of obstructing a government function by defrauding the United States. It is designed to fill a gap in existing law by reaching all conduct by which a person intentionally obstructs or impairs a government function by fraudulent means. Unlike other provisions in the proposed Code that cover fraudulent activity, e.g., section 1734 (Executing a Scheme to Defraud) and section 1216 (Fraudulently Acquiring . . . a Passport), the proposed section is not directed at the obtaining of property but rather at fraudulent conduct the purpose and effect of which is to obstruct a function of the Federal Government.

2. Present Federal Law

18 U.S.C. 371, in addition to making it a crime to conspire to commit any substantive offense against the United States,[1] contains a separte provision, not tied to any substantive offense, of conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose."

This latter provision has been broadly construed by the courts. The principal gloss placed upon it stems from the holding in *Haas* v. *Henkel.*[2] In that case, the indictment charged that certain speculators in the cotton market had conspired with an employee of the Department of Agriculture to obtain information from him as to the state of the cotton crop in the country, which information it was the function of the Department to publish in a report. The conspirators were alleged to have bribed the employee to obtain this information in advance of its publication, thereby defrauding the United States by obstructing and impairing it in the exercise of its function of "promulgating fair, impartial and accurate reports concerning the cotton crop."[3] The Supreme Court sustained the validity of the indictment and the conviction. In commenting on the fact that the indictment did not charge that there was any pecuniary loss to the United States, the Court observed:[4]

> But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. This statute is broad enough in its terms to include any conspiracy for the purpose of impairing, or obstructing, or defeating the lawful function of any department of Government.

In *Hammerschmidt* v. *United States,*[5] the Court again gave the statute an expansive construction, noting that:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention.

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[1] This aspect of the statute is carried forward in the proposed Code in section 1002.

[2] 216 U.S. 462 (1910).

[3] *Id* at 478.

[4] *Id.* at 479. See also, to the same effect, *United States* v. *Keitel,* 211 U.S. 370, 387-395 (1908), where the Court sustained a conviction under this satute involving a conspiracy to deceive the United States into permitting the defendant to purchase more coal land than he was entitled to under the law, notwithstanding that the United States was paid the full purchase price.

[5] 265 U.S. 182, 188 (1924).

In more recent years, the statute has been applied successfully in a variety of contexts. For example, in *Glasser* v. *United States,*[6] the Court sustained a conviction of Assistant United States Attorneys assigned to prosecute violations of the liquor laws who solicited bribes from persons either charged or about to be charged with such offenses in exhcange for unlawfully influencing their cases. By such conduct the United States was defrauded of its right to be honestly and fairly represented in its courts of law.[7]

In *Lutwak.* v. *United States,*[8] the Court upheld a conspiracy conviction under this statute involving a scheme in which veterans were solicited to enter into sham marriages with aliens in order to effect their entry into the United States in contravention of the immigratin quota system.

In *United States* v. *Peltz,*[9] the court affirmed the defendant's conspiracy conviction to defraud the United States, where the conspiracy was based on a scheme under which he was able to profit on stock transactions through the use of confidential information received from an employee of the Securities and Exchange Commission as to pending investigatory proceedings against various corporation.[10]

In *United States* v. *Johnson,*[11] the convictions of savings and loan officers were affirmed where a conspiracy was found between themselves and a Congressman pursuant to which he improperly sought to exert his influence upon the Department of Justice in connection with pending indictments.[12]

In *United States* v. *Klein,*[13] the conspiracy conviction of corporate officers was sustained, based on a scheme to obstruct the Department of the Treasury in its collection of revenue through the use of false and inconsistent statements.[14]

In *United States* v. *Thompson,*[15] members of a county council were convicted of conspiracy to defraud the United States in the solicitation of a kickback from the architects on a county hospital project which received Federal Financing.[16]

In *United States* v. *Levinson,*[17] the defendants' conviction was upheld for conspiracy to defraud the United States based on a scheme to secure Federal loan guarantees by submitting false documents, thereby depriving the United States of the proper administration of its veteran's housing program.[18]

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[6] 315 U.S. 60 (1942).

[7] See, with respect to the same theme of obstruction of justice by fraud, *United States* v. *Manton,* 107 F.2d 834 (2d Cir. 1939), cert. denied, 309 U.S. 664 (1940); *Cendagarda* v. *United States,* 64 F.2d 182 (10th Cir. 1933); *Outlaw* v. *United States,* 81 F.2d 805 (5th Cir. 1936); *Carrigan* v. *United States,* 196 F. 2d (9th Cir.), cert. denied, 344 U.S. 866 (1952).

[8] 344 U.S. 604 (1953).

[9] 433 F.2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971).

[10] This case is similar in motif to *Haas* v. *Henkel, supra* note 2, which also concerned the use of "inside" information.

[11] 337 F.2d 180 (4th Cir. 1964), cert. denied, 385 U.S. 846 (1966).

[12] Other similar prosecutions under this branch of 18 U.S.C. 371 involving legislators or their aides include *May* v. *United States,* 175 F.2d 994 (D.C. Cir), cert. denied, 338 U.S. 830 (1949); *United States* v. *Gilboy,* 160 F. Supp. 442 (M.D. Pa. 1958); and *United States* v. *Sweig,* 316 F. Supp. 1148 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971).

[13] 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

[14] See also *United States* v. *McGuire,* 381 F.2d 306 (2d Cir., 1967), cert. denied, 389 U.S. 1053 (1968); *United States* v. *Guterma,* 281 F.2d 742 (2d. Cir.), cert. denied, 364 U.S. 871 (1960).

[15] 366 F.2d 167 (6th Cir.), cert. denied, 385 U.S. 973 (1966).

[16] For a similar kickback prosecution, see *Harlow* v. *United States,* 301 F.2d 361 (5th Cir.), cert. denied, 371 U.S. 814 (1962).

[17] 405 F.2d 971 (6th Cir. 1968), cert. denied, 395 U.S. 958 (1969).

In *Dennis* v. *United States*,[19] the Court sustained the convictions of union officers of a Communist-affiliated labor union for filing false affidavits with the Natinal Labor Relations Board in regard to this affiliation. As a result, the defendants fraudulently obtained services for the union from the N.L.R.B.[20] Although the defendants sought to raise a defense that the underlying statute requiring them to indicate their Communist Party membership and affiliation was unconstitutional, the Court rejected the defense and stated the "governing principle" that:[21] "a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate, and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional."

In *Baker* v. *United States*,[22] the defendants were convicted of conspiracy to defraud the United States by acquiring, transporting, and offering for sale quantities of gold in excess of that permitted under official gold regulations.

In *Curley* v. *United States*,[23] the defendants were convicted of conspiracy to defraud the United States by having one of them impersonate the other in taking the civil service examination in order to procure a position as a letter carrier.

In *United States* v. *Haldeman*,[24] the Watergate case, the defendants were convicted under 18 U.S.C. 371 of using deceit, craft, trickery, and dishonest means to defraud the United States by interfering with and obstructing the lawful governmental functions of the Central Intelligence Agency, the Federal Bureau of Investigation, and the Department of Justice. The conspiracy was furthered by attempting to induce the CIA to provide financial assistance to those under investigation for the Watergate burglary, by attempting to get the CIA to interfere with the Watergate investigation being conducted by the FBI, and by obtaining information concerning the investigation from the FBI and the Department of Justice. In so doing, the defendants conspired to defraud the United States of its right to have its officials and agencies transact their business honestly, impartially, and free from corruption or undue influence or obstruction.

A final contemporary example of a prosecution for a fraudulent scheme the aim of which is not the obtaining of money or property directly from the United States, but which has as a purpose (generally in furtherance of a scheme to obtain property from another source) the obstruction of a legitimate function of the Federal Government in *United States* v. *Aloi*, 449 F. Supp. 698 (E.D.N.Y. 1977). There 18 U.S.C. 371 was used to charge the defendants with a conspiracy to defraud the United States by obstructing the Department of Health, Education, and Welfare from properly administering and distributing Federal funds under medicial assistance programs and of depriving the Federal Government of the State of New York's honest participation in such programs through a scheme to prevent elimination of podiatric services from the New York State medicaid program by bribery of a State legislator with respect to a pending legislative proposal.

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[18] See also *Heald* v. *United States*, 175 F.2d 878 (10th Cir.), cert. denied, 338 U.S. 859 (1949); *United States* v. *Aderman*, 191 F.2d 980 (7th Cir. 1951), cert. denied, 342 U.S. 927 (1952).

[19] 384 U.S. 855, 860–864 (1966).

[20] See also *United States* v. *Pezzati*, 160 F.Supp. 787 (D. Colo. 1958).

[21] *Dennis* v. *United States*, *supra* note 19 at 867.

[22] 279 F.2d 111 (9th Cir.), cert. denied, 364 U.S. 819 (1960).

[23] 130 Fed. 1 (1st Cir.), cert. denied, 195 U.S. 628 (1904).

[24] 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

As illustrated in part by the cases just described, the various ways in which courts have held a government function may be obstructed under this statute are virtually endless.[25] The courts have, however, placed limitations on the coverage of 18 U.S.C. 371 when the effect of the defendant's fraudulent activity on the impairment of a government function is speculative or attenuated.

For example, in *United States* v. *Kaiser,*[26] the court held the relationship between a conspiracy to embezzle toll money at a bridge and the obstruction of a government function too attenuated to support conviction under 18 U.S.C. 371 where the only connection with a Federal function was the fact that in the enabling legislation passed by Congress to permit construction of the bridge the hope was expressed that, if ever the tolls collected succeeded in fully paying for the cost of the bridge, the bridge would be toll free.[27]

Courts have also restricted the scope of 18 U.S.C. 371 where the means used to obstruct a government function do not partake of fraud or trickery. For example, in *Hammerschmidt, supra,* the Court reversed the conviction of the defendant, who had been charged under the statute with urging persons subject to the Draft Act to refuse to register for conscription, on the ground that the statute punished only obstruction of governmental functions by dishonest means and did not extend to "open defiance" of a governmental purpose to enforce its laws.[28] Similarly, it has been stated that mere failure to disclose taxable income would not constitute a means of obstruction prohibited by this statute.[29]

3. The Offense

Section (a) of section 1301 provides that a person commits an offense if he "intentionally obstructs or impairs a government function by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means."

This section reflects a decision to include in the proposed new Code a generic offense punishing obstruction of a government function by fraud.[30] There appears no sound reason for the oddity in

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[25] See also, e.g., *Phelps* v. *United States,* 160 F.2d 858 (8th Cir. 1947), cert. denied, 334 U.S. 860 (1948) (obstruction of the administration of tire rationing regulations); *Wallenstein* v. *United States,* 25 F. 2d 708 (3d Cir.), cert. denied, 278 U.S. 608 (1928) (obstruction of function of regulating intoxicating liquor); *United States* v. *Stone,* 135 F.2d 392 (D. N.J. 1905) (impeding regulation of statutes dealing with the quality of life preservers); *Green* v. *United States,* 28 F.2d 965 (8th Cir. 1928) (obstruction of function of United States in acting as trustee for the Five Civilized Tribes of Oklahoma); *United States* v. *Soeder,* 10 F. Supp. 944 (W.D. Mo. 1935) (obstruction of regulations as to qualifications for selling hogs to the government).

[26] F. Supp. 545 (S.D. Ill. 1960).

[27] See also *United States* v. *Woll,* 157 F. Supp. 704 (E.D. Pa. 1957); *United States* v. *Byers,* 73 F.2d 419 (2d Cir. 1934).

[28] *Supra* note 5 at 188–189.

[29] *United States* v. *Klein, supra* note 13.

[30] See Hearings, p. 6487.

U.S.C. 371 only in the event of a conspiracy to defraud the United States, but not in circumstances involving an individual scheme that in fact results in the obstruction of a government function.[31] The National Commission while not including in its Final Report a substantive offense of defrauding the United States, indicated that this was an appropriate alternative if the conclusion were reached that such conduct would not adequately be covered by other provisions of the Code.[32] By including such a provision the Committee insures that there will be an available basis for prosecution of such conduct.[33]

The conduct proscribed in section 1301, obstructing or impairing "by defrauding" carries a culpability level of "intentional." Thus, under the provisions of section 302(a), the prosecution must establish that the offender had a conscious objective or desire to obstruct or impair a function, and to do so by defrauding through one or more dishonest means. Mere awareness of the nature of his conduct will not suffice. By the use of the phrase "defrauding through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means", the Committee intends to perpetuate and endorse the body of case law, previously discussed with respect to 18 U.S.C. 371, as to the type of obstructive conduct that will come within the ambit of section 1301.[34] Thus the Committee intends that the principal use of this section will arise when the thrust of an individual's fraudulent scheme is not to cause the government financial loss but to interfere with the exercise of a legitimate governmental function.[35] The means embraced by the section are designed to carry forward the broad interpretation of the phrase "defraud . . . in any manner" in 18 U.S.C. 371 as including any kind of dishonest activity.[36]

The element that that function obstructed or impaired is a "government function" is an existing circumstance. As no culpability standard with respect to this element is specifically designed, the state of mind that must be provided is at least "reckless."[37] Thus the actor must be shown to have been aware of but disregard a substantial risk that the function he obstructed or imparied by defrauding in any manner was a government function.[38]

The offense mandates that the conduct engaged in shall obstruct or impair the government function[39] in question. The term "obstructs" has been in the Federal law for decades in contempt and obstruction of justice statutes and has a well established meaning. Conceptually, it probably includes the term "impairs." However, because the latter word also recurs in the law, the Committee deems it proper to include it in order to insure completeness of coverage, in this section and in the parallel section, 1302. It is intended that these terms receive a broad interpretation from the courts.

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[31] See Hearings, pp. 7468–7469, 7487–7488.

[32] See Final Report, p. 71.

[33] The presence of a substantive offense patterned after 18 U.S.C. 371 enables the existing conspiracy coverage of that statute to continue in the general conspiracy section (1002) of the proposed Code.

[34] The additional phrase in 18 U.S.C. 371 "or for any purpose" is deleted. Since the term "intentional" in this section conveys the purposive element required, the motive for which a defrauding is done is irrelevant.

[35] See *Haas* v. *Henkel, supra* note 2; *Dennis* v. *United States, supra* note 19.

[36] See *Hammerschmidt* v. *United States, supra* note 5 at 188.

[37] See section 303(b)(2).

[38] See section 302(c)(1).

[39] The term "government" is defined in section 111.

4. Bar to prosecution

Subsection (b) provides that it is a bar to prosecution under this section that the offense was committed solely for the purposes of disseminating information to the public. In one sense, this bar to prosecution is unnecessary since, if the sole purpose underlying the offense was dissemination of information to the public, the actor could not also have harbored an intent to obstruct or impair a government function. The provision is included, however, in order to underscore the Committee's view that this section is not applicable in such situations. Its inclusion was prompted by the recent, unsuccessful indictment of Daniel Ellsberg under 18 U.S.C. 371 in comparable circumstances. Making the matter a bar to prosecution serves the function of permitting a pre-trial resolution of the question, rather than compelling the defendant to go to trial and raise the issue as a defense.

It is intended that the dissemination of information to the public not be covered by this offense unless the intent of the disclosure is to obstruct or impair a government function. This intent might be demonstrated, for example, by showing that the defendant's purpose was to undermine the effectiveness of a government reporting function, as occurred in *Haas* v. *Henkel, supra.* The mere fact that information was disclosed, of course, would not be enough for prosecution under this section, even if the disclosure in fact disrupted a government function. It would also be necessary to show the intent to impair or impede a government function by means of fraud (e.g. deceit, chicanery, craft, false statement, or misrepresentation).

For example, if a person (perhaps a public servant) fraudulently acquired information concerning the tentative decision of an administrative agency, and provided certain interested corporations affected by the decision with that information with intent to influence the final decision or to give advantage to those so notified, the person supplying that information could be prosecuted under this section.

If on the other hand, this information were published by a newspaper solely to inform the public of the impending agency decision, the newspaper could not be prosecuted under this provision because the newspaper's conduct consisted only of disclosure of information to the public for that purpose unaccompanied by fraud (deceit, chicanery, etc.), a necessary element of the offense.

5. Jurisdiction

Subsection (c) provides that there is Federal jurisdiction under this section if the government function involved is a Federal government function. Of course, no culpability need be proved as to the Federal nature of the function.[40] In addition, there is extraterritorial jurisdiction over an offense herein if committed by a national or resident of the United States.[41]

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[40] See section 303(d).

[41] See section 204(c)(7). Thus, for example, jurisdiction would lie as to a scheme to interfere with or obstruct, by dishonest means, voter registration abroad or the casting of ballots by absentee voters with respect to a Federal election.

6. Grading

An offense described in this section is a Class D felony (i.e., up to six years in prison). This classification preserves the general punishment level found in 18 U.S.C. 371.

SECTION 1302. OBSTRUCTING A GOVERNMENT FUNCTION BY PHYSICAL INTERFERENCE

1. In General

This section deals with intentional interference with government functions by physical means. As such the section is both narrowly and broadly focused. It is comparatively narrow in its limitation to physical means as distinct from other modes of interference, for example, fraud as dealt with in the previous section, or threat or intimidation (see section 1357). However, it is broad in terms of its reach to a wide spectrum of government functions, as distinguished from a number of more specific sections in chapter 13 and elsewhere that are directed at obstruction of or interference with only "official proceedings" or a particular form of proceeding. See, e.g., perjury (section 1341), obstructing a proceeding by disorderly conduct (section 1334), tampering with physical evidence (section 1325), and obstructing military recruitment or induction (section 1116). As will be evident, the present section in the bill, as reported, serves to combine several offenses in current law, thereby providing uniformity of grading. The section also contains defenses defining the circumstances in which physical resistance may be used (e.g., where the government function was unlawful and being carried out in bad faith and in certain situations involving the exercise of First Amendment rights).

2. Present Federal Law

A number of statutes in current law are concerned with various aspects of physical obstruction and interference with government functions, but no single statute deals with the offense generally. Among the statutes that presently treat aspects of this subject are the following:

(i) 18 U.S.C. 111. This section forbids, among other things, the forcible opposing, impeding, or resistance of or interference with those Federal public servants designated in 18 U.S.C. 1114 including law enforcement agents, employees of penal or correction institutions, and judges, in the course of their official duties. It also contains provisions punishing assaults on such officers. The section carries a maximum penalty of three years in prison. If a deadly or dangerous weapon is used, however, the maximum penalty is increased to ten years' imprisonment.

(ii) 18 U.S.C. 1501. This section prohibits the knowing and willful obstruction or resistance of or opposition to any United States officer serving or executing any court writ or process. The offense carries a maximum prison sentence of one year.

(iii) 18 U.S.C. 1502. This section makes it illegal for any person to obstruct, resist, or impede an extradition agent of the United States in the execution of his duties. It too carries a maximum penalty of one year in prison.

(iv) 18 U.S.C. 1509. This section forbids, *inter alia,* the use of force to prevent, obstruct, impede, or interfere with the due exercise of rights or the performance of duties under any court order, judgment, or decree. The maximum penalty is imprisonment for one year

(v) 18 U.S.C. 1701. This section punishes with a maximum penalty of six months in jail anyone who knowingly and willfully obstructs or retards the mail.

(vi) 18 U.S.C. 2231. This section punishes those who, *inter alia,* oppose, prevent, impede, or interfere with persons executing search warrants. The statute also covers assault on such persons. The offense carries a maximum term of three years in prison.

(vii) 18 U.S.C. 2232, 2233. These sections forbid, respectively, the destruction, breaking, or removal of property in order to prevent its seizure by any person authorized to make searches and seizures (one-year maximum term in prison) and the forcible retaking of propery seized by a person authorized to make searches and seizures (two-year maximum term in prison).

(viii) 18 U.S.C. 2388. This statute prohibits, *inter alia,* the willful obstruction, at a time when the United States is at war, of the recruiting or enlistment service of the United States. The maximum penalty is twenty years in prison.

(ix) 7 U.S.C. 87b(8). This statute makes it illegal to forcibly resist, oppose, impede, intimidate, or interfere with official inspection personnel under the United States Grain Inspection Act. The statute carries a penalty of six months in prison for a first conviction and one year in prison for any subsequent conviction.

The above list of statutes, which is not meant to be exhaustive,[42] illustrates the piecemeal method used by current law to protect government functions from physical obstruction. These statutes are deficient in that, while numerous, they nonetheless fail to encompass all of the types of physical obstruction that may occur, they commingle assaultive conduct with other forms of physical obstruction, and they lack overall grading consistency.

Current law also contains a judicial defense of uncertain scope with respect to the right to resist by force an unlawful government function, such as an invalid arrest or search. In *John Bad Elk* v. *United States,*[43] the Court held, in accordance with common law principles, that there is a right to resist one's own unlawful arrest by reasonable force, at least where the arrest is attempted without a warrant.[44] More recent Federal decisions, however, have questioned the continuing vitality of the *John Bad Elk* holding and have narrowed the circumstances in which resort to forcible self-help will be deemed justifiable. The Second Circuit, in a series of cases under 18 U.S.C. 111, has held that force may not be used to resist an unlawful arrest, whether with or without a warrant, so long as the arrestee knows that he is being arrested by a law enforcement officer.[45] Even where he does not know the status of the arresting officer, the arrestee, in order to prevail, must still show that he was in a situation where he could not ascertain why another was seeking to take him into custody and reasonably believed that he was being subject to a hostile attack upon his person.[46] The Seventh Circuit agrees with these principles and has stated that it regards *John Bad Elk* as of "diminished" authority.[47] The Ninth Circuit, while indicating that it considers the principle of *John Bad Elk* viable within its proper sphere, has refused to extend it to the situation where an arrest was only derivatively unlawful (as the product of an unlawful search) and no excessive force to make the arrest was used.[48] The Third Circuit has held that force may not be used to resist an unlawful search where officers are executing a warrant, although leaving open the question whether an invalid, warrantless search may be resisted.[49] Additionally, the cases make clear that the right to resort to self-help applies with rare exceptions only where the illegal government action is directed against the defendant .personally. Thus, a bystander has no right to intervene in the unlawful attempted arrest of another, even if he does not know that law enforcement officers are involved; rather, before intervening he must make an effort to inquire into the nature of the attempted arrest and authority of the persons seeking to effect it, "unless circumstances make such inquiry impossible or fruitless." [50]

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[42] See, e.g., 18 U.S.C. 231(a)(3); 18 U.S.C. 1858-1860; 18 U.S.C. 1164; 21 U.S.C. 461(c), 675; 26 U.S.C. 7212(b).

[43] 177 U.S. 529 (1900).

[44] See also *United States* v. *Di Re,* 332 U.S. 581, 594 (1948).

3. The Offense

Subsection (a) of section 1302 provides that a person commits an offense if, "by means of physical interference or obstacle, he intentionally obstructs or impairs a government function in fact involving (1) the performance of an official duty by (A) a United States official, (B) a juror, a law enforcement officer, an employee of an official detention facility, or an employee of the United States Probation System, (C) a member of the armed forces, or (D) any other public servant, and (i) the duty is imposed by a statute, or by a regulation, rule, or order issued pursuant thereto, and (ii) the obstruction or impairment is material; (2) the delivery of mail; or (3) the exercise of a right, or the performance of a duty, under a court order, judgment or decree."

This section is an outgrowth of the view that a general statute forbidding physical obstruction of any government function is appropriate. Such a statute was recommended by the National Commission [51] and the Model Penal Code [52] and has been enacted by such States as New York and Oregon.[53] The new provision replaces the scattergun approach of current law with a single provision that allows uniform treatment of similar types of conduct. It has the further advantages of allowing greater consistency in grading and of not treating in one statute conduct of physical obstruction and other dissimilar conduct often associated with it, such as assaults and threats. Where these additional offenses are present, they may be separately punished under the proposed Code, generally either under section 1357 (Tampering with a Public Servant) or under the assault series (section 1611 *et seq.*).

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[45] See *United States* v. *Heliczer,* 373 F.2d 241 (2d Cir.) cert. denied, 388 U.S. 917 (1967); *United States* v. *Ulan,* 421 F.2d 787 (2d Cir. 1970); *United States* v. *Beyer,* 426 F.2d 773 (2d Cir. 1970); *United States* v. *Martinez,* 465 F.2d 79 (2d Cir. 1972).

[46] See *United States* v. *Heliczer, supra* note 45 at 248; *United States* v. *Martinez, supra* note 45 at 82.

[47] *United States* v. *Simon,* 409 F.2d 474, 477 (7th Cir.), cert. denied, 396 U.S. 829 (1969).

[48] *United States* v. *Moore,* 483 F.2d 1361, 1364-1365 (9th Cir. 1973).

[49] *United States* v. *Ferrone,* 438 F.2d 381, 389-390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971).

[50] *United States* v. *Heliczer, supra* note 45 at 248-249; see also *United States* v. *Vigil,* 431 F.2d 1037 (10th Cir. 1970), cert. denied, 401 U.S. 918 (1971).

[51] Final Report, § 1301.

[52] Model Penal Code, § 2421 (P.O.D. 1962).

[53] See McKinney's N.Y. Rev. Penal Law, § 195.05 (1967); Oregon Laws 1971, ch. 743, § 198.

The reason for paragraphs (1) through (3) in the offense is to clarify it by indicating the basic kinds of government functions that are protected.[54] Thus, paragraph (1) is primarily designed to carry forward the scope of present statutes such as 18 U.S.C. 111 and 2231. It would cover, among other things, physical interference with a law enforcement officer engaged in the prevention, detection, investigation, or prosecution of an offense, or with a Secret Service agent performing a protective function involving the President. The list of public servants in subparagraphs (1) (A) and (B) is coextensive with the list of domestic public servants covered in the murder and assault series of offenses. The terms "United States official", "juror", and "law enforcement officer" are defined in section 111. Subparagraphs (1) (C) and (D) are largely new, although (D) is in part designed to bring forward statutes such as 7 U.S.C. 87b(8) and 21 U.S.C. 461(c). The Committee has concluded that military functions should be generically protected from acts of intentional physical interference. Subparagraph (D) reflects a belief that any other Federal public servant performing official duties should be similarly protected. However, the Committee has required that, as to such persons, e.g., inspectors, the obstruction or impairment must be material, i.e., significant, rather than, for example, causing a mere momentary inconvenience. Paragraph (2) is intended to perpetuate the scope of laws such as 18 U.S.C. 1701, and paragraph (3) continues the coverage of statutes like 18 U.S.C. 1509.

The conduct proscribed—obstructing or impairing a function by means of physical interference or obstacle—carries a culpability level of "intentional." Thus, under the provisions of section 302(a), it must be proved that the offender had a conscious objective or desire to obstruct or impair a function and to do so by physical interference or obstacle. Mere awareness of the effect of his conduct will not suffice.[55] In establishing a requirement that the conduct be engaged in intentionally, it is the committee's intention to exclude from punishment under this section such actions as pulling away from an arresting officer at his initial approach or knocking away a hand suddenly placed on the shoulder to effect an arrest where this type of action amounts to a reflex response. The fact that the function is a "government" function is an existing circumstance as to which, since no culpability standard is expressly stated, the applicable state of mind that must be shown is "reckless."[56] Thus the actor must be shown to have been aware of but disregarded a substantial risk that the function be obstructed or impaired by physical interference or obstacle was a government function.[57]

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[54] By contrast, S. 1 of the 94th Congress and the National Commission did not attempt to categorize or enumerate the generic kinds of government functions covered.

[55] See Working Papers, pp. 520-521.

[56] See section 303(b)(2).

The various types of government functions set forth in subparagraphs (1) through (3) are preceded by the term "in fact". Therefore, by the operation of section 303(a)(1), no proof of a mental state is required as to these elements. The Committee deems it appropriate and consistent with existing case law to require proof of *scienter* only wth respect to the general fact that a government function was obstructed or impaired; it serves no purpose to require proof of any particular state of mind as to the kind of government function obstructed.[58]

The fact that the government function was a Federal government function is not an element of the offense, but merely a basis for Federal jurisdiction. Therefore, no culpability need be proved as to this fact.[59] A person may therefore be convicted under this section if the evidence establishes, for example, that he intentionally obstructed by physical interference the execution of a Federal search warrant, even if he believed he was obstructing a State function rather than a Federal function.[60]

The offense requires that the conduct engaged in should be such that it "obstructs or impairs" the government function involved. As stated above, the word "obstructs" has been in the Federal law for decades in contempt and obstruction of justice statutes and probably includes "impairs." However, the latter word also recurs in the law and has been used in various State revisions and the Model Penal Code. For these reasons, and to insure completeness of coverage, the term "impairs" is included with the term "obstructs," as is done in the parallel section, 1301.[61] It is intended that these terms receive a broad meaning and interpretation from the courts.

The section also requires that obstruction or impairment be by means of "physical interference or obstacle."[62] This phrase is also intended to be given an expansive construction though limited, of course, to the concept of "physical" means. It should include affirmative physical acts such as the barring of a door against a process server, the raising of barriers, the destruction of property, the use of a stench bomb, or the causing of persistent noise. However, mere verbal efforts to obstruct a government function or the failure to take affirmative action to facilitate a government function, such as unlocking a door to permit an inspector to enter, are not covered by the provision.[63]

Threats that are intended to influence government actions are penalized at a felony level under section 1357 and may, in certain cases, constitute menacing under section 1614. Cursing and other forms of verbal abuse that do not amount to threats and that occur absent any physical acts of interference or obstacle may be punishable under such sections of the Code as a contempt of court if the verbal abuse involves the courts or as disorderly conduct if committed within a Federal enclave.[64]

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[57] See section 302(c)(1).

[58] See section 303(d)(2).

[59] Cf. *United States* v. *Feola*, 420 U.S. 671 (1975).

[60] Cf. *United States* v. *Jennings*, 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973).

[61] See Working Papers, pp. 578–579.

[62] The term "physical" is intended to modify both "interference" and "obstacle."

[63] See *District of Columbia* v. *Little*, 339 U.S. 1 (1950); *United States* v. *Cunningham*, 509 F.2d 961 (D.C. Cir. 1975).

The Committee intends that section 1302(a)(3) cover, for example, physical interference with public servants attempting to enforce judicial decrees or judgments.[65] Section 1302, however, is not intended to reach problems that arise between civil litigants after a judgment is made and collection of a debt is involved unless Federal judicial collection procedures are involved. Depending on the factual context, it is possible that disputes between litigants could involve violations of section 1323 (Tampering with a Witness, Victim, or Informant), section 1324 (Retaliation against a Witness or Informant), or the statutes involving civil rights offenses and contempt of court.

The Committee has received and given careful consideration to certain criticisms of section 1302. The principal concern as expressed by one witness was that "virtually every mass demonstration would, at one moment or another, fall within its prohibition. * * * Even an influx of cars carrying demonstrators to the chosen site might constitute the proscribed felony [misdemeanor]."[66] The Committee has concluded that, while this concern is genuine, it is without merit and ascribes to the section a scope far beyond its actual reach. Indeed, Professor Archibald Cox, the former Solicitor General and former Wategate Special Prosecutor, said:

> The ACLU criticism of Section 1302 is, in my opinion, a forced and false interpretation which would appear plausible only to one determined to find reasons for seeking to defeat the bill.[67]

In his view, which the Committee endorses and which is clearly consistent with the language of the offense, an influx of cars carrying demonstrators would be a violation only if they were intentionally parked or driven in such a way as to deliberately interfere with the mails or with another of the enumerated protected government functions. Professor Cox concluded that the offense is not subject to attack on grounds of vagueness or overbreadth.

Thus, conduct such as that involved in picketing or mass demonstrations is not prohibited by this section even if it has the foreseeable consequence of obstructing a government function, if such obstruction was not an objective of the conduct. Moreover, even if obstruction of a government function is intended as a result of a demonstration otherwise protected by rights of free speech or assembly, subsection (b)(2) establishes a defense to prosecution if the interference or obstacle (a) involved no violence or only spontaneous minor violence incidental to the demonstration and (b) did not significantly obstruct or impair a government function.[68]

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[64] See sections 1331, 1334, and 1861.

[65] Compare 18 U.S.C. 1509.

[66] Testimony of the American Civil Liberties Union, Hearings, pp. 9067-68.

[67] Letter to Senator Philip A. Hart, Jan. 7, 1976, Hearings, p. 9414.

[68] It may well be that the Constitution shields the conduct of non-violent demonstrators from governmental intervention until or unless significant harm has occurred. See *Washington Mobilization Committee* v. *Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

The offense in a somewhat different form appeared as section 1301 of both the Study Draft and the Final Report.[69] The National Commission proposal in turn was based upon a similar offense contained in the Model Penal Code.[70]

The Committee has also considered a number of Supreme Court decisions on "physical obstruction" which indicate that section 1302 is clearly immune from overbreadth or vagueness attacks.

In *Cameron* v. *Johnson*[71] the Court held that a State statute that made it an offense to engage in picketing or mass demonstration in such a manner as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways was not void for vagueness or overbreadth. The Court said that the statute was not vague since it "clearly and precisely delineates its reach in words of common understanding. * * * It is 'a precise and narrowly drawn regulatory statute * * *'"[72] Nor was it overbroad, because picketing was prohibited only if it "obstructs or unreasonably interferes" with entry to or exit from a public building. Prohibiting such conduct does not abridge the exercise of First Amendment rights.[73] Numerous subsequent opinions have reaffirmed the view that direct blocking of traffic or entry to a building is not protected conduct. In *Bachellar* v. *Maryland*[74] the court said:

"[A conviction] could constitutionally have rested on a finding that they [the defendants] sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on."

And in *Coates* v. *City of Cincinnati*[75] the court stated:

"[A government] is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct."

After reviewing the applicable judicial decisions the Committee is satisfied that no constitutional problem with respect to over breadth or vagueness exists in this section. The Committee does not intend, nor could this offense be construed, to impair the constitutionally protected right to peaceable assembly.[76]

4. Defense

Subsection (b)(1) of section 1302 provides a defense to a prosecution under this section when the government function is both (A) "unlawful" and (B) "conducted by a public servant who was not acting in good faith." The theory behind the defense is that physical resistance to an arrest, search, or some other function of government is generally not justifiable and that disputes as to the legality of such government action should ordinarily be taken to the courts. In limiting the circumstances in which forcible self-help may be used to those where a public servant is acting both illegally and in bad faith, the defense probably is more circumscribed than that obtaining under the Federal cases dealing with the right to forcibly resist an unlawful arrest or search.[77] However, the scope of the defense herein is in accord with the trend of modern decisions and State legislatures to restrict the right to resort to force or violence as a means of resolving disputes with government.[78] Unlike the situation in former days, the development of legal safeguards in the Fourth, Fifth, and Fourteenth Amendments, as well as the development of statutory remedies, now affords the victim of an illegal arrest, search, or intentional tort, realistic and orderly alternatives to physical resistance.[79] The Committee believes that resort to such legal means should be required except in the rare circumstance where a Federal public servant not only is acting illegally but in evident bad faith. As a practical matter, the Committee considers that bad faith will almost always be negated by a showing that the officer was acting pursuant to a warrant or other judicial process.[80] However, bad faith may be shown by proof that the officer harbored a personal bias against the defendant or that he clearly exceeded the limits of his rightful authority, such as by using unreasonable force against the person or property of another or ransacking premises in the course of a search. In light of the fact that the use of clearly excessive force in the performance of a government function is ordinarily evidence of bad faith, the Committee has provided, in subsection (c), a proof provision stating that the use by a public servant of "clearly excessive force in the performance of a government function" will constitute "prima facie evidence that the public servant was not acting in good faith." Under the definition of "prima facie evidence" in Rule 25.1 of the Federal Rules of Criminal Procedure in this bill, this provision will have the effect of requiring the government not only to prove lack of bad faith beyond a reasonable doubt but to overcome, in that process, the inference of bad faith that normally may be drawn from the fact that clearly excessive force was employed.

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[69] Study Draft, § 1301; Final Report, § 1301.

[70] Model Penal Code, § 241.1 (P.O.D. 1962).

[71] 390 U.S. 611 (1968).

[72] *Id.* at 616 (citation omitted).

[73] *Id.* at 617.

[74] 397 U.S. 564, 571 (1979) (dictum).

[75] 402 U.S. 611, 14 (1971) (dictum).

[76] *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Hague* v. *CIO*, 307 U.S. 496 (1939).

Subsection (b)(2) deals with minor obstructions of government functions that occur in the course of activities otherwise protected by rights of free speech and assembly, and has been discussed earlier.

Subsection (b)(3) is new with respect to previous versions of the Code and is designed to address the problem of unlawful inspections. It creates a defense that the interference or obstacle: (1) was directed against a public servant who was an inspector acting, or reasonably believed by the actor to be acting, unlawfully, (2) was intended to stop or mitigate the unlawful act in protection of a person or in protection of property in the person's custody or possession, and (3) was limited to the degree reasonably necessary for that purpose. Recent Supreme Court decisions have made it clear that warrantless administrative searches of business premises by Federal inspectors may be valid or invalid depending upon the nature of the statutory scheme and the intent of Congress.[81] Although wishing to protect Federal functions generally from intentional physical interference, the Committee believes it is important that this section not impose criminal sanctions on those persons who are simply protecting their persons or property from unlawful inspections, and who use only the degree of physical resistance necessary to do so. For example, the defense would apply, irrespective of the good faith of the inspector, if an employer or custodian of business premises, upon encountering an inspector who was unlawfully seeking to enter the premises, locked the door and thereby prevented him from effecting such entry, or if the employer or custodian used reasonable force to remove from the premises an inspector who was acting unlawfully in performing his official duties, whether because he lacked a necessary warrant or otherwise. The defense, however, exists only if the actor's intent is to stop or mitigate the unlawful act with the purpose of protecting a person or property.[82]

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[77] See *John Bad Elk* v. *United States, supra* note 43, and other cases discussed *supra*.

[78] As noted in *United States* v. *Heliczer, supra* note 44 at 246 n.3, the right to resist an unlawful arrest has in recent years been abolished by statute in Rhode Island, New Hampshire, Delaware, and California, and by judicial decision in New Jersey. In addition, the Model Penal Code and the Uniform Arrest Act each contains a provision curtailing the scope of the common law right to use force to resist an unlawful arrest.

[79] See *United States* v. *Ferrone, supra* note 48 at 890; see also *United States* v. *Harris,* 521, F.2d 1089, 1092 (7th Cir. 1975) (legality of underlying lien or assessment not relevant in prosecution under 26 U.S.C. 7212(b) for forcibly rescuing property seized by I.R.S.).

[80] See *id.*

5. Jurisdiction

Federal jurisdiction exists for this offense if the government function is, in fact, a Federal function. This jurisdictional base is broad enough to reach a physical obstruction of a State or local public servant who is properly exercising a Federal government function. In addition, there is extraterritorial jurisdiction over an offense herein, by virtue of section 204(c)(7), if it is committed by a national or resident of the United States.

6. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison), which is consistent with the average penalty for this type of offense under current law. If the conduct engaged in by the defendant is more serious and amounts to a threat, an assault, or even homicide, proper prosecution will be possible either because the public servant involved is specifically covered in the jurisdiction sections of those offenses or the conduct is covered by means of ancillary jurisdiction.[83]

SECTION 1303. IMPERSONATING AN OFFICIAL

1. In General and Present Federal Law

This section consolidates a number of impersonation statutes in chapter 43 of title 18 and carries forward the view that impersonation of Federal officials should be a Federal crime because such impersonation harms the effective functioning of the Federal government by creating suspicion of Federal credentials. As stated by the Supreme Court, the purpose of an impersonation statute is "not merely to protect innocent persons from actual loss through reliance on false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself."[84]

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[81] Compare *Donovan* v. *Dewey*, U.S. (decided June 17, 1981) (no warrant required for inspection conducted under the Federal Mine Safety and Health Act) with *Marshall* v. *Barlow*, 436 U.S. 307 (1978) (warrant required for inspection conducted under the Occupational Safety and Health Act).

[82] This defense and the formulation thereof was suggested by various business groups as well as the American Bar Association. See Hearings, Part XVI, p. 11845.

[83] See, e.g., section 1621 (Kidnapping).

The most important sections of title 18 dealing with false impersonation are 18 U.S.C. 912 and 913, covering public servants, and 18 U.S.C. 915, covering foreign officials. Other less significant statutes in chapter 43 will not be incorporated into this section but instead will be embraced within other sections of the proposed Code or transferred to title 18 Appendix of the United States Code.

18 U.S.C. 912 contains the basic statute prohibiting the impersonation of Federal public servants. It has two distinct prohibitions. First, the statute punishes anyone who "falsely assumes or pretends to be an officer or employee acting under the authority of the United States . . . , and acts as such." Second, it punishes anyone who "in such pretended character demands or obtains any . . . thing of value." The penalty is imprisonment for up to three years.

The first part of the statute states the offense carried forward in this section and relates to those impersonations which are most injurious to the government in that the impersonator does an act related to his pretended capacity. Although originally enacted to prohibit frauds on the government by those claiming to be entitled to Federal pensions,[85] this provision has mainly been used for prosecutions in which victims other than the government have been the subject of the impersonation, for example, a case where a telegram was sent in the name of a United States Senator to the warden of a State penitentiary ordering a stay of execution,[86] and a case involving the defrauding of private persons by one acting in the guise of a United States Congressman.[87] The kinds of impersonation cases under this branch of the statute most common today involve private investigators, claims adjusters, debt collectors, and the like who impersonate F.B.I. agents or other Federal investigators in order to obtain information or access to private files which would otherwise not be made available.[88]

Originally, 18 U.S.C. 912 contained a requirement of "intent to defraud" applicable to both branches of the statute. In *United States* v. *Lepowitch,*[89] however, the Supreme Court interpreted this language, in connection with a prosecution under the first (i.e. "acts as such") branch, to mean only that the offender "by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." [90] In the 1948 revision of title 18, the revisers deleted the "intent to defraud" language as to *both* branches of statute, indicating that the *Lepowitch* decision had rendered it meaningless. Although the law today remains relatively clear that a specific intent to defraud is not an element of the offense under the first branch of the statute,[91] a split in judicial authority has developed over whether the requirement should be read back into the second branch.[92]

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[84] *United States* v. *Barnow,* 239 U.S. 74, 80 (1915).

[85] See *Pierce* v. *United States,* 314 U.S. 306, 307 (1941).

[86] See *Thomas* v. *United States.* 213 F.2d 30 (9th Cir. 1954).

[87] See *Lamar* v. *United States.* 241 U.S. 103 (1916).

[88] See Working Papers, p. 730; see also *United States* v. *Lepowitch,* 318 U.S. 702 (1943).

[89] *Id.*

[90] *Id.* at 704.

The critical point about the second branch of 18 U.S.C. 912 is that it is essentially a form of theft (i.e., "demands or obtains any . . . thing of value"). Accordingly, rather than retain this offense in this section or subchapter, the Committee has determined to cover the conduct proscribed in the second branch by means of a jurisdictional base in the theft section (section 1731(c)(4)).[93]

The Committee believes that when a person impersonates a public servant or a foreign official and thereby obtains property of another by fraudulent means with intent to deprive the holder of it, then the offense is, in essence, theft and should be treated as such. This treatment of the second part of 18 U.S.C. 912 permits prosecution when a theft is attempted or accomplished by means of an impersonation and is in accord with the Fifth Circuit decision that read a specific intent to defraud back into the current statute.[94]

18 U.S.C. 913 makes it an offense punishable by up to three years in prison for any person to "falsely represent himself" as an officer, agent, or employee of the United States "and in such assumed character" to arrest or detain any person or to search any person, building or other property of any person. There have been very few prosecutions under this statute, apparently because the conduct is also covered under the first part of 18 U.S.C. 912.

18 U.S.C. 915 punishes by up to ten years in prison whoever, "with intent to defraud within the United States, falsely assumes or pretends to be a diplomatic, consular or other official of a foreign government duly accredited as such to the United States and acts as such, or in such pretended character, demands or obtains or attempts to obtains any . . . thing of value." This statute is drafted along lines parallel to 18 U.S.C. 912 and therefore, for the reasons discussed in connection with that provision, the second branch of 18 U.S.C. 915 is also excised from coverage under this section and is carried forward by establishing a jurisdictional base in the theft offense (section 1731(c)(4)). 18 U.S.C. 915 was initially enacted in 1917 during World War I to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States and to punish espionage. Its ten-year grading provision, which is considerably higher than that under 18 U.S.C. 912, probably reflects its purpose to assist in preventing espionage.[95]

Since there have been no cases interpreting the *scienter* requirements of section 915, it is unclear whether the phrase "intent to defraud" has the meaning given to those words in 18 U.S.C. 912 in *United States* v. *Lepowitch, supra.* Because of the specificity of the kinds of foreign officials covered, there is also some doubt whether the statute would apply to impersonation of a United Nations official or an officer of the Organization of American States.[96]

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[91] See *United States* v. *Mitman.* 459 F.2d 451 (9th Cir.) cert. denied, 409 U.S. 863 (1972). In *United States* v. *Randolph,* 460 F.2d 367 (5th Cir. 1972), however, the Fifth Circuit held that an indictment under the first branch of 18 U.S.C. 912 must allege either an intent to defraud or the purpose for false personation.

[92] Compare *Honea* v. *United States.* 344 F.2d 798 (5th Cir. 1965). with *United States* v. *Guthrie,* 387 F.2d 569 (4th Cir. 1967). cert. denied, 392 U.S. 927 (1968).

[93] The National Commission, by contrast, included both branches of 18 U.S.C. 912 in its proposed false impersonation provision. See Final Report §1381.

[94] *Honea* v. *United States, supra* note 92.

[95] See Working Papers, pp. 733–734.

Chapter 43 of title 18 also contains other false impersonation statutes which are not covered in this section.

18 U.S.C. 911 punishes by up to three years in prison whoever "falsely and willfully represents himself to be a citizen of the United States." The additional culpability term "willfully" in this section has been construed to require only that the misrepresentation concerning citizenship be voluntarily and deliberately made and not to require a fraudulent purpose.[97] This offense is carried forward in the proposed Code as to misrepresentation of United States citizenship in governmental matters by means of the jurisdictional subsection in the false statement statute (section 1343(c)) and in other respects by transfer to title 18 Appendix.

18 U.S.C. 914 punishes by up to five years in prison whoever "falsely personates any true and lawful holder of any . . . debt due from the United States, and, under color of such false personation," receives or endeavors to receive money. This is essentially a theft provision and is covered by a jurisdictional base in the theft section (section 1731(c)(12)).

18 U.S.C. 916 punishes by a maximum of six months in prison whoever "falsely and with intent to defraud" [98] impersonates a 4-H Club member or agent. This section is preserved by transferring it to title 18 Appendix of the United States Code.

18 U.S.C. 917 punishes by imprisonment for up to one year whoever, within the United States, falsely or fraudently holds himself out as or represents or pretends himself to be a member of or an agent for the American National Red Cross, for the purpose of soliciting, collecting, or receiving money or material. This section is also preserved by transferring it to title 18 Appendix of the United States Code.

Other impersonation statutes not in chapter 43 include 18 U.S.C. 1424, proscribing impersonation in any citizenship or naturalization proceeding, and 18 U.S.C. 1546, punishing impersonation in obtaining visas or other documents required for entry into the United States.[99] The coverage of these statutes will be carried forward in part by the prejury and false statements provisions of this chapter (sections 1341-1343), as well as by sections 1215 and 1216, which penalize, *inter alia,* the fraudulent acquisition of naturalization or citizenship, or a United States passport.

2. The Offense

A. Elements

Subsection (a) of section 1303 provides that a person commits an offense if he "pretends to be a public servant or a foreign official and purports to be exercising the authority of such public servant or foreign official."

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[96] Cf. Working Papers, p. 734.

[97] See *Chow Bing Kew* v. *United States*. 248 F.2d 466 (9th Cir.), cert. denied, 355 U.S. 889 (1957); *United States* v. *Franklin*, 188 F.2d 182 (7th Cir. 1951).

[98] The "intend to defraud" requirement has not been interpreted.

[99] The court in *United States* v. *Carillo-Colmenero*, 523 F.2d 1279 (5th Cir. 1975) adopted an interpretation of the latter statute as extending to a case of false personation in applying for admission to the United States, although no entry-type document was involved.

This section is designed to perserve the basic offense in the first part of 18 U.S.C. 912 and 915, albeit in somewhat refined form. Thus the offense here has two essential elements: first, the defendant must pretend to be a public servant or a foreign official; and second, he must purport to be exercising the authority of the impersonated servant or official.

The modifier "falsely" which appears in 18 U.S.C. 912 before the word "pretends" has been deleted as redundant, because the concept of a pretension or impersonation inherently contains the idea of falsity. Retaining the adjective might also lead to the erroneous conclusion that some additional culpability element, e.g., evil motive, which is not part of existing law and is not intended to be incorporated under this section, is required.[100]

The committee has also replaced the "acts as such" language of 18 U.S.C. 912 and 915 with the phrase "purports to be exercising the authority of such public servant or foreign official." This latter language, while lengthier, is believed to be a clearer expression of the prohibited conduct.

Thus it should be evident that once the actor has pretended to be a public servant or foreign official, the crime becomes complete upon his engaging in any conduct which is an exercise of the pretended person's authority. It is not necesary that the conduct be successful--only that it occur. For instance, a person who, after pretending to be an F.B.I. agent, flashes a badge in order to try to gain access to premises violates the statute by showing the badge after pretending to be an agent. It matters not whether he actually succeeds in gaining entrance. The word "purports" in lieu of "acts" is intended to make this concept apparent. As is current law, some conduct or action independent of the impersonation itself is required for a violation of this section.

The test of this independent conduct or action is whether or not it is designed to exercise the authority, capacity, or duty of the person impersonated. In discussing a predecessor statute to 18 U.S.C. 912, the Supreme Court stated that the requirement of an act beyond the mere pretense "means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense."[101]

Although an intent to defraud has been eliminated from current 18 U.S.C. 912 and from this section, each does or will require "some act in keeping with the pretense." The acts which have been held to satisfy this requirement, and which will also suffice under section 1303, include attempting to elicit from one person information concerning the where-abouts of another,[102] wearing firearms,[103] and attempting to stay an execution.[104] The act or conduct involved must to some extent be apart from the pretense itself. For example, stating that one is an F.B.I. agent alone would be insufficient. However, making that statement and thereupon entering premises in order to search, or attempting to effect an arrest, would be sufficient. In one case involving an impersonation of an Internal Revenue agent and an attempt, in that pretended capacity, to locate the address of a former tenant from a landlord, the court upheld the conviction and stated that an indictment under 18 U.S.C. 912 would be valid if it "states that the defendant engaged in doing something which is not the pretense itself in the pretended capacity." [105] This should remain the test under section 1303.[106]

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[100] Compare *United States* v. *Achtner*, 144 F.2d 49, 52 (2d Cir. 1944), where the court used the inclusion of the term "falsely" in 18 U.S.C. 911 to restrict the statute's application to instances where the false representation of citizenship was in response to an inquiry by one having a right to inquire about or adequate reason for ascertaining a defendant's citizenship.

[101] *United States* v. *Barnow, supra* note 84 at 77.

[102] *United States* v. *Lepowitch supra* note 88.

[103] *United States* v. *Hamilton*, 276 F.2d 96 (7th Cir. 1960).

[104] *Thomas* v. *United States, supra* note 86.

The classes of persons covered are "public servants" and "foreign officials." The former term is broadly defined in section 111 and is intended to reach all conceivable impersonations that are injurious to the authority or credibility of Federal credentials.[107] The definition is also designed to cover the situation of one public servant impersonating another, as does current law.[108] It should be noted that the definition of "public servant" is section 111 includes persons who act "for or on behalf of a government." The term "government" is also specifically defined in section 111 to encompass a "government agency," which in turn is defined to include a department, independent establishment, commission, administration, authority, board, and bureau, as well as a "corporation or other legal entity established by, and subject to control by, a government or governments for the execution of a governmental or intergovernmental program." This clearly incudes such entities as the Tennessee Valley Authority, impersonation of the employees of which an early Supreme Court decision held was outside the scope of 18 U.S.C. 912.[109]

With respect to foreign officials, the rational for continuing the protection in current 18 U.S.C. 915 for acts of impersonation concerning them was clearly set forth by the Deputy Director of the National Commission, as follows:[110]

> Maintenance of good foreign relations is a matter of exclusive Federal concern, and probably should not depend upon the ability or discretion of local law enforcement officials. Foreign governments should be able to look to the Federal government, rather than to the States for protection of the good repute of their officials, and hold the Federal government accountable for lax enforcement. Moreover, protection of the credentials of foreign officials in

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[105] *United States* v. *Harth,* 280 F. Supp. 425 (W.D. Okla. 1968).

[106] Thus, situations where a person impersonates a public servant or foreign official solely to enhance his status, e.g., for the purpose of obtaining a job, credit, or cashing a check, will not be covered under this section. See *United States* v. *Grewe,* 242 F. Supp. 826 (W.D. Mo. 1965); *United States* v. *York,* 202 F. Supp. 275 (E.D. Va. 1962). Compare *United States* v. *Etheridge,* 512 F.2d 1249 (2d Cir. 1975) (sustaining a conviction where the defendant, while impersonating a member of the army, obtained a loan by virtue of his purported army status). Where credit is sought, such conduct may amount to a violation of the false statement section (1343), if a national credit institution is involved.

[107] Note that impersonation of a former public servant is not covered, whereas theft by impersonation of such a former public servant is proscribed. See section 1731(c)(4).

[108] See *Russell* v. *United States,* 271 F. 684 (9th Cir 1921).

[109] See *Pierce* v. *United States, supra* note 85. The *Pierce* holding was in effect reversed by the definition of "agency" in the 1948 title 18 revision. See 18 U.S.C. 6.

[110] See Working Papers, p. 734.

this country provides a basis for obtaining protection of credentials of Federal officials abroad.

The term "foreign official" is defined in section 111 to mean a "foreign dignitary" (a term also defined in section 111) or a person of foreign nationality "duty notified to the United States as an officer or employee of a foreign power," which includes a "government" or an "international organization." The latter term is also defined in section 111 with reference to the International Organizations Immunities Act (22 U.S.C. 288) and will include such organizations as the United Nations and the Organization of American States. The definition of "foreign official" generally parallels the recently enacted definition set forth in 18 U.S.C. 1116 in connection with the protection of foreign officials from murder and manslaughter, except that impersonation of family members of foreign officials—which is not covered in 18 U.S.C. 915—is similarly excluded from the scope of this section.

B. Culpability

The conduct in this section is pretending to be a public servant or a foreign official and purporting to be exercising the authority of such servant or official. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is, at a minimum, "knowing," i.e., that the offender was aware that he was pretending to be a public servant or foreign official and was aware that he was purporting to be exercising the authority of such person.[111] Thus, it would not be a crime for a person to pretend to be another who happened to be a public servant or foreign official if the defendant was not aware of that person's status.

3. Defense Precluded

Subsection (b) provides that it is not a defense to a prosecution under this section that the pretended capacity did not exist or that the pretended authority could not legally or otherwise have been exercised or conferred.

This codifies existing judicial interpretations of 18 U.S.C. 912,[112] and is derived from the recommendations of the National Commission.[113] The need for the word "conferred" is to cover the situation of a person not pretending to be someone other than himself but claiming to have Federal authority for what he is doing.

4. Jurisdiciton

There is Federal jurisdiction over an offense under this section in two circumstances.

The first is if the pretended capacity or authority is that of a Federal public servant. The latter term is defined in section 111 (see "public servant"), *inter alia,* to exclude a District of Columbia public servant. Because of the potential seriousness of the impersonation of a Federal public servant, extraterritorial jurisdiction is provided for this offense when committed abroad.[114]

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[111] See sections 303(b)(1) and 302(b)(1).

[112] See e.g., *United States* v. *Barnow, supra* note 85 at 76–77; *Thomas* v. *United States, supra* note 102; *Elliot* v. *Hudspeth* 110 F.2d 389 (10th Cir. 1940); *Caruso* v. *United States,* 414 F.2d 225 (5th Cir. 1969).

[113] See Final Report § 1381(2).

The second circumstance occurs when the pretended capacity or authority is that of a foreign official and the offense is committed within the general or special jurisdiction of the United States. These areas are defined in sections 202 and 203 respectively. In essence they include any State, Federal enclave, location on the high seas, and certain aircraft while in flight.

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This is similar to the maximum penalty afforded by current law in 18 U.S.C. 912. The ten-year penalty allowed under 18 U.S.C. 915 for impersonating a foreign official is deemed too high. The National Commission proposed reducing the offense to a misdemeanor. However, in view of the gravity of the damage to United States interests which may result from offenses of this kind, the Committee believes that felony treatment is warranted.

SUBCHAPTER B.—OBSTRUCTIONS OF LAW ENFORCEMENT

(Sections 1311-1315)

The offenses included within this subchapter are: Hindering Law Enforcement (section 1311); Bail Jumping (section 1312); Escape (section 1313); Providing or Possessing Contraband in a Prison (section 1314); and Flight to Avoid Prosecution or Appearance as a Witness (section 1315). The common thread running throughout these sections is the obstruction of law enforcement efforts that results from the prohibited conduct.

Hindering law enforcement is the traditional accessory after the fact offense. It prohibits interference with law enforcement efforts to apprehend and punish other offenders or to recover the proceeds of the crime. Sections 1312-1314 come into play after the offender has been apprehended. Section 1312 makes it a crime to jump bail. Section 1313 prohibits escape from official detention facilities. Linked to escape, section 1314 makes it unlawful to provide or possess items that could be used to escape; but beyond that, it prohibits the making or possession of certain items, the use of which in a prison could thwart order, discipline, and safety. Section 1315 completes the series of obstruction of law enforcement offenses. It makes it unlawful to flee a State or local jurisdiction with intent to avoid prosecution or giving testimony.

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[114] See section 204(c)(6).

SECTION 1311. HINDERING LAW ENFORCEMENT

1. In General

Section 1311 is designed to proscribe conduct that assists others either to avoid apprehension or prosecution or to profit from the fruits of their crimes. These offenses are distinguishable from some other forms of prohibited conduct that would aid the offender, such as tampering with witnesses or jurors, because the offenses in this subchapter are directed solely at the aider.[1] Subsection (a)(1) and (a)(2) combine several sections of current law dealing with common law notions of accessories-after-the-fact and misprision of felony. In general, it is intended primarily to prevent obstruction of law enforcement efforts to apprehend and punish another offender.

Subsection (a)(3) prohibits, as a form of an accessory offense, aiding the consummation of a crime. It is intended to reach acts that do not amount to obstructions of justice or the receipt of stolen property as such, but instead involve assisting other persons in carrying out an unlawful project or otherwise profiting from a crime. Examples of the conduct that this section would reach include acting as a custodian for the proceeds of a theft or robbery until the culprits can meet and split up the spoils, fencing marked ransom money, or helping a thief to collect a reward for the return of stolen property. Other conduct that this offense would prohibit includes activities of so-called frontmen for organized criminals who invest illegally obtained funds in legitimate businesses and thus "launder" the fruits of crime; fencing of stolen property where actual receipt of the property cannot be established; and purchasing of property at an extremely low price, e.g., acquiring treasury bills at a half their face value, where the person does not know the details of the crime but is aware of and disregards a risk that the property has been illegally obtained.

2. Present Federal Law

In existing law, there are eight statutes dealing with the type of accessorial conduct covered by section 1311. Six of these are consolidated in subsections (a)(1) and (a)(2) of section 1311:

(i) 18 U.S.C. 3. This statute declares that any person who, knowing that a Federal offense has been committed, "receives, relieves, comforts, or assists the offender" for the purpose of hindering or preventing his apprehension, trial, or punishment, is "an accessory after the fact." It is the basic title 18 accessory-after-the-fact statute. Offenders are punished generally at one-half of the maximum penalty for the underlying offense.

(ii) 18 U.S.C. 4. This section is entitled "misprision of felony." It provides that any person who has knowledge of the actual commission of a Federal felony and who conceals it and does not make his knowledge known to the authorities is guilty of an offense and can be imprisoned for a maximum of three years.[2] The section has been interpreted to require affirmative acts of concealment[3] such as concealment of evidence or harboring the offender. Mere failure to report a known felon is insufficient for a conviction. As such, 18 U.S.C. 4 is probably covered to a large extent by the language in 18 U.S.C. 3 relating to assisting the offender.

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[1] Offenses such as tampering with witnesses, victims, or jurors are discussed in the next subchapter.

[2] It has been held that the Fifth Amendment privilege against compulsory self-incrimination shields an individual from prosecution under this section, however, if he was simultaneously in-

(iii) 18 U.S.C. 1071. This offense covers acts of harboring or concealing an offender after an arrest warrant has issued so as to prevent the offender's discovery and arrest. The harborer under this section must know that the arrest warrant has issued. If the underlying offense charged is a felony, violation of section 1071 carries a maximum penalty of five years in prison; if it is a misdemeanor, violation of section 1071 carries a maximum penalty of one year in prison.

(iv) 18 U.S.C. 1072. This section deals with the specific situation of "willfully" harboring or concealing an escaped Federal prisoner. It carries a maximum penalty of three years in prison.

(v) 18 U.S.C. 792. This offense is a specialized accessory after the fact statute dealing with national security offenses. It bars the harboring or concealing of a person who the actor knows, "or has reasonable grounds to believe," has committed, or is about to commit, an offense under 18 U.S.C. 793 (Gathering, transmitting, or losing defense information) or 18 U.S.C. 794 (Gathering or delivering defense information to aid foreign government). A violation of 18 U.S.C. 792 carries a maximum penalty of ten years in prison.

(vi) 18 U.S.C. 2382. This section is entitled "misprision of treason." Its reach is much the same as that of 18 U.S.C. 4 except that it is limited to concealment and knowledge of treason against the United States where such act is by one owing allegiance to the United States. It carries a maximum penalty of seven years in prison.

It is quite clear that while these six statutes deal basically with the same offense of harboring, concealing, or assisting a Federal offender, penalties and requirements of proof are treated disparately and inconsistently. Subsections (a)(1) and (a)(2) of section 1311 eliminate the anomalies and overlap and consolidate the six offenses into one provision with uniform elements and grading.[4]

Subsection (a)(3) of section 1311, which constitutes a general provision barring the asistance of another in profiting from the proceeds of a crime, is novel to current law not in its approach but in its scope. There are two statutes presently in title 18 that reach specific instances of the kind of conduct proscribed by subsection

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volved in criminal conduct linked to the concealed crime. *United States* v. *Kuh*, 541 F.2d 672 (7th Cir. 1976); *United States* v. *King*, 402 F.2d 694 (9th Cir. 1968).

[3] See *Neal* v. *United States*, 102 F.2d 643 (8th Cir. 1939), cert. denied, 312 U.S. 679 (1941).

[4] Other offenses of a similar nature that exist in current law are handled separately in the Code. One, 8 U.S.C. 1324(a)(3), deals with harboring certain aliens. It is treated separately in section 1213 because of detailed grading requirements and the need to refer to title 8 of the United States Code for the definition of specific terms such as "alien" and the like. The second 18 U.S.C. 757, which deals with harboring an escaped prisoner of war or an escaped enemy alien is covered in sections 1117 because of differing offense elements. Finally 18 U.S.C. 1381 which, *inter alia*, punishes by up to three years in prison any person who "harbors, conceals, protects or assists" a person who has deserted from the armed forces of the United States, is treated in section 1116 because of its more logical relationship to the military offenses contained in chapter 11.

(a)(3). First, 18 U.S.C. 1202 prohibits any person from receiving possessing, or disposing of any money or property that has been at any time delivered as ransom or reward for a kindnapping if the actor knew that the proceeds had been used for such ransom or reward. A violation of 18 U.S.C. 1202 carries a maximum penalty of ten years in prison. Second, 18 U.S.C. 2113(c) prohibits, *inter alia,* any person from receiving, possessing, bartering, selling, or disposing of any property knowing the same to have been stolen from a bank. The maximum sentence is the same as that for 18 U.S.C. 1202.

As is evident from the face of the statutes, both are narrow in scope. Subsection (a)(3) would replace these specific provisions and extend the prohibition against assisting another in profiting from the proceeds of a crime to all situations in which the Federal government had jusrisdiction over the crime committed by the other person.

3. The Offense

The offense subsection of section 1311 is divided into three paragraphs in order to reach different types of acts which obstruct law enforcement effort. The first and second paragraphs proscribe conduct that hinders efforts to apprehend and punish another offender. The third paragraph punishes conduct that aids another in secreting, disguising, or converting the proceeds of a crime or otherwise profiting from a crime of another. In each case, the offense involves conduct that takes place after an offense had been committed by another person or after acts that have given rise to criminal charges.

A. Hindering efforts to apprehend and punish offenders

As noted, the hindering offense, proposed in subsection (a)(1) and (a)(2) consolidates those aspects of existing "assistance" provisions which prohibit interference with law enforcement efforts to apprehend and convict an offender. It goes beyond the general accessory-after-the-fact statutes (18 U.S.C. 3 and 4). however, by imposing criminal liability regardless of whether the offense was actually committed. This is in accord with the recent revisions[5] and embraces the same notion contained in the offense of harboring when an arrest warrant has been issued (18 U.S.C. 1071). As explained in the Working Papers, "[t]he principle underlying the offense is that it is an obstruction of justice, rather than that the offender is an accessory in the crime."[6] Accordingly, section 1311 (a)(1) and (a)(2) do not—like 18 U.S.C. 3 and 4—make commission of a crime by another a matter of proof in the prosecution of an aider. Instead, the sections refer to assisting "another person, knowing that such person has committed a crime, *or is charged with or being sought for a crime.*" [Emphasis added.]

As noted in the National Commission Working Papers, "[c]riminal liability for such obstructive efforts should not depend upon whether guilt of the other is ultimately established, or whether the obstructor knows the specifics of his offense. . . ."[7] Thus, ever if the other person is later acquitted of the underlying offense, or the charges against the other are dropped, a prosecution of the person who interferes with law enforcement efforts in order to aid the one charged or being sought can still be brought. Accordingly, as a procedural matter, existing Federal law which provides that it is not necessary that the principal be convicted first before bringing to trail another one charged with aiding or abetting is continued.[8]

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[5] See, e.g., Final Report, § 1303; Working Papers, p. 531: Model Penal Code, § 242.3 (P.O.D. 1962); McKinney's N.Y. Rev. Pen. Law., §§ 205.50, 205.55, 205.60, 205.56 (1967); Mich. Rev. Crim. Code, §§ 4635-37, 4640 (Final Draft 1967).

[6] Working Papers, p. 531.

Subsection (a)(1) states that a person commits an offense if he "interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment" of another for a crime by enagaging in the conduct described in subparagraphs (A), (B), or (C). Subsection (a)(2) states that a person commits an offense if he "internationally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment" of another for a crime by altering, destroying, multilating, affirmatively concealing, or removing a record, document, or other object. In both subsections, the language "interferes with, hinders, delays, or prevents" described as prohibited result of the defendant's conduct. No culpability standard is specifically designated as to result under subsection (a)(1). Accordingly, the proof under this subsection must show that the defendant was at least "reckless" as to the result of his conduct; that is, it must be proved that he was aware of a subtantial risk that his conduct would cause the result but disregarded that risk in gross deviation from the the standard of care that a reasonable person would have exercised in such a situation. By contrast, subsection (a)(2) specifically designates the culpability level regarding the result of the defendant's conduct as "intentionally". Thus, it must be proved under this subsection that the defendant acted with a conscious purpose or desire to interefere with, hinder, delay, or prevent government functions. The reason for the intentional standard for subsection (a)(2) which covers the destruction of records is to make clear that mere awareness of the risk that record destruction will hinder the apprehension of a fugitive is not a sufficient basis to support a prosecution. Because record destruction is an indispensable facet of carrying on a business, and may be an ambiguous act, the Committee determined to require proof of an intentional state of mind for conviction under this section, i.e., that the defendant desired by the act of record destruction or removal to interfree with, hinder, etc., the apprehension, prosecution, or punishment of the fugitive. "Knowledge" is the state of mind specified with respect to the existing circumstance that the person the defendant is assisting has committed a crime, or is charged with or being sought for a crime.[9]

The description of the conduct prohibited under subsections (a)(1) and (a)(2) is preceded by terms that suggest obstuction of law enforcement efforts—i.e., to interfere with, hinder delay, or prevent "the discovery, apprehension prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime." A simple prohibition barring all conduct intended to hinder law enforcement efforts was rejected. As noted in the Working Papers, such a provision would make a person "guilty of hindering even though there was no basis for an obstruction of justice, i.e., there was no crime and no effort by law enforcement authorities to apprehend anyone . . ."[10] If it should ever arise, an intentional effort to hinder law enforcement where there is no effort in fact to apprehend anyone can be handled as an attempt since impossibility is rejected as a defense under that section.[11]

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[7] *Ibid.*

[8] See *Beauchamp* v. *United States,* 154 F2d 413 (6th Cir.), cert. denied 329 U.S. 723 (1946).

[9] This policy is supported by the A.B.A. Committee on Reform of Federal Criminal Laws of the Section of Criminal Law, Hearings, p. 5783. Consistent with existing law, there is no requirement that the accursed have any *scienter* as to the fact that the crime is Federal. *United States* v. *Hobson,* 519 F.2d 765, 769-770 (9th Cir.), cert. denied, 423 U.S. 931 (1975).

The four specified prohibited acts set forth in sections 1311 (a)(1) and (a)(2) generally parallel those drafted by the National Commission. These four acts reflect the types of conduct that have consistently been recognized and prosecuted as hindering law enforcements. By specifying the prohibited conduct, the proposed section avoids problems invited by the generality of the term "assist" (as in 18 U.S.C. 3) and permits the making of clear policy choices by the Congress as to the kinds of assistance that will be subject to penal sanctions.

First, the section prohibits harboring the other person or affirmatively concealing him or his identity. The word "harbor" is present in 8 U.S.C. 1324 and 18 U.S.C. 757 and 1381. The Committee intends that "harbor" receive a uniform interpretation in the various Criminal Code sections that carry forward these offenses (i.e., sections 1116, 1117, 1213, and this section), and specifically endorses the recent interpretation of "harboring" in 8 U.S.C. 1324 as extending beyond conduct of a clandestine or surreptitious nature to reach any act of providing shelter or refuge.[12] "Conceal" is to be given the meaning "to hide, secrete or keep out of sight."[13] The phrase "concealing . . . his identity" is added to make it clear that the statute is violated in those situations where the actor states falsely that he does not have a person of the fugitive's name staying with him or where the actor falsely identifies the fugitive to a law enforcement officer, thus concealing the fugitive's true identity.[14] In such instances, coverage under this section may overlap with that under section 1343 (Making a False Statement).[15] As under the current Federal statutes, as interpreted by the courts, the "concealing" offense requires affirmative acts of concealment. Thus, a mere failure or refusal to identify a fugitive (e.g., where a reporter refused to divulge a confidential source known to have committed a crime) would not constitute "concealing."

The conduct element in subparagraph (A) is "harboring the other person or affirmatively concealing him or his identity." Since no culpability standard is specifically designated, the appicable state of mind that must be proved is at least "knowing,"[16] i.e., that the defendant was aware of the nature of his action.[17] The remainder of subparagraph (A) describes a result of conduct, but specifies a "knowing" standard of culpability.

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[10] Working Papers, p. 532.

[11] See section 1001(c).

[12] See *United States* v. *Lopez*, 521, F.2d 437, 439–441 (2d Cir.), cert. denied, 423 U.S. 995 (1975); *United States* v. *Acosta DeEvans*, 531 F.2d 428, 429–430 (9th Cir. 1976). Contrast *United States* v. *Biami*, 243 F. Supp. 917 (E. D.Wis. 1965).

[13] *United States* v. *Biami*, *supra* note 12.

[14] Compare *United States* v. *Magness*, 456 F.2d 976 (9th Cir. 1972).

[15] Cf. *Neal* v. *United States*, *supra* note 3.

Second, the section prohibits "providing the other person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension." This subparagraph sets out the usual methods whereby one may actively aid a person fleeing from the law. The list is not intended to be all-inclusive as the concluding clause indicates; any assistance is covered if it consists of a means of avoiding either discovery or apprehension.

Each of the acts listed amounts to unequivocal conduct designed to aid an offender and to interfere with law enforcement. Money, for instance, is included because the act of providing a fugitive with funds enables him to use it to hide or escape.[18] The word "disguise" is specifically intended to include the changing of physical characteristics to prevent apprehension such as the surgical changing of facial appearance or fingerprints.[19]

"Providing" is the conduct prohibited and under section 303(b)(1) the state of mind is "knowing", i.e., an awareness that something is being supplied. The remaining elements, listing the types of assistance provided, are all existing circumstances and therefore the culpability under the proposed Code's rule of construction is "reckless,"[20] i.e., an awareness but disregard of the substantial risk that the circumstance exists.[21]

Third, the section prohibits warning the other person of impending discovery or apprehension. This, too, is an unequivocal act of interference with law enforcement. An exception is made, however, for warnings made for the purpose of deterring unlawful conduct.[22] Thus, in subsection (b) there is created an affirmative defense to a prosecution under this subparagraph, and under any section incorporating this subparagraph by reference, that the warning was made solely in an effort to bring the other person into compliance with the law. The defense is denominated as "affirmative," thereby requiring that the defendant bear the burden of proving the elements of the defense by a preponderance of the evidence.[23] Other sections in this Code that incorporate this subparagraph by reference, and that therefore are governed by this provision, are sections 1116(a)(3), 1117(a)(2), and 1213.

The conduct in this offense is warning of impending discovery or apprehension and, as in the preceding subparagaphs, the requisite minimum state of mind to be proved is "knowing."

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[16] See section 303(b)(1).

[17] See section 302(b)(1).

[18] In this respect this provision is intended to overrule cases such as *United States* v. *Shapiro*, 113 F.2d 891 (2d Cir. 1940) (prosecution under 18 U.S.C. 1071), which have held that a harboring and concealing prohibition does not prohibit providing money to a fugitive to avoid arrest. Cf. *United States* v. *King*, 402 F.2d 694 (9th Cir. 1968).

[19] See *Piquett* v. *United States*, 81 F.2d 75 (7th Cir.), cert. denied, 298 U.S. 664 (1936), holding that surgical change of facial appearance and fingerprints is concealing.

[20] See section 303(b)(2).

[21] See section 302(c)(1).

[22] See Final Report, § 1303(1)(d); Working Papers, p. 533.

[23] See the definition of "affirmative defense" in section 111.

Fourth, the section prohibits altering, destroying, mutilating, concealing, or removing a record, document, or other object. Applicable to this offense is a provision in subsection (c) that it is not a defense that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.[24] This defense precluded provision is not intended to bar proof that a record, document, or other object was irrelevant or immaterial to the law enforcement efforts in question if such proof is deemed relevant to whether the defendant intended, etc., to interfere with, etc., those efforts.

Efforts to alter, hide, or destroy evidence are obvious methods to interfere with law enforcement efforts and to obstruct discovery or apprehension of offenders. This paragraph parallels section 1325 (Tampering with Physical Evidence), which deals with similar acts involving a pending or contemplated official proceeding. "Altering, destroying, mutilating, concealing, or removing" are words describing the conduct and requiring a state of mind of "knowing", although, as noted earlier, the state of mind required with respect to the interference is "intentional".[25] The other elements are existing circumstances and the culpability level is "reckless."[26]

Some States have exempted from the scope of this offense close relatives who harbor, conceal, or otherwise aid an offender—such as parents, spouses, and children.[27] This type of defense was rejected by the National Commission[28] and is rejected for section 1311 also. Such a defense creates problems in determining the size of the class to be covered and even within categories immunizes those who may have motives not engendered solely by familial relationships. Because of these problems, the Committee concluded that the existence of close relationships should be left to sentencing or prosecutorial discretion.[29]

The misprision statutes (of treason, 18 U.S.C. 2382, and of felony, 18 U.S.C. 4) are not continued in the new Code. However, since both have been interpreted to require active proof of a concealment, the coverage of these statutes is fundamentally retained in section 1311(a).[30] 18 U.S.C. 1072, which prohibits the harboring or concealment of escaped Federal prisoners, is covered under section 1311(a) because escape is itself a separate crime for which the escaped prisoner would be sought.

B. Aiding consummation of a crime

As previously noted, the "aiding consummation" offense (paragraph (3)) consolidates aspects of existing law more closely related to accessorial conduct—disposing of marked ransom bills, hiding stolen money—than to thwarting enforcement of the law against another offender. While the two paragraphs might overlap when hiding the proceeds of a crime also constitutes suppression of evidence, this may not always be the case. For example, concealment or conversion may occur after conviction of the other offender.

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[24] This provision is intended to overrule *Neal* v. *United States, supra* note 3, which held that concealment of relevant items was not assisting another when their evidentiary nature was not established. An identical provision is included in sections 1315, 1322, 1323, and 1325.

[25] See section 303(b)(1).

[26] See section 303(b)(2).

[27] See e.g., Wis. Stat. Ann. §946.47 (1955).

[28] See Working Papers, p. 532.

[29] The Committee contemplates, however, that the Department of Justice will take full account of the motivation to assist arising from close familial ties and accordingly will prosecute only in aggravated or unusual cases of this type.

[30] See Hearings, pp. 7488–7490.

The basic culpability level adopted for aiding consummation of a crime is "knowing." As to the existence of the underlying crime, the requisite state of mind is "reckless" because that element is an existing circumstance for which no culpability standard is specifically designated.[31] Thus, it is only necessary to prove that the offender was aware of but disregarded the substantial risk that the underlying crime was committed.[32] There must, of course, be an underlying offense but the actor need not be aware of its specifics.

Paragraph (3), being in the nature of an offense prohibiting accessorial conduct, requires that the prohibited acts be in aid of another person. Accordingly, the thief who invests the fruits of his crime in a business cannot be charged under this section.

Specifically, the conduct prohibited is secreting, disguising, or converting the proceeds of a crime or otherwise profiting from a crime. Secreting or disguising can be purely accessorial with no specific profit to the actor, as also can be converting. The last phrase, "otherwise to profit from a crime," is intended to extend the offense to reach all acts whereby the person assisted receives some gain from the underlying criminal act. In all of these ways of assisting another there is no need for the actor charged under section 1311 to profit personally although that generally would be the case.

The word "proceeds" as used in the section is intended to include any kind of gain from a crime whether it is money, tangible property, intangible property, or any form of investment.

4. Jurisdiction

There is Federal jurisdiction over an offense under this section if the crime that the other person has committed, is charged with, is being sought for, or is seeking to profit from, is a crime over which Federal jurisdiction exists.

5. Grading

An offense described in this section is graded according to the severity of the underlying offense and the culpability level with respect to the details of the crime. If the crime with which the person assisted has been charged is a Class A, B, or C felony, and the actor knows the nature of the conduct constituting the crime or is reckless with regard to the nature of such conduct, the offense of the aider is graded as a Class D felony (up to six years in prison). If the underlying crime is a Class D felony and the actor knows or is reckless with regard to the nature of such conduct, or if the aider committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, the offense is graded as a Class E felony (up to three years in prison). In any other case, the offense is a Class A misdemeanor (up to one year in prison).

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[31] See section 303(b)(2).

[32] See section 302(c)(1).

SECTION 1312. BAIL JUMPING

1. In General and Present Federal Law

The purpose of section 1312 is to deter those who would obstruct law enforcement by failing to appear for trial or other judicial appearances and to punish those who indeed fail to appear. The section basically continues the current law offense of bail jumping.

The present bail jumping offense is 18 U.S.C. 3150 which was enacted in 1966 as part of the Bail Reform Act of 1966.[33] Since the Act is procedural in nature, it is located within Part II (Criminal Procedure) of existing title 18. This results in the anomalous situation of a substantive Federal offense (bail jumping) in the procedural part of the Code.

The Federal bail jumping statute was first enacted in 1954 to fill the void in the criminal law highlighted by the conduct of fleeing fugitives who were leaders of the Communist Party. The only available penalties, at that time, were forefeiture of money and contempt proceedings. In the absence of an indictable offense for bail jumping, defendants were able to buy their freedom for forfeiting their bonds and taking the risk that they could go unapprehended. Even if apprehended, many defendants could hide for periods long enough for the government's case, especially for major offenses, to grow weaker because of the unavailability of witnesses, memory lapses, and the like, and thereby defeat the government's prosecutive efforts. They would then be subject only to the criminal contempt charge, the sentence for which was usually of considerably less gravity than for the original offense. These were the reasons that led to the original Federal bail jumping statute of 1954. Those same reasons underlie current 18 U.S.C. 3150 and proposed section 1312 of the new Code.

A violation of the current bail jumping statute requires first, that a person be released pursuant to the provisions of the Bail Reform Act,[34] and, second, that "he willfully fail . . . to appear before any court or judicial officer, as required." The word "willfully" as used in the statute has been interpreted to mean that the omission of failing to appear was "voluntary . . . and with the purpose of violating the law, and not by mistake, accident, or in good faith." [35] Furthermore, actual notice of the appearance date has been held unnecessary in the face of evidence of the defendant's willful to failure to appear.[36] The requirement that the person fail to appear "before any court or judicial officer" has led at least one court to hold that it is not an offense under 18 U.S.C. 3150 to fail to surrender to a United States marshal to begin service of sentence as ordered.[37]

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[33] 18 U.S.C. 3146 *et seq.*

[34] This probably does not apply to an individual released on bail in connection with a charge of juvenile delinquency, since the Bail Reform Act speaks in terms of persons "charged with an offense". 18 U.S.C. 3146; see also 18 U.S.C. 33148, 5034.

[35] *United States* v. *Bourassa,* 411 F.2d 69, 74 (10th Cir.), cert, denied, 396 U.S. 915 (1969).

[36] *United States* v. *DePugh,* 434 F. 2d 548 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Bourassa, supra* note 35.

[37] *United States* v. *Wray,* 369 F. Supp. 118 (W.D.Mo. 1970); but see *United States* v. *Bright.* 541 F.2d 471 (5th Cir. 1976). and *United States* v. *West.* 477 F.2d 1056 (4th Cir. 1973), reaching the opposite conclusion on the ground that the marshal is an agent of the court for these purposes.

A violation of 18 U.S.C. 3150 carries a maximum term of five years in prison if the defendant was released in connection with a charge of felony, or if he was released while awaiting sentence, or pending appeal or petition for certiorari after conviction for any offense. If the defendant has been released on a charge of misdemeanor or as a material witness, bail jumping carries a maximum penalty of one year in prison. The statute also calls for a forfeiture of any security given for his release. However, such a forfeiture is not a condition precedent to bringing a prosecution for bail jumping.[38]

Section 1312 of the bill, as reported, basically continues the current law offense of bail jumping although the grading has been enhanced to more nearly parallel that of the underlying offense for which the defendant was released. This enhanced grading provision is designed to eliminate the temptation to a defendant to go into hiding until the government's case for a serious felony grows stale or until a witness becomes unavailable, often a problem with the passage of time in narcotics offenses, and then to surface at a later date with criminal liability limited to the less serious bail jumping offense. A specific provision has been added to make clear that the failure to surrender for service is covered as a form of bail jumping; also the offense has been broadened at the suggestion of the Administrative Office of the United States Courts to include at a misdemeanor level bail-jumping in relation to a charge of juvenile delinquency. The offense itself has been moved out the procedural part of title 18 and placed with those substantive offenses that deal with obstruction of governmental functions where it more logically belongs. The forfeiture provisions of current law are retained in Rule 46(f) of the Federal Rules of Criminal Procedure. This should make it even more clear that a forfeiture of security is in no way a prerequisite for prosecution of bail jumping.

2. The Offense

As noted, the basic offense set forth in section 1312 parallels current law. It is also substantially similar to the proposals in the Final Report of the National Commission.

Subsection (a) provides that a person commits an offense if, after having been released pursuant to the provisions of chapter 35 or of subchapter A of chapter 36: (1) he fails to appear before a court as required by the conditions of his release; or (2) he fails to surrender for service of sentence pursuant to a court order. The conduct element in these offenses is an act of omission, i.e., the offender "fails to appear" or "fails to surrender." Since no culpability standard is specifically set forth, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the nature of his conduct.[39] The remaining elements are all existing circumstances. As no culpability level is specifically designated, the applicable state of mind to be established is, at a minimum, "reckless."[40]

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[38] *United States* v. *DePugh, supra* note 36.

[39] See sections 303(b)(1) and 302(b)(1).

[40] See section 303(b)(2).

It is believed that the concept of "willfully" which appears in the current bail jumping statute as interpreted in *United States* v. *DePugh*[41] and *United States* v. *Hall*[42] is most closely preserved by the definition of "reckless" in section 302(c) which requires an awareness but disregard of a substantial risk that the circumstances exist and characterizes the risk as that which is of "such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation." In this instance, in order to obtain a conviction for bail jumping, the prosecution must show that the defendant was aware of the risk that the requirement that he appear might exist but disregarded that risk.

Often a defendant realizes that he may have to appear but simply disappears, moves and fails to leave a forwarding address, fails to keep in touch with his attorney, or does not respond to notices and when later apprehended defends on the grounds that he was out of town on the designated appearance date, that he never received any notice, or the like. Under the "reckless" standard, the defendant could be convicted for bail jumping upon a showing that he was aware that he might have to appear but disregarded the substantial risk that the requirement existed. Stated otherwise, the risk involved is that an appearance date will be set and that there will be a resulting failure to appear. Conduct involving a failure to keep in contact and in touch with the situation amounts to a conscious disregard that an appearance date will come and pass. A person released on bail can be charged with a gross deviation from the standard of conduct applicable to the ordinary person when he fails to keep in touch with the status of his case or places himself out of reach of the authorities and/or his attorney.[43]

Subsection (b) provides that it is an affirmative defense that "uncontrollable circumstances prevented the defendant from appearing or surrendering, that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist." This provision is based upon the recommendation of the National Commission.[44] As noted in the Working Papers,[45] it is intended that the defense should apply where, for example, a "person is recuperating from a heart attack and to leave his bed would imperil his life, or, after he had made careful plans for transportation to the court house, his vehicle breaks down or unexpected weather conditions bring traffic to a halt." The requirement of appearance or surrender as soon as circumstances permit was not part of the National Commission's proposal, but was included by the Committee for two reasons: first, in order to confirm the defendant's lack of bad faith in failing to appear or surrender; and, second, to encourage the defendant to appear or surrender even after he fails to so do as required. Since the defense is denominated as "affirmative", the defendant will bear the burden of proof as to the elements thereof by a preponderane of the evidence.[46]

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[41] *Supra* note 36.

[42] 346 F.2d 875 (2d Cir.), cert. denied, 382 U.S. 910 (1965).

[43] See *United States* v. *Bright, supra* note 37. Compare *Gant* v. *United States*, 506 F.2d 518 (8th Cir. 1974), cert. denied, 420 U.S. 1005 (1975).

[44] Final Report, § 1305 (3).

[45] Working Papers, p. 540.

Section 1312 provides that a person must have "been released pursuant to the provisions of chapter 35 or of subchapter A of chapter 36" in order for the offense to apply. Chapter 35 revises the Bail Reform Act and specific reference to that chapter puts within the bail jumping offense anyone released under the Act, including material witnesses. As noted above, subchapter A of chapter 36 embodies the provisions dealing with release of persons charged and adjudicated as juvenile delinquents, and the reference here is designeed to create a specific offense of bail-jumping applicable to such person. The phrase "upon condition that he appear," contained in section 1305 of the Final Report, is superfluous as that is the meaning of release pursuant to subchapter A.

After requiring that the offender has been released pursuant to the provisions of chapter 35 or subchapter A of chapter 36, subsection (a)(1) goes on to require that the released person fail to appear before "a court as required by the conditions of his release." The word "court" is defined in section 111 to include the presiding judge. The word "judge" is defined in section 111 to include any "judicial officer" and is to be interpreted to mean court or judicial officer as those terms are used in the Bail Reform Act. As in that Act, the word is intended to be broadly defined to cover any person authorized pursuant to section 3501 of the bill, as reported, and the Federal Rules of Criminal Procedure to grant bail or otherwise release a person charged with or convicted of a crime or who is a material witness.[47] It is not intended to cover such lesser court officials as probation officers, marshals, bail agency personnel, and the like. The holding in *United States* v. *Clark*[48] that a probation officer is not a judicial officer so that a failure to appear before him as required by the court is not bail jumping is specially endorsed, and section 1312 should be interpreted to reach the same result. Bail jumping is an offense intended to apply to actual court appearances before judges or magistrates and not to other court personnel, with the sole exception of a failure to surrender for service of sentence, as covered in subsection (a)(2). In this situation the Committee believes that the failure to appear is tantamount to a failure to appear before a court and is equally deserving of punishment.[49]

The term "as required" in subsection (a)(1) has been held not to be unconstitutionally vague when combined with a requirement of "willfully".[50] The same result clearly follows when it is combined with the equivalent culpability term "reckless" as used in the proposed Code.

As indicated in connection with the discussion of the culpability standard of "reckless," it is often the case that accused persons who by their own acts place themselves out of touch with the authorities defend on the basis that they never received actual notice of a scheduled appearance date and thus cannot be charged with a failure to appear "as required." Actual notice of an appearance date, however, is not an element of the offense under 18 U.S.C. 3150, the language of which is similar to that of proposed section 1312.[51] The burden on the government is only to see that reasonable efforts are made to serve notice on the defendant as to any mandatory court appearance. In *United States* v. *DePugh, supra,* the defendant had gone underground and had left no forwarding address with court officials or his attorney. Notice of the trial date was given to the defendant's wife at his last known address and to the defendant's attorney. Such notice was deemed sufficient to make the appearance "as required." It would also suffice under section 1312.

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[46] See the definition of "affirmative defense" in section 111.

[47] See 18 U.S.C. 3141.

[48] 412 F.2d 885 (5th Cir. 1969).

[49] See *United States* v. *West, supra* note 37.

[50] See *United States* v. *DePugh, supra* note 36.

Section 3146(c) of title 18, United States Code, provides that a judicial officer authorizing a release under the Bail Reform Act must issue an order that, *inter alia,* informs the released person of the penalties applicable for violation of the conditions of release. In *DePugh,* it was argued that issuance of such an order is a condition prerequisite to a bail jumping prosecution under 18 U.S.C. 3150. That contention was rejected. The court cited the legislative history of 18 U.S.C. 3150 to find that 18 U.S.C. 3146(c) is designed to enhance the deterrent value of criminal penalties but that it was not intended to establish the issuance of the order as prerequisite to subsequent prosecution. That history and the *DePugh* holding with respect to the effect of 18 U.S.C. 3146(c) are specifically endorsed.[52]

3. Jurisidction

The reference to chapters 35 and 36 in the offense section which relate to Federal statutes makes a separate statement of jurisdiction for section 1312 unnecessary, and it is omitted.

It has been suggested that aliens pending deportation who fail to appear as required should be covered in the bail jumping statute. They have not been included in section 1312 because they have not been traditionally considered as within the bail jumping offense in the past, and because little need for their inclusion has been demonstrated. This and other categories can easily be added to section 1312, if deemed necessary, by inserting the relevant chapter or title numbers in subsection 132(a).

4. Grading

As noted above, the grading for section 1312 has been designed to parallel the grading for the offense for which the defendant has been released. Thus, bail jumping for a Class A, B, or C felony is graded as a Class C felony, and bail jumping for a Class D or E felony is graded as a Class D or E felony respectively. Paralleling current law, the penalty for a Class D felony carries a six-year maximum term in prison if the release was while awaiting sentence, pending review of sentence, appeal, or certiorari after a conviction of any offense other than a Class A, B, or C felony; bail jumping for release after conviction for those higher level felonies is graded at the Class C level, an increase over the current law levels. Class A misdemeanor treatment is provided for all other cases, including those involving misdemeanants, juvenile delinquents, and material witnesses.

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[51] *Ibid.; United States* v. *Bourassa, supra* note 35.

[52] See section 3502(h) of S. 1630 as reported, which specifically states that a failure to advise the person of the applicable penalties for failure to appear is not a bar or a defense to a prosecution for bail jumping under section 1312.

SECTION 1313. ESCAPE

1. In General

Section 1313 punishes escape as a form of obstruction of a government function. It substantially carries forward existing law while adopting several changes suggested by the National Commission to improve the statutory definition of escape as an offense. In particular, the bill, as reported, reflects the view of the consultant to the National Commission that "escape is removal from custody beginning at the time of the arrest (or surrender in lieu of arrest) and continuing up to release on bail or personal recognizance or on probation or parole or full, unconditional release."[53]

2. Present Federal Law

The basic Federal statute on escape is 18 U.S.C. 751. It prohibits escape from three types of custody. First, section 751 proscribes the escape or attempted escape of any person from the custody of the Attorney General, from his authorized representative, or from any institution or facility in which the person is confined by order of the Attorney General; second, it prohibits an escape or attempted escape from any custody under, or by virtue of, any process issued under the laws of the United States by any court, judge, or magistrate; and, third, it prohibits the escape or attempted escape from the custody of an officer or employee of the United States pursuant to "lawful" arrest. Only the third category—escape from an arresting officer—requires that the method of obtaining custody, in this case and arrest, be "lawful." Thus under current law a defense exists for the person who escapes from an arresting officer if the arrest, itself is improper.[54] The other categories do not require that the original method of obtaining custody be "lawful"[55] For example, a person, although illegally convicted, who escapes from a Federal prison facility violates 18 U.S.C. 751. The rational underlying this result is that persons wishing to test the validity of their confinement should do so by legal rather than physical means which may endanger life.

The word "escapes" is not otherwise defined in section 751. The courts have extended its meaning, however, to such things as absconding from a part-time release job instead of returning to prison,[56] failing to return after a furlough, [57] and signing out from a pre-release guidance center and failing to return at a designated time.[58] Confinement in the custody of the Attorney General includes confinement for purposes of extradition.

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[53] Working Papers, p. 544. See also Final Report, § 1306(3)(a), defining the term "official detention."

[54] See *United States* v. *McKim*, 509 F.2d 769 (5th Cir. 1975), which indicates that the validity of the arrest is a defense only where the escape occurs prior to presentment of the defendant before a magistrate.

[55] *United States* v. *Allen*, 432 F.2d 939 (10th Cir. 1970).

[56] *Nace* v. *United States*, 334 F.2d 235 (8th Cir. 1964).

[57] *United States* v. *Coggins*, 398 F.2d 668 (4th Cir. 1968).

[58] *McCullough* v. *United States*,369 F.2d 548 (8th Cir. 1966).

If the custody or confinement is a result of an arrest for a felony or a conviction of any offense, escape is punished by a maximum term of five years in prison. If the confinement is for extradition, or is a result of an arrest or charge for a misdemeanor, or because of an arrest or confinement in connection with juvenile proceedings, then escape under 18 U.S.C. 751 is punished by a maximum term of one year in prison.

Several other sections of title 18 also deal with the general subject of escape. 18 U.S.C. 752 prohibits conduct by those who rescue a prisoner or instigate, aid, or assist his escape. Grading is much the same as for 18 U.S.C. 751. Such conduct will generally be covered by the accomplice liability section of the Code (section 401) or by the section punishing hindering law enforcement (section 1311). The "rescue" element of 18 U.S.C. 752 and the statute dealing with rescue of a person sentenced to death (18 U.S.C. 753), where there is no active effort to escape by the prisoner himself which would bring the conduct within the confines of proposed section 1313, would be covered by proposed section 1302 (Obstructing a Government Function by Physical Interference).

18 U.S.C. 755 deals with a public servant who, having custody of a Federal prisoner, "voluntarily suffers" or "negligently suffers" such person to escape. A voluntary act carries a maximum term of two years in prison while a negligent act carries a maximum sentance of one year in prison.

3. The Offense

Section 1313 retains the descriptive word "escapes," as that term is used in current law. The National Commission sought to define the offense in terms of a removal from "official detention" or a failure to return to "official detention" after temporary leave. There is no need, however, to change the terminology. The word "escapes" in 18 U.S.C. 751 has not created undue difficulty. On a case by case basis, most of the items included in the definition of "official detention" have been found to be covered by the term "escapes . . . from . . . custody" in current law. As the revisers of the New York penal law observed, in declining to define "escape" more specifically, the word has long been used "in its ordinary, accepted meaning and connotes an unauthorized voluntary departure from or substantial severance of official control".[59] For these reasons, the word "escape" has been retained in the operative subsection of the offense (1313(a)(1)). Furthermore, it is believed that the word "escape" is more descriptive and therefore better understood than the Commission's phrase "removes . . . himself from official detention" which requires qualifying phrases to limit the ambit of the offense to situations where there is no right to leave.[60] In its common usage, "escape" includes the notion that there is no such right to leave.[61]

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[59] See McKinney's N.Y. Rev. Pen. Law, § 205.05, Comment, p. 669 (1967).

[60] The Commission added the phrase "without lawful authority" to its definition of the offense because standing alone the phrase "removes . . . himself from official detention" could suggest a violation whenever a prisoner leaves the detention facility with proper permission to do so.

[61] Further discussion on escape may be found in Hearings, pp. 7490–7492.

In an effort to insure completeness of coverage, paragraph (a)(2) of section 1313 is included. It penalizes the person who "fails to return to official detention following temporary leave, granted for a specified purpose or a limited period pursuant to the terms under which such leave was granted." The word "escape" as used in current law might well be sufficient to reach this type of situation. Including subsection (a)(2), however, eliminates any need to litigate, in the future, the issue of whether such temporary leave as furloughs, release with or without guards to testify in court, to attend a funeral, or to visit a sick family member, are encompassed within the scope of the word "escape."

The culpability level adopted for escape is "knowing." The conduct element is "escapes" in subparagraph (1) and "fails to return" in subparagraph (2). Because no culpability level is specified, the general rule of construction in section 303(b) is operative designating "knowing" as the state of mind with respect to the conduct. The remaining elements of the offense, e.g., "from official detention" and "to official detention following temporary leave," are existing circumstances and under section 303(b) the culpability is "reckless." Thus, a person is guilty of an offense if (1) he is reckless as to the fact that he is subject to official detention, that is, he is aware that he may be in official detention, e.g., under arrest or in custody, but disregards the substantial risk that he is in fact in official detention, and (2) knowingly leaves the detention area or breaks from custody.

The term "official detention" is elaborately defined in the general definitions section of the bill, as reported. The definition departs from the general concept of "custody of the attorney general," or custody pursuant to court process, and instead states in particular the types of custody covered. Under section 111, "official detention" is defined to mean:

> (a) detention by a public servant, or under the direction of a public servant, following arrest for an offense;[62] following surrender in lieu of arrest for an offense; following a charge or conviction of an offense or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance; or pending extradition, deportation, or exclusion; or (b) custody by a public servant, or under direction of a public servant, for purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; "official detention" does not include supervision or other control, other than custody during specified hours or days, during release pending trial or appeal, pursuant to the provisions of chapter 35; during release on probation, pursuant to the provisions of chapter 21; during release following a finding of juvenile deliquency, pursuant to the provisions of subchapter A of

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[62] "Offense" is defined in section 111, and includes a violation of the Uniform Code of Military Justice. See 10 U.S.C. 857, 858.

> chapter 36; during release on supervised release following imprisonment, pursuant to the provisions of chapter 23; or during release on conditional discharge under a medical care or treatment regimen pursuant to the provisions of subchapter B of chapter 36.

Although the definition by and large speaks for itself, some comments are in order. The reference to "detention . . . following a charge or conviction of an offense or an allegation or finding of juvenile delinquency" is intended to include the use of "halfway houses" and the like where prisoners, during the last few weeks or months of their incarceration, can live and work under supervision while at the same time can readjust to freedom and society. The requirement to live in time can readjust to freedom and society. The requirement to live in the halfway house and to return to it as required, whether it be nightly or just on weekends, suffices as custody so that the halfway house is a facility used for official detention. Leaving that facility improperly or failing to return when required is escape as contemplated in section 1313. This would not, however, apply to a community treatment facility for a person on parole or probation.[63] Nor would it apply to a halfway house environment when living there is part of the conditions imposed for supervised release after imprisonment pursuant to section 2303.

The reference to "detention . . . following arrest" is meant to include only situations where a true arrest has occurred; as under present law, the Committee does not intend to punish as escape flight following a detention for a limited purpose short of arrest (e.g., a "stop" pursuant to *Terry* v. *Ohio,* 392 U.S. 1 (1968) or a detention pursuant to 8 U.S.C. 1357).

Detention of an alien held for deportation or exclusion appears to be covered under 18 U.S.C. 751 because such persons are clearly held in the custody of the Attorney General. However, no penalty is set forth in section 751 for the escape of such an alien. To the Committee's knowledge, there are no reported cases on the subject, ostensibly because such persons are usually deported upon recapture. Under section 111 such detentions are specifically included in the definition of "official detention" to make it clear that an escape could, in such a case, be prosecuted.

The reference to detention under a law authorizing civil commitment in lieu of criminal proceedings or authorizing such detention while criminal proceedings are held in abeyance is intended to cover commitments and detentions under statutes such as the Narcotic Addict Rehabilitation Act and to eliminate the necessity for separate escape statutes under such acts.[64]

Furthermore, the definition of "official detention," like the National Commission definition, sets forth certain exclusions from the meaning of "official detention," making section 1313 inapplicable.

First, the definition excludes restrictions imposed as conditions of release under the Bail Reform Act of 1966[65] unless the condition requires a return to custody after specified hours of release. Thus a person who is released on bail to work during the day and who is required to return to a detention facility at night[66] violates the escape statute if he fails to so return. On the other hand, violations of other conditions, including failure to obey a third party custody order,[67] do not amount to escape. Failure to appear as required after release on bail is, of course, bail jumping (section 1312) and not escape.

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[63] See seaction 2103(b)(12), *infra.*

[64] See 42 U.S.C. 3425.

[65] 18 U.S.C. 3146 *et seq.*

Second, the definition does not apply to supervision of a person on probation. The concept of probation is release under supervision—it is not custody even if, as an incident of either method of release, the person is required to live in a community treatment facility.[68]

Third, the definition excludes restrictions imposed after release due to conditions imposed on a juvenile delinquent other than custody after specified hours of release.

Fourth, it does not cover supervised release following imprisonment discussed above, and release on conditional discharge requiring a medical care or treatment regimen under subchapter B of chapter 36, dealing with offenders with mental disease or defect.

4. Affirmative Defense

Section 1313 establishes an affirmative defense that largely parallels the defense suggested by the National Commission. Subsection (b) reiterates the established rule that illegality in bringing about or maintaining an official detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a prosecution for escape except in certain limited stituations. Under current 18 U.S.C. 751 lawfulness of the arrest can only be challenged if the escape is from an arresting officer, but not if it is from a detention facility.[69] This general principle is followed in section 1313. The legality of the detention may be challenged if three factors coincide: (1) the escape is not from any facility used for official detention; (2) the escape does not involve a substantial risk of harm to the person or property of another; and (3) the official detention was not in good faith. This defense will apply primarily to escapers from arresting officers. The defense is not as broad as that of current law because the lawfulness of an arresting officer's acts will not be the only test, but, in addition, the escape must not create any substantial risk of injury to the officer or another. The added requirement regarding danger to others stems from the view expressed in connection with section 1302 (Obstructing a Government Function by Physical Interference) that the place to test the lawfulness of the arrest is in the courts and not the streets. The requirement that the detention "was not in good faith" is the counterpart to the similar requirement of the defense provided in section

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[66] See section 3502(c)(2)(M).

[67] See section 3502(c)(2)(A).

[68] See section 2103(b)(12) of the bill, as reported.

[69] *United States* v. *Allen, supra* note 55. This section thus fails to codify the developing affirmative defense, recently recognized by the Supreme Court under 18 U.S.C. 751 and by some state courts, of escape to avoid a threat of death, forcible sexual attack, or substantial bodily injury, where there is no time for complaint to the prison authorities or the courts, no force is used in the escape and the escapee immediately reports to the proper authorities when he has attained a position of safety. *See United States* v. *Bailey,* 444 U.S. 394 (1980); *United States* v. *Boomer,* 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978); *People* v. *Lovercamp,* 43 Cal. App. 3d 823, 1974. The Committee however does not intend to foreclose such a defense from being raised under section 501.

1302(b)(1) in a prosecution for obstructing a government function by physical interference, and the earlier discussion of that requirement should be consulted here.

It should be noted that an escape from an arresting officer and the application of the affirmative defense can only occur after the person has first been taken into custody and subsequently acts to escape. Resisting arrest is covered under section 1302 and is not escape.

The National Commission offense dealing with public servants who permit escape through either reckless or negligent conduct,[70] modeled on 18 U.S.C. 755, is not included in the proposed Code. In the case of negligence or in the case of recklessness, such conduct can be penalized by discharging the public servant involved. Discharge from public employment is an adequate sanction for such acts; criminal penalties are considered to be too servere especially for negligent acts.

5. Jurisdiction

There are three separate bases for Federal jurisdiction over the offense of escape. First, jurisdiction exists if the official detention results from an arrest made, or an order or process issued, under the laws of the United States. This would cover any person held pursuant to a Federal court order even if the person is held in a State or local jail and escapes from such non-Federal custody.

Second, Federal jurisdiction exists if the escape is from a Federal public servant. Thus, escape from such Federal law enforcement officers as arresting officers, marshals transporting a prisoner for a court appearance or for testimony, or Federal prison employees escorting prisoners outside of the prison walls is a Federal offense.

Third, jurisdiction exists if the escape is from a Federal facility used for official detention; it thus reaches State or local prisoners who might be housed for one reason or another (e.g., witnesses held pursuant to a writ of *habeas corpus ad testificandum*) in a Federal facility.

6. Grading

In grading, section 1313 parallels current law. Thus escape is a Class D felony (up to six years in prison) if the actor was in official detention on a charge of, or an arrest for, a felony, or if the detention is pursuant to the actor's conviction for an offense except for an adjudication of juvenile delinquency. Any other escape is a Class A misdemeanor (up to one year in prison).

The Committee rejected the National Commission's suggestions for grading higher where weapons, force, or threats were used during the escape. The use of a firearm, destructive device, or other dangerous weapon during the escape or during the immediate flight from the escape is, itself, a separate Federal offense punishable as a felony under section 1823. The use of force or threats against a Federal public servant to influence the performance of an official act (section 1357), and the homicide and assault series of offenses (sections 1601–1614) as well as the kidnapping (section 1621) and aggravated restraint (section 1622) offenses are also applicable if committed during an escape either through ancillary jurisdiction, where applicable, or because the victim is a Federal law enforcement officer or a Federal employee of a penal or correctional institution.

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[70] Final Report § 1307.

SECTION 1314. PROVIDING OR POSSESSING CONTRABAND IN A PRISON

1. General

Section 1314 prohibits the introduction or possession of any contraband item in a Federal detention facility. In general, it carries forward the reach of current 18 U.S.C. 1791. However, whereas section 1791 punishes the introduction of any item of contraband, be it a firearm or a can of food, with the same penalty (ten-year imprisonment maximum), proposed section 1314 improves upon existing law by differentiation between the most dangerous and disruptive items that may be introduced into a prison and those whose presence is of far less ramification. This differentiation is achieved by means of a grading system that ranges from a high of a Class C felony (up to 12 years in prison) down to a low of a Class B misdemeanor (up to six months in prison). In continuing the complete ban of contraband by current law, section 1314 reflects the peculiar penal institution requirements needed to ensure discipline, safety, and security.

2. Present Federal Law

Under 18 U.S.C. 1791 it is illegal for anyone, contrary to any rule or regulation promulgated by the Attorney General, to introduce or to attempt to introduce into or upon the grounds of any Federal penal facility "anything whatsoever." Furthermore, it is unlawful "to take or attempt to take or send" from such facility anything whatsoever contrary to any rule or regulation promulgated by the Attorney General.

To implement this prohibition, the Attorney General is granted authority under 18 U.S.C. 4001 to promulgate rules for the regulation of Federal penal facilitics. Pursuant to such authority, the Attorney General has promulgated 28 C.F.R. 6.1 which provides that the introduction of "anything whatsoever" into any Federal penal facility or the taking or attempting to take or send anything therefrom "without the knowledge or consent of the warden or superintendent" of the facility is prohibited. The range of the regulation is thus extremely broad and prohibits anything at all from introduction or removal without the knowledge or consent of the warden.

18 U.S.C. 1792 makes it illegal to take into a prison "or from place to place therein" any firearm, weapon, explosive, or any lethal or poisonous gas, or any other substance or thing designed to kill, injure, or disable any prison employee or inmate.

Both 18 U.S.C. 1791 and 1792 carry a maximum penalty of ten years in prison. Because there is no differentiation with respect to different classes of contraband, this ten-year maximum applies whether the contraband is a weapon or merely a package of cigarettes.

The constitutionality of current sections 1791 and 4001 and 28 C.F.R. 6.1 was recently tested in the Third Circuit.[71] The court held that 18 U.S.C. 1791 is a proper Congressional delegation of power, that the regulation is not void for vagueness, and that section 1791 is not overbroad and does not adversely affect protected First Amendment rights.

3. The Offense

The offense subsection is divided into two paragraphs, one dealing with any person who provides certain contraband to an inmate and the other dealing solely with inmates. However, no distinction is made in the list of prohibited items introduced or possessed as between inmates and persons other than inmates. Under paragraph (a)(1) a person commits an offense if he "provides" to an inmate or introduces into an official detention facility certain contraband items. The phrase "provides to an inmate" would cover the act of a prison guard, employee, or even another inmate giving or selling such prohibited items as firearms, drugs, or alcoholic beverages to an inmate. The phrase "introduces into an official detention facility" covers the person—such as a visitor, a new inmate, or a prison employee—who brings the object into the prison from the outside whether or not the object ever reaches an inmate.

As to an inmate himself, paragraph (a)(2) of section 1314 prohibits him from making, possessing, procuring, or otherwise providing himself with a prohibited object. This is intended to have a broad interpretation in order to preserve prison discipline and security. Thus, taking a bottle of liquor as an example, an inmate may not buy it from anyone, nor make it himself, nor steal it from another, nor even possess it as a gift from a fellow prisoner.

In paragraph (a)(1), the conduct element is "provides" or "introduces" and in paragraph (a)(2), "makes, possesses, procures, or otherwise provides." In both subparagraphs the conduct must, at a minimum, be committed "knowingly."[72] The remaining elements, e.g., "inmate of official detention facility", "firearm", "weapon", and "narcotic drug", constitute existing circumstances and under the rule of construction provided in section 303(b), the minimum state of mind which must be proved is "reckless." Thus, for example, a defendant need not know that a device is "destructive" under subparagraph 1(A) but need only be aware of the substantial risk that the device is destructive and nevertheless disregard that risk.[73]

The section contains a list of prohibited items. This list is intended, by and large, to serve grading purposes and will be discussed in more detail in that context. In the context of the offense, however, it should be noted that the item must be provided or introduced, contrary to a statute, or a regulation, rule, or order issued pursuant thereto.[74] However, no culpability need be shown as to the existence of the statute, regulation, etc.[75]

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[71] *United States* v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973). See also *United States* v. *Chatman*, 538 F.2d 567 (4th Cir. 1976).

[72] No state of mind is specified in the section with respect to these elements. Accordingly, under the rule of construction in section 303(b), the state of mind read into the statute for the conduct elements is "knowing."

[73] The terms "firearm" and "destructive device" are defined in section 111.

With respect to an inmate, paragraph (a)(2) incorporates by reference the categories of contraband enumerated in paragraph (a)(1). That paragraph includes as a catch-all category "any other object". The adoption of such a broad prohibition is necessary because of the array of objects that can be used to disrupt the discipline or endanger the safety within a prison. There are many items the introduction of which into, or the presence of which in the facility is valid but which can be used for improper purposes. Examples of such items would be kitchen table knives, screwdrivers, pieces of metal and like objects. Seemingly innocuous items are also readily convertible into dangerous objects. Yeast can be utilized as an ingredient in an explosive device; tin cans of food can be converted into knives and keys; and letters that do not pass through prison censorship can be used to plan escapes and other crimes.[76] It is not the mere presence of such items in the prison that is deleterious but the removal of such items to cellblocks and the menacing or other improper use of such items that can thwart prison safety, discipline, or order.

An example of the type of conduct to be reached by these provisions can be found in *United States* v. *Bedwell.*[77] There the defendant was observed by a shop foreman sharpening a piece of metal on a belt sander in an apparent attempt to manufacture a knife. He suspiciously dropped the object on being approached. Prosecution under 18 U.S.C. 1792 failed because there was no proof that the defendant had moved the object from place to place in the facility. Prosecution under 18 U.S.C. 1791 probably would not have been successful because all the parts of the home-made knife appeared to have been brought into the prison properly. Under proposed section 1314, however, conviction would be possible if from the facts it could be shown that, contrary to a statute, rule, regulation, or order, the defendant was knowingly making or possessing an object which might be used as a weapon or as a means of facilitating escape.

Whether the item falls within one of the specific groupings or the broad concept "any other object," it must be made, possessed, procured, or otherwise provided in violation of a statute, regulation, rule or order. It is expected that the regulations, rules, etc. will specify a list of prohibited items, such as firearms, drugs, or letters not passed through censorship, or will define the prohibition in terms of conduct surrounding the introduction, making, possessing, etc., of the item. For example, with respect to kitchen table knives, or forks, the regulation could prohibit the possession of such items outside the dining area, or regarding pieces of metal in a workshop, the regulations could prohibit the concealment of such items. In either case, whether possession of the item is absolutely prohibited or merely restricted, conduct in violation of the regulation would trigger criminal sanctions, the imposition of which is necessary to further prison safety, discipline and order.

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[74] The current regulation is 28 C.F.R. 6.1. 18 U.S.C. 4001, the current statute upon which the regulation is founded, is moved in the conforming amendments to that part of title 28 dealing with the Bureau of Prisons. Minor changes have been made.

[75] Section 303(d)(1).

[76] Written communications also afford major criminals a method to control their organizations from behind prison walls. The Committee takes note of the fact, however, that under current policies, the Bureau of Prisons does not read incoming mail addressed to an inmate from an attorney. Such mail is opened only to inspect it for physical contraband, with the inmate having the right to be present. See Brief for the United States as Amicus Curiae in *Wolff* v. *McDonnell* (case reported at 418 U.S. 539 (1974)).

[77] 456 F.2d 448 (8th Cir. 1972).

The section rejects the current law approach specifically prohibiting taking certain objects *from* a detention facility. Such an approach is unnecessary where an inmate is involved. He could be prosecuted for possession because he necessarily would have to possess an object, either directly or as an accomplice, before he could take or send it outside the facility. In the case of a third person, removing something from a prison does not constitute nearly the threat to prison discipline or safety as does the introduction of prohibited items. Because protecting prison discipline and safety is the underlying rationale for section 1314, there seems little reason to punish the non-inmate for removing an object whose presence in the prison is prohibited.

Current law includes, as a punishable offense, an attempt at introducing into, or the taking or sending out of, a penal facility of any prohibited item. 28 C.F.R. 6.1, in turn, talks of such acts being committed without the knowledge and consent of the warden or superintendent. In one recent case,[78] the warden gained knowledge of the acts of smuggling letters into and out of a Federal prison through the work of an undercover agent. The offense was prosecuted as an attempt but the conviction obtained on several counts dealing with the attempted violation of 18 U.S.C. 1791 was reversed on the theory that because the warden, in fact, knew what was happening, it was legally impossible to attempt the offense because the regulation required that the warden not know. The court failed to find authority under Federal law for an attempt conviction to prevail in the face of legal impossibility. Whatever the validity of the Third Circuit's analysis of the current state of legal impossibility as it relates to the law of attempt, a different result is clearly mandated by the attempt section of the proposed Code. Under subsection (c) of section 1001 (Criminal Attempt) it is provided that in a prosecution for an attempt there is no defense "that it was factually or legally impossible for the actor to commit the crime, if the crime could have been committed had the circumstances been as the actor believed them to be."

Current 18 U.S.C. 1792 is generally included within section 1314. That statute covers, *inter alia,* moving a dangerous weapon from place to place within a penal institution. Because proposed section 1314 prohibits mere possession of a prohibited item, there is no need to prove movement of the weapon by the inmate. On the other hand, 18 U.S.C. 1792 requires no proof that the dangerous weapon was prohibited by any regulation. This added requirement of proof should pose no problem because 28 C.F.R. 6.1 need only be amended to track the language and prohibitions of new section 1314 as it does now for current 18 U.S.C. 1791.

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[78] *United States* v. *Barrigan, supra* note 71.

4. Jurisdiction

Jurisdiction is strictly limited to areas of direct Federal interest. Jurisdiction for a prosecution under section 1314 exists only if the official detention facility is a Federal facility.[79] The Federal interest in discipline, safety, and security is paramount in Federal institutions. If a Federal prisoner is confined in a State or local institution, the primary interest in barring contraband from those facilities lies with State or local officials. Accordingly, a Federal prisoner in a State or local facility possessing or making a contraband object does not commit a Federal offense.

"Official detention," as used in section 1314, carries the same meaning as set forth in section 111. However, when the term appears in section 1314 it is always modified by the word "facility" thus limiting the statute to prisons, jails, court-house detention pens, and any other facility used for purposes of official detention.

5. Grading

A major criticism of existing 18 U.S.C. 1791, as previously noted, is the harsh ten-year imprisonment maximum penalty imposed for all contraband notwithstanding the varying degrees of potential harm posed by different objects. Current law does not discriminate between a firearm and heroin on the one hand and a can of food or a dollar bill on the other.[80] Section 1314 provides a more discriminating grading structure ranging from a Class C felony to a Class B misdemeanor depending on the nature of the prohibited object involved. There are four grading classifications as follows:

A. It is a Class C felony (up to twelve years in prison) if the object is a firearm or destructive device. These are the objects reserved for the highest grading because they are the most dangerous objects to be found in a prison.

B. Other weapons or objects which may be used as a weapon or as a means of facilitating escape, or a narcotic drug as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 812, are graded at the next lowest level, a Class D felony, punishable by up to six years in prison.

The drugs included are considered the most dangerous controlled substances—heroin, cocaine, and the like. The presence of such drugs in a prison which often houses numerous former addicts is most disruptive of prison discipline, safety, and security. This section is not intended to be exclusive. All of the penalties for drug offenses contained in chapter 18 of the Code may also be applicable in a case involving drugs in a detention facility.

C. It is a Class A misdemeanor (up to one year in prison) if the object is any controlled substance other than a narcotic drug defined in the drug act, an alcoholic beverage, or United States currency. Prison experience has shown that the presence of these items in a prison is highly disruptive of prison discipline.

D. Any other prohibited object that is the subject of a section 1314 violation will be a Class B misdemeanor carrying one of the lowest penalties in the Code (a maximum of six months in prison). A penal sanction is deemed necessary since, as previously noted in the discussion of the elements of the offense, prison authorities believe that internal prison sanctions are often insufficient to control the flow of contraband items within prison walls.

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[79] The American Bar Association's Section of Criminal Law took the view that Federal jurisdiction should extend to State or local facilties used to hold Federal prisoners when Federal inmates are implicated. See Hearings, p. 5805.

[80] See, generally, Hearings p. 7492.

SECTION 1315. FLIGHT TO AVOID PROSECUTION OR APPEARANCE AS A WITNESS

1. In General

Section 1315 is an offense prohibiting unlawful flight to avoid prosecution or appearance as a witness. The basic purpose of this offense is threefold. First, in its own right, it serves as a basis for prosecuting fugitives from justice who have fled across State lines. Second, it also serves as a basis for the Federal prosecution of accessories after the fact who hinder law enforcement by harboring or concealing a fugitive from justice.[81] Third, it authorizes the Federal government to assist in the location and apprehension of fugitives from State or local law enforcement authorities. Simply stated, it grants Federal authority to arrest State fugitives who have fled interstate. The Federal government, with national law enforcement authority and resources, is uniquely able to afford fugitive apprehension assistance to the States and assist in removing the major threat to the safety of citizens in other States posed by fugitives in interstate flight.

2. Present Federal Law

Proposed section 1315 is derived from current sections 1073 and 1074 of title 18. Section 1073 bars movement or travel in interstate or foreign commerce with intent to avoid: (A) prosecution or detention after conviction for a felony under the laws of the place from which the fugitive has fled; (B) giving testimony in a criminal trial involving a felony in the place from which he has fled; and (C) service of process or contempt proceedings for failure to attend and testify before an agency of the State from which he has fled empowered to conduct investigations of alleged criminal activities.

18 U.S.C. 1074 parallels the first two subsections of section 1073 except that its application is limited to certain specific offenses involving destruction by fire or explosive of any building or structure. The sections appear to overlap. The destruction of any building by fire or explosion, outside of perhaps an unoccupied storage shed, would most probably be a felony under any State law. Accordingly, flight to avoid prosecution or giving testimony in such cases would be covered under both sections 1073 and 1074.

The maximum punishment for both sections is the same—five years' imprisonment. Moreover, both statutes have a special venue provision which requires that any prosecution under either statute be conducted in the Federal judicial district in which the crime was committed or the service or contempt proceeding avoided. In addition, no prosecution can be brought under 18 U.S.C. 1073 except upon the formal approval in writing of the Attorney General or an Assistant Attorney General.

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[81] See section 1311 (Hindering Law Enforcement).

The Committee takes notice of the fact that the current fugitive felon statutes have served well as vehicles for Federal assistance to State and local law enforcement particularly because fugitives in interstate flight can pose a major threat to the safety of citizens in other States. Moreover, there is no record of any abusive use of the statute, of unnecessary Federal prosecutions, or of usurpation of State or local functions in the almost forty years of history of the Fugitive Felon Act.

3. The Offense

Section 1315, like the proposal of the National Commission,[82] parallels existing 18 U.S.C. 1073 in large measure. In general, the changes that are made are technical in nature, designed either to clarify the offense or to take advantage of values of codification (e.g., using defined terms, such as "official proceeding").

Subsection (a) provides that:

> A person commits an offense if he leaves a State or local jurisdiction with intent to avoid:
>
> (1) criminal prosecution, or official detention after conviction, for the commission of, or for a conspiracy to commit, a State or local felony in such jurisdiction;
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> (2) appearing as a witness, giving testimony, or producing a record, document, or other object in an official proceeding in which a State or local felony in such jurisdiction is charged or being investigated; or
>
> (3) contempt proceedings, or criminal prosecution, or official detention after conviction for failure to appear as a witness, to give testimony, or to produce a record, document, or other object in an official proceeding in which a State or local felony in such jurisdiction is charged or being investigated.

The conduct element is leaving a jurisdiction. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[83]

The element that the jurisdiction is "State or local" is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[84]

Paragraphs (1), (2), and (3) state the particular, alternate purposes for which it must be shown that the conduct was performed. That is, the prosecution must establish that the defendant knew he was fleeing or leaving and, in the course of doing so, had an intent to avoid certain circumstances, i.e., criminal prosecution,[85] official detention after conviction,[86] appearing as a witness, giving testimony or producing information,[87] contempt proceedings, etc.

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[82] See Final Report, § 1310.

[83] See section 303(b)(1) and 302(b)(1).

[84] See section 303(b)(2) and 302(c)(1).

[85] The Committee intends that the existing interpretations of the "intent to avoid prosecution" element in 18 U.S.C. 1073 be followed under this statute. See e.g., *United States* v. *Bando*, 244 F.2d 833, 843 (2d Cir.), cert. denied, 355 U.S. 844 (1957); *Hett* v. *United States*, 353 F.2d 761 (9th Cir. 1965), cert. denied, 384 U.S. 905 (1966).

The circumstances which the accused was seeking to avoid by leaving all are in connection with a State or local felony. The term "felony" which includes a State or local felony is defined in section 111 as "an offense for which a term of imprisonment of more than one year is authorized." This avoids problems where a State, like New Jersey, labels some offenses punishable for more than one year, as high misdemeanors or other such terms. There is no reference to specific serious offenses, such as 18 U.S.C. 1074's destruction of a building by fire or explosion, because such references are unnecessary. It is believed that all serious offenses are encompassed within the phrase "State or local felony" as defined. The use of this phrase will also enable law enforcement officers to effect the arrest of felons without first seeking an arrest warrant.

The special venue provisions of sections 1073 and 1074 are continued but moved to the general venue section of the Code.[88]

Attorney General authorization is not included in the Code for the Fugitive Felon Act as it is in current law. It is the Committee's view that such matters are better handled on an administrative level rather than by statute. Prosecutions under present 18 U.S.C. 1073 are rare. It can be expected that this experience will continue in the future under section 1315.

There is no need to grant discretionary authority for Federal law enforcement authorities to decline Federal enforcement assistance under specified conditions, because such authority is inherently within the power of Federal law enforcement agencies.

4. Defense Precluded

Subsection (b) provides that it is not a defense to a prosecution under this section that the testimony or the record document, or other object would have been legally privileged or would have been inadmissible in evidence. An identical provision has been included in section 1311 (Hindering Law Enforcement), and the discussion relating to that provision should be referred to here.

5. Jurisdiction

The jurisdiction for proposed section 1315 is the same as that for the current sections it would replace. There is Federal jurisdiction over the offense of flight to avoid prosecution or giving testimony if the actor moves across a State or United States boundary in the commission of the offense.

6. Grading

Section 1315 provides Class E felony grading (i.e., up to three years in prison) for the offense.

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[86] The term "official detention" has been explained in connection with section 1313.

[87] Under subsection (b) it is not a defense that the testimony, or the record, document, or other object would have been legally privileged or would have been inadmissable in evidence. See the explanation of an identical provision in section 1311, applicable to subsection (a)(2).

[88] Section 3311(f).

SUBCHAPTER C.—OBSTRUCTIONS OF JUSTICE

(Sections 1321–1329)

This subchapter contains the offenses of witness bribery, corrupting a witness or informant, tampering with a witness, victim, or informant, retaliating against a witness or informant, tampering with physical evidence, improperly influencing a juror, monitoring jury deliberations, and demonstrating to influence a judicial proceeding, as well as a special proof provision relating to attempts to commit certain of these offenses. While the proposals generally follow the outline suggested by the National Commission, the Committee has made four modifications from the statutory scheme in the Final Report. First, a separate section entitled "Witness Bribery" (section 1321) has been added to parallel the proposed bribery offense (section 1351). Second, the Committee has restructured the offenses by consolidating the crimes of bribery involving a witness in an official proceeding and bribery involving an informant in a criminal investigation into one section (section 1322) and has separately defined the offenses of using force, threat, and the like against a witness, victim, or an informant in a section entitled, "Tampering with a Witness, Victim, or an Informant" (section 1323). Third, the Committee has decided to perpetuate the catch-all language of current law relating to influencing, or obstructing, or impeding the due administration of justice (section 1323(a)(2)), on the theory that the proven advantages of this language in 18 U.S.C. 1503 outweigh any supposed disadvantages that its presence creates. Fourth, the Committee has drafted a separate retaliation statute for injury to the person or property of a witness in an official proceeding or an informant in a criminal matter (section 1324). This permits restricting the application of section 1358 of the proposed Code to retaliation against public servants and leads to a more logical structuring of the various offenses in chapter 13.

1. In General and Present Federal Law

Current title 18 covers the general offense of obstructing justice in two contexts. First, 18 U.S.C. 201 prohibits the bribing of jurors, court officers, or witnesses; second, chapter 73 of title 18, entitled "Obstruction of Justice," prohibits a wide variety of acts which, if carried out, would result in a miscarriage of justice by corrupt methods.

Subsections (b), (c), (f), and (g) of 18 U.S.C. 201 reach the bribery of court officials and jurors by deeming these persons to be public servants. The Committee in its proposals on bribery and graft in sections 1321 and 1322 has continued this statutory scheme. Subsections (d), (e), (h), and (i) of 18 U.S.C. 201 cover the offenses of bribing a witness in any Federal court, or legislative or administrative hearing. The first two subsections parallel 18 U.S.C. 201 (b) and (c) and ban the "corrupt" offering or receiving of anything of value with intent to influence a witness' testimony under oath or with intent to influence a witness to absent himself from a hearing. Subsections (h) and (i) of 18 U.S.C. 201 parallel 18 U.S.C. 201 (f) and (g) and bar the offering or receiving of anything of value "for or because of" a witness testimony at any trial, hearing, or proceeding or his absenting himself therefrom. These latter sections drop the elements of a "corrupt" offer or solicitation and the requirement of a specific intent. Subsections (d) and (e) carry a penalty of up to fifteen years in prison; subsection (h) and (i), which can be considered as lesser offenses to the preceding subsections, carry a maximum penalty of two years in prison.

The obstruction of justice chapter in title 18 has seven specific statutes pertinent to this subchapter.[1] The principal of these are 18 U.S.C. 1503, 1504, 1505, 1506, 1507, 1508, and 1510.

Section 1503 covers a number of disparate offenses in one large and complicated section entitled: "Influencing or injuring officer, juror or witness generally." First, the statute forbids anyone to "corruptly," or by force or threat, endeavor to influence, intimidate, or impede a witness in any Federal court. Second, corrupt endeavors to influence, obstruct, or impede jurors or court officials are barred. Third, the statute makes it unlawful to injure any person or property of a party or witness in any Federal court proceeding on account of attendance or testimony at such proceeding. Fourth, it bars injury to the person or property of a juror or a court officer on account of the performance of official duties. Fifth, it forbids anyone, corruptly, or by force or threat, to influence, obstruct, or impede the due administration of justice or to endeavor to influence, obstruct, or impede the due administration of justice. This latter provision is a catch-all which, while often restrictively construed by the courts, has served as a vehicle for proseution of a number of offense affecting the proper functioning of the Federal courts. For example this provision has been held to reach the situation of a lawyer corruptly advising other persons to claim their Fifth Amendment privilege so as not to reveal facts before a grand jury.[2] Similarly, it has been held to include as within the term "witness" not only a person already called to testify, but also one expected to be called.[3] Likewise the Supreme Court has held that the word "endeavors," as used in the obstruction of justice statute, is broader than the concept of attempt and "describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent."[4] Finally, the indictment in the Watergate coverup case is a recent example of the effective use of this catch-all clause. In that case the defendants were charged with conspiring to violate this branch of the statute by endeavoring to have the Central Intelligence Agency interfere with the FBI investigation of the Watergate burglary.[5]

It is apparent that an overlap exists between an offer to bribe a witness under 18 U.S.C. 201 and a corrupt endeavor to influence a witness or a corrupt endeavor to influence or obstruct the due administration of justice by means of offering a bribe, under 18 U.S.C.

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[1] Four other sections contained in chapter 73 of title 18 will be considered elsewhere: 18 U.S.C. 1501 (Assault on a process server); 1502 (Resistance to extradition agent); 1509 (Obstruction of court orders); and 1511 (Obstruction of State or local law enforcement).

[2] See *Grunewald* v. *United States,* 353 U.S. 391 424 (1957); *Cole* v. *United States,* 329 F.2d 437 (9th Cir.), cert. denied, 377 U.S. 954 (1964).

[3] See *Hunt* v. *United States,* 400 F.2d 306, 307 (5th Cir. 1968), cert. denied, 393 U.S. 1021, (1969), and cases cited therein.

[4] *United States* v. *Russell,* 255 U.S. 138, 143 (1921).

[5] *United States* v. *Haldeman, et al,* 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

1503. There have been instances where such bribery efforts have resulted in an indictment, charging both offenses as separate counts based on essentially the same conduct. It has been held that, although based on the same transaction, the separate counts under the bribery and obstruction of justice statutes charge separate and distinct offenses.[6]

Section 1505 of title 18 is a parallel statute that applies many of the provisions of section 1503 to Federal departments and agencies as well as to congressional hearings. Thus, the catch-all phrase used in this section bars anyone from corruptly, or by threats or force, influencing, obstructing, or impeding or endeavoring to influence, obstruct, or impede, the due and proper administration of the law under which or impede, the due and proper administration of the law under which the proceeding is being held before any department or agency of the United States, or the due and proper exercise of the power of congressional inquiry. Similar provisions are included to protect witnesses at administrative or congressional proceedings from retaliatory injury to persons or property. There is, however, no protection from threats or injury directed toward administrative or congressional officers as there is in section 1503 for threats or injuries directed at court officers on account of their official duties.

Section 1505 has one proviso that is absent from section 1503. This deals with the destruction, alteration, or removal of material documentary evidence with the intent to evade any civil investigative demand duly made under the Antitrust Civil Process Act or under 18 U.S.C. 1968 (Civil Investigative Demand).

The maximum penalty for violation of 18 U.S.C. 1503 or 1505 is imprisonment for five years and a $10,000 fine.

18 U.S.C. 1504 prohibits any attempt to influence the action or decision of a juror by sending him any written communication in relation to an issue pending before the jury. This is an effort to insulate the jury from contact with litigants that falls short of bribery or "corrupt" plans to influence its decisions. It carries a relatively light maximum penalty of six months in prison.

18 U.S.C. 1506 proscribes theft, alteration, or falsification of any record, writ, process, or other proceeding in a court of the United States whereby a judgment is voided, reversed, or made ineffective. This statute, which carries a penalty of up to five years in prison, also bars the act of acknowledging any bail in the name of a person not consenting thereto. This latter provision is covered in the section 1343 of the Code concerning false statements.

Picketing or parading in or near a court house with intent to obstruct or impede the due administration of justice or to influence a judge, juror, witness, or court officer is made illegal under 18 U.S.C. 1507, a statute which carries a maximum penalty of one year in prison. The statute contains no definition of what "near" to a courthouse means, creating a problem of potential vagueness which has been discussed by the Supreme Court in relation to a conviction based upon a similar State law.[7]

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[6] *Slade* v. *United States*, 85 F.2d 786 (10th Cir. 1936).

[7] *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

Under 18 U.S.C. 1508, it is illegal to record the proceedings of a Federal grand or petit jury or to listen in or observe their proceedings. This offense carries a maximum penalty of one year in prison.

18 U.S.C. 1510, entitled "Obstruction of Criminal Investigations," makes it unlawful to willfully endeavor by means of bribery, misrepresentation, intimidation, force, or threats, to obstruct or prevent the communication of information relating to a Federal offense to a Federal criminal investigator. This statute, which was enacted in 1967, was made necessary by holdings that the basic obstruction statute, 18 U.S.C. 1503, did not apply until an official proceeding was initiated and that this required, at the least, the filing of a complaint.[8] It was thus necessary to protect informants at an earlier stage. The statute also prohibits injury to the person or property of an informant in retaliation for the giving of information. Violation of 18 U.S.C. 1510 carries a penalty of not more than five years in prison. The statute was carefully limited to information relating to a Federal offense given to Federal officers only. Thus, a bribe to a witness to a Federal crime not to report it to a local law enforcement officer does not violate the statute.

There are several other statutes in the United States Code dealing with various forms of obstruction of the judicial process.[9] One example is 18 U.S.C. 551 which, *inter alia,* bars the concealment or destruction of invoices or books dealing with merchandise imported into the United States if the act is done for the purpose of suppressing any evidence of fraud. Other examples are 15 U.S.C. 50, which makes it a misdemeanor to fail to attend or to testify at a Federal Trade Commission hearing or produce documentary evidence in response to a subpena, and 46 U.S.C. 239 (also a misdemeanor) barring any coercion or inducement of a witness to get him to testify falsely in connection with a shipping casualty.[10]

There is also inevitably somewhat of an overlap between some of the obstruction of justice statutes and the laws dealing with contempt of court.

SECTION 1321. WITNESS BRIBERY

1. In General

This section makes it an offense for a person knowingly to offer, give, or agree to give to another person, or to solicit, demand, accept, or agree to accept from another person anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding.

This statute is drafted in order to avoid the anomalous situation that, absent a special provision covering bribery of witnesses, bribery of a judge or juror under proposed section 1351 would carry a higher penalty than bribery of a witness, which could be reached only under one of the general obstruction of justice statutes in this subchapter. It is evident that bribery of a witness to influence his testimony is as disruptive of the basic integrity of the judicial system as would be the bribery of a juror to influence his verdict. Indeed all these offenses are identically graded in 18 U.S.C. 201. Section 1321 therefore parallels, as closely as possible, the bribery section (section 1351). Common terms such as "anything of value," "in return for an understanding or agreement," and "will be influenced" are utilized with the intention that the comments made about them in the bribery statute should apply here also with equal force. There is, moreover, identical grading, and the jurisdictional bases contained in section 1321 are similar to those in section 1351.

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[8] See *United States* v. *Scoratow,* 137 F. Supp. 620 (W.D. Pa. 1956); Working Papers, pp. 569-570.

[9] Some of these statutes overlap into the area of obstruction of a government function covered in another part of this report.

[10] Other statutes includes 45 U.S.C. 60, dealing with intimidation of witnesses to suppress information regarding the injury or death of a railroad employee, and 49 U.S.C. 1472(g), making it illegal to refuse to attend, testify, or produce books at a hearing before the Federal Aviation Administration.

The basic distinctions between the two offenses relate to the purpose and effect of the bribe. Thus, testimony in an official proceeding, rather than the official action of a public servant, is the object of the offense under section 1321, and the prohibited act is to influence the recipient's testimony at the official proceeding rather than to influence the recipient's official action as a public servant.

As will be more fully described in the discussion of the proposed statute on corruption of a witness or an informant (section 1322), the emphasis on bribing or corrupting a witness is not on the fact that an official proceeding is already pending. Rather, the focus is on the defendant's conduct in influencing or seeking to influence another's testimony in an official proceeding even though not yet instituted. This policy is implemented, in part, by the defense precluded subsection of section 1321 which eliminates the current restriction under 18 U.S.C. 1503 requiring that a proceeding be pending at the time of the illegal act.[11] This emphasis on the defendant's conduct in seeking to influence another's testimony is also implemented by omitting reference to the term "witness" for fear of importing the limiting interpretations on that word in current law. The problems with the word "witness" have concerned such issues as whether the witness has been subpoenaed or will be subpoenaed, and whether it is necessary to show that he actually intended to testify or only that the defendant believed he intended to testify.[12] Section 1321 avoids these shoals by barring payments to "another person" in return for an agreement that the recipient's testimony be influenced at an official proceeding.

2. *The Offense*

The conduct element in this section is offering, giving, or agreeing to give to another person, or soliciting,[13] demanding, accepting, or agreeing to accept from another person. As no culpability level is designated, the applicable culpability will be "knowing," thus requiring proof that the defendant was aware that he was offering, etc., or soliciting, etc., something from another person.[14]

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[11] See e.g., *United States* v. *Metcalf*, 435 F.2d 754 (9th Cir. 1970); *United States* v. *Baker*, 494 F.2d 1262 (6th Cir. 1974).

[12] See Working Papers, pp. 581-582.

[13] Solicit does not mean the conduct proscribed in section 1003 (Criminal Solicitation) but instead is intended to bear its dictionary meaning of "approach with a request," or "try to obtain by asking for." See section 111.

[14] See sections 303(b)(1) and 302(b)(1).

The elements that what is offered or solicited is "anything of value,"[15] and that the offer or solicitation is "in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding" are existing circumstances. As no culpabiity level is specifically set forth, the applicable state of mind that must be proved is "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed and his disregard was such as to constitute a gross deviation from the standard of care a reasonable person would exercise in such a situation.[16]

The terms "anything of value" and "official proceeding" are defined in section 111. The former term is not intended to encompass legitimate payments to witnesses of travel and subsistence expenses or a reasonable fee for the preparation of an expert's opinion.[17] The latter term is defined as a "proceeding or inquiry, including an investigative proceeding or inquiry, convened or instituted pursuant to lawful authority or a portion of such a proceeding or inquiry that is or may be heard before (a) a government branch or agency; or (b) a public servant who is authorized to take oaths. . . ." This definition is designed to be very broad and specifically includes investigatory proceedings (e.g., such as are conducted by the Small Business Administration) as well as adjudicatory hearings.

3. Defense Precluded

Subsection (b) provides that is is not a defense that (1) an official proceeding was not pending or about to be instituted, or (2) the defendant or other recipient or proposed recipient of the thing of value also committed or attempted to commit by the same conduct an offense under section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft). The first provision, as has been discussed, is designed to reverse current case law interpretations under 18 U.S.C. 1503 limiting the application of that statute to pending proceedings. The second provision is derived from New York law.[18] Similar provisions were also in S. 1, as originally introduced in the 93d Congress, S. 1437 of the 95th Congress, and S. 1722 in the 96th Congress.[19] The provision is designed to deal with the problem of the often blurred distinction between bribery, theft, and extortion in cases involving payments to public officials. Some defendants have contended, for example, although most case authority is to the contrary, that the crimes of bribery and extortion are mutually exclusive and that in fact the receiver's crime was extortion and that he, the defendant, is therefore entitled to be acquitted of the mutually exclusive charge of bribery.[20] The purpose of the instant provision is to do away with this undeserved and technical defense which

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[15] The language was approved by the A.B.A. Committee on Reform of Federal Criminal Laws of the Section of Criminal Law, Hearings, pp. 5788, 5806.

[16] See sections 303(b)(2) and 302(c)(1).

[17] See 18 U.S.C. 201(j).

[18] See McKinney's N.Y. Penal Law §§135.70, 155.10, 180.30, 200.15.

[19] See sections 2-6E2(b) and 2-9C4(b) of S. 1 and section 1321 of S. 1437 and S. 1722.

[20] See e.g., *United States* v. *Addonizio*, 451 F.2d 49, 72-73, 77-78 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972); *United States* v. *Hyde*, 448 F.2d 815, 832-834 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972): *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965); see also *People* v. *Dioguardi*. 8 N.Y. 2d 260, 168 N.E. 2d 683 (1960).

"frequently places prosecutor and court in the precarious position of being forced to choose between two crimes having the finest of distinction." [21] Under the present provision it will still, to be sure, be a defense that not all the elements of bribery were sufficiently proved. But the mere showing that the bribe recipient or the defendant himself commited extortion, blackmail, or theft will not constitute a defense. Parallel provisions are included in the proposed Code in the general bribery and graft section (1351–1355), and in the extortion and blackmail sections.[22]

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if the proceeding "is or would be a federal official proceeding," if the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, or other enumerated phases of the offense, or if movement of a person across a State or United States boundary occurs in the planning, promotion, etc., of the offense. The "or would be" language in the first jurisdictional branch is added to effectuate the intent that this section reach instances of witness bribery even if no official proceeding is then pending or ever takes place. The latter two bases continue the coverage presently fund in 18 U.S.C. 1952 for local or State bribery offenses where commerce facilities are used or State or international boundaries are crossed.[23]

5. Grading

An offense under this section is a Class C felony (up to twelve years in prison). This is consistent with the penalty under current 18 U.S.C. 201, as well as with the penalty under proposed section 1351 (Bribery).

SECTION 1322. CORRUPTING A WITNESS OR AN INFORMANT

1. In General

This section deals with the bribery or corruption aspects of obstruction of justice. Although neither witnesses nor informants are specifically mentioned in the statute itself, the title refers to both as the principal classes of individuals intended to be protected. The section includes parts of the offenses covered in 18 U.S.C. 201(h) and (i) as well as the overlapping obstruction prohibitions of 18 U.S.C. 1503, 1505, and 1510. The Code section 1323 on tampering deals with force, threats, intimidation, or deception. There is no coverage, in either statute, however, for the person who persuades or induces one of these acts, but employs none of the prohibited conduct of sections 1322 and 1323. Absent bribery, threats, etc., there is no crime under this subchapter although justice will be as obstructed if the persuasion is effective, as if bribery or threats were actually employed. Such persuasion under current law could conceivably be reached under the catch-all clause of 18 U.S.C. 1503 although there do not seem to be any cases in point. Conduct of the sort described, however would be covered by the general criminal solicitation statute set forth in section 1003.

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[21] McKinney's N.Y. Penal Law §200.15, Practice Commentary; see also Working Papers, p. 920.

[22] See sections 1359(b)(2) and 1724(c).

[23] However, the Committee has expanded the travel branch somewhat to cover the travel by any person (including the victim) relative to the offense, not just travel by the offender. Compare *Rewis* v. *United States*, 401 U.S. 808 (1971); *United States* v. *DeCavalcante*, 440 F.2d 1264, 1268 (3d Cir. 1971).

This section as it concerns informants in criminal investigations covers bribe offering only. It does not cover the potential informant who witnesses a crime, then seeks out the offender and demands a bribe not to inform the authorities. This latter situation is generally known in the law as compounding a crime, which, in essence, is a form of blackmail. It is possible that the language of both 18 U.S.C. 1510 and 18 U.S.C 873 covers this offense, although there is some authority for the view that compounding a crime is not a Federal criminal offense.[24] The compounding offense is reached generally under the proposed Code via section 1723 on blackmail.

2. The Offense

Subsection (a)(1) provides that a person commits an offense if he offers, gives, or agrees to give another person, or solicits,[25] demands, accepts, or agrees to accept from another person, anything of value "for or because of any person's" doing of any of five enumerated things. The phrase "for or because of" to connect the bribe payment with the prohibited purposes has also been adopted in section 1352 on graft and section 1751 on commercial bribery. This language is intended to draw a distinction between these offenses and the more serious offense of witness bribery, discussed above, which requires proof of "an understanding or agreement."

The first prohibited act involves a person's testimony in any official proceeding. It should be noted that this is intended to include a payment to cause someone to testify truthfully as well as falsely.

The second prohibited act is a person's witholding testimony, or a record, document, or other object from an official proceeding, whether or not the person would be legally privileged to withhold it and regardless of its admissibility in evidence. The latter clause is set forth in a defense precluded subsection and is intended, among other things, specifically to perpetuate the line of cases holding that the other's privilege not to testify or produce information is no defense.[26]

The third prohibited purpose is engaging in conduct which constitutes a violation of section 1325 (Tampering with Physical Evidence).

The fourth forbidden purpose is evading legal process summoning the person to testify in an official proceeding.

The fifth prohibited purpose is the person's absenting himself from an official proceeding to which he has been summoned.

Subsection (a)(2) makes it an offense to offer, give, or agree to give anything of value to another person for or because of a person's hindering, delaying, or preventing the communication of information relating to an offense or possible offense to a law enforcement officer. This provision carries forward the bribery aspect of 18 U.S.C. 1510. The term "offense" is defined in section 111 to embrace only conduct punishable under a Federal statute.

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[24] See Working Papers, pp. 577–578. The Model Penal Code contains a compounding a crime offense, see section 242.5 (P.O.D. 1962), but also makes it an affirmative defense that the payment was restitution or indemnification for harm caused by the actor.

[25] See note 12, *supra*.

[26] See note 2, *supra*.

The phrase "or possible offense" is included to make it clear that an actual offense need not be the subject of the information. It is sufficient that the information be such as to relate to the possibility that an offense has been or will be committed.

The conduct in subsection (a)(1) is offering, giving, or agreeing to give anything to another person, or soliciting, demanding, accepting, or agreeing to accept anything from another person. Since no culpability standard is specifically designated, the applicable state of mind that must be proved under section 303(b)(1) is "knowing," i.e., that the defendant was aware of the nature of this actions.

The elements that the offer, demand, etc. was "for or because of" any person's (1) testimony, (2) withholding testimony, a record, document, or any other object, (3) engaging in conduct constituting a violation of section 1325, (4) evading legal process summoning him to appear as a witness or to produce some object or (5) absenting himself from a proceeding to which he has been summoned, state the alternative motives or purposes of the defendant which must be proved.

The elements that what is offered, given, demanded, etc. is "anything of value" and that the proceeding involved is an "official proceeding" are existing circumstances. As no culpability level is specifically prescribed, the applicable state of mind that must be proved is "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[27]

The terms "anything of value" and "official proceeding" as defined in section 111. The latter term is discussed in connection with section 1321. With respect to the former term, the Committee considered whether or not to limit the crimes of bribery and corruption to the payment of anything of pecuniary value, as is done in section 1352 (Graft). The purpose of the limitation there is to eliminate such things as business lunches, theater tickets, and the like from criminal coverage when such minor gifts between public servants and citizens occur. It is doubtful, however, if such essentially harmless gifts are as likely to pass between defendants and witnesses or informants in the context of official proceedings or criminal investigations. Accordingly, the Committee provided a blanket bar on anything of value passing to a witness or informant for or because of his testimony, etc. Prosecutorial discretion is deemed sufficient to deal with the harmless or *de minimis* gift.

The Committee, as under section 1321, does not intend that the term "anything of value," broad though it be, extend to legitimate payments to witnesses of travel and subsistence expenses or to a reasonable fee for the preparation of an expert's opinion. In addition, the Committee intends to exclude the situation where two codefendants agree among themselves to assert their respective privilege against self-incrimination and not to take the stand. Although it could be argued that they are exchanging something of value for or because of withholding testimony (and thus violating subsection (a)(1)(B)), it is obviously undesirable to have a criminal statute interfere in this decision, and that is not an intended result of this statute. In a similar context under existing law, where a charge of suborning perjury resulted, it was stated that "it is not a crime . . . for one jointly indicted with others and charged with conspiracy to consult with his co-defendants after the indictment has been returned."[28] The opinion indicated that courts should be reluctant to become involved in such cases and should not stretch criminal laws to cover such consultations and what amounts to trial strategy. The Committee endorses this attitude and result but believes that there is no need specifically to exempt from "anything of value" such agreements on testifying between codefendants. In the unlikely event that a case of this kind should be brought, the Committee anticipates that the courts would take the same position as was done in the suborning perjury case noted above.

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[27] See sections 303(b)(2) and 302(c)(1). The fact that the conduct was in violation of section 1325 requires no proof as to culpability. See section 303(d)(1).

The conduct of subsection (a)(2) is offering, giving, or agreeing to give anything. Since no culpability standard is specifically designated, the applicable state of mind that must be proved under section 303(b)(1) is "knowing," i.e., that the defendant was aware that he was offering, giving, or agreeing to give something. The element that what was offered, given, etc. was "for or because of any person's hindering, delaying, or preventing the communication to a law enforcement officer of information relating to an offense or a possible offense" states the purpose or motive for the conduct hereunder. This purpose is intended to be substantially equivalent to the present interpretation of 18 U.S.C. 1510 to the effect that the offender need only believe, not know, that the informant would communicate such information.[29]

The element that what was offered, given, etc., was "anything of value" is an existing circumstance as to which the applicable culpability standard is "reckless." The discussion of this element in connection with subsection (a)(1) is incorporated here as equally relevant.

3. Defense Precluded

Section 1322 contains, in subsections (b)(1) and (b)(3), identical defense precluded provisions to section 1321 and the previous discussion there should be consulted at this point.[30] The Committee notes that it considered but rejected an affirmative defense under this section recommended by the National Commission[31] that "any consideration for a person's refraining from instigating or pressing the prosecution of an offense was to be limited to restitution or indemnification for harm caused by the offense." This defense is believed to be too difficult to administer. It would provide an automatic insulation for the bribe offeror who can camouflage his bribe by claiming that he was merely making a restitutional bid to the complainant, and, if the sum offered is large, the offeror can say he was simply intending to be generous in righting the wrong he had done. It could be expected that this defense would be raised far more often than in the rare case where its use would be justified. In essence, it would permit justification of an act that amounts to obstruction of justice in the form of buying off the complainant.

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[28] *Walker* v. *United States,* 93 F.2d 792, 795 (8th Cir. 1938).

[29] See *United States* v. *Kozack,* 438 F. 2d 1062 (3d Cir.), cert. denied, 402 U.S. 996 (1971).

[30] Subsection (b)(2) contains a defense precluded that the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence. A similar provision is applicable to section 1311 (Hindering Law Enforcement) and the explanation there should be adverted to here.

[31] Final Report, § 1321(3)(b).

4. Jurisdiction

There is Federal jurisdiction over an offense under this section in four situations. Three of these correspond to the jurisdictional bases under section 1321, and the discussion of those provisions in that context is incorporated here as equally pertinent. The additional base not utilized in section 1321 provides jurisdiction for obstructions of communication about Federal offenses or possible offenses to Federal officers. As such it tracks the jurisdiction presently found in 18 U.S.C. 1510. In accord with the policy underlying that recently enacted statute, it was felt that it would be unwise to extend Federal coverage to non-Federal officers. Several years of experience under 18 U.S.C. 1510 have failed to demonstrate any need for such expanded coverage.

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This is an accomodation between the two-year maximum penalty under 18 U.S.C. 201 and the five-year maximum penalty under 18 U.S.C. 1503, 1505, and 1510. It is also identical to the grading applicable to the graft section (1352), the most analogous statute to this one in the proposed Code.

SECTION 1323. TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT

1. In General

This section covers the coercive acts that can be employed to tamper with witnesses, victims, and informants in official proceedings and to tamper with informants in criminal investigations.

This statute, with the exception of the offense in subsection (a)(2), is meant to parallel, as closely as is practicable, the preceding statute (section 1322) dealing with corruption of witnesses and informants. Thus, for instance, the conduct sought to be influenced by the prohibited acts (a payment of anything of value in section 1322 and the use of force, threat, intimidation, or deception in section 1323) is identical. However, the "for or because of" language which is particularly suited to a bribery statute, is replaced with language of similar import—to "influence" testimony or to "cause or induce" the withholding of testimony, etc. In addition there is included in this section a residual offense clause taken from current law which will be discussed below. Sections 1322 and 1323 in combination contain virtually all the criminal acts presently punishable under 18 U.S.C. 201(h), 201(i), 1503, 1505, and 1510, as well as a new proposal in subsection (a)(2) that expands Federal witness and victim protections.

2. The Offense

A. Elements

Subsection (a)(1) provides that a person commits an offense if he knowingly uses "force, threat, intimidation, or deception" with intent to accomplish a variety of enumerated results. The terms quoted above are similar to those used by the National Commission [32] except that "intimidation" has been added in order to comport with the definition of "consent" in section 111. The inclusion of the term "deception" is intended, in part, to enable the prosecution of conduct dealing with entreaties to public officials in criminal cases made by those who failed to reveal that they were being paid for their efforts.[33] If not covered here, such conduct could in any event be reached under subsection (a)(3), discussed below.

The prohibited purposes in paragraph (1) are: first, to influence the testimony of another person in an official proceeding; second, to cause or induce another person to (i) withhold testimony, or a record, document, or any other object from an official proceeding, whether or not the person would be legally privileged to do so, and regardless of its admissibility in evidence,[34] (ii) engage in conduct constituting an offense under section 1325, (iii) evade legal process summoning him to appear as a witness, or to produce an object, in an official proceeding, or (iv) absent himself from an official proceeding to which he has been summoned by legal process; and third, to hinder, delay or prevent the communication of information relating to an offense or possible offense to a law enforcement officer. These prohibited purposes correspond, with the exception of the first, to the forbidden categories of intent under section 1322 and the discussion in tht context is applicable here. It should be noted that the Committee rejected the suggestion of the National Commission to limit the offense of tampering with informants by deception to the situation where the offender deceives the informant but not the law enforcement officer.[35] The Committee considers that it is equally as obstructive to deceive the officer (e.g., as to the meeting place with an informant) and thereby discourage the informant, as it would be to deceive the informant in the first instance. "Misrepresentation" to prevent a report of an offense to a criminal investigator is also currently a violation of 18 U.S.C. 1510.

As in section 1322, in subsection (a)(1) the term "witness" is not directly mentioned. A useful consequence of dropping this term and talking in terms of threats to induce action by any person is that the scope of the offense extends to threats that are made, not against the witness himself, but against his family or anyone else of interest to him. Current law would probably reach threats to a witness' family through the catch-all clause at the end of 18 U.S.C. 1503.

The first prohibited purpose uses the term "influence." This is the broadest word used in 18 U.S.C. 1503, and the Committee intends that it also receive an expansive interpretation in this section. The fact that the section requires that force, threat, intimidation, or deception be employed suffices to narrow the offense to clearly culpable conduct.

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[32] See Final Report, § 1321.

[33] See, e.g., *United States* v. *Kahaner,* 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963); *United States* v. *Poloff,* 121 F.2d 333 (2d Cir.), cert. denied, 314 U.S. 626 (1941).

[34] See the defense precluded, subsection 323(d)(2).

[35] See Final Report, § 1322.

Subsection (a)(2) makes it an offense for an actor, with intent to annoy, harm, or injure another person, to hinder, delay, prevent, or dissuade (A) a witness or a victim from attending or testifying in an official proceeding, or (B) a witness, victim, or a person acting on behalf of a victim, from (i) making a report of an offense or possible offense to a judge, law enforcement officer, probation officer, or officer of a correctional facility, (ii) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted or assisting in such prosecution or proceeding, or (iii) arresting, or causing or seeking the arrest of, a person in connection with an offense. Under subsection (b), the term "witness" is defined expansively to mean an individual (A) having knowledge of the existence or nonexistence of facts relating to an offense, (B) whose declaration under oath is received in evidence for any purpose, (C) who has reported an offense to a judge, law enforcement officer, probation officer, or officer of a correctional facility, (D) who has been served with a subpoena, including a grand jury subpoena, issued under the authority of a court of the United States, or (E) who a reasonable person would believe to be an individual described in this paragraph."Victims" is defined as an individual against whom an offense has been or is being committed.

This offense is derived closely from the recommendations of the Committee on Victims of the American Bar Association's Criminal Justice Section for a model statute covering the problems of intimidation of witnesses and victims. The October 29, 1979, product of the Association's Committee, reflecting the submissions of more than eighty persons and organizations, makes a convincing case for the need, at the Federal as well as the State and local levels, of new protections for witnesses and victims. Senator Laxalt, a member of the Committee, who had chaired hearings on victims-witness problems,[36] sponsored the amendment to S. 1722 in the 96th Congress.

Thus, while subsection (a)(1) is confined to the traditional means of tampering involving the use of force, threat, intimidation, or deception, subsection (a)(2) covers any conduct that hinders, delays, prevents, or dissuades a witness or victim from fulfilling his societally desirable role with reference to attending or testifying in an official proceeding or reporting or taking other action in relation to an offense or possible offense, if the conduct is done "with intent to annoy, harm, or injure another person".

The term "official proceeding" is defined broadly in section 111, where definitions also are given for the terms "judge" and "law enforcement officer." It should be noted that the broad definition of "witness" includes a person who has become aware of a crime but who has not yet been subpoenaed.

Subsection (a)(3) provides that a person is guilty of an offense if he "does any other act with intent to influence improperly, or to obstruct or impair," the administration of justice, the administration of law under which an official proceeding is being conducted, or the exercise of a legislative power of inquiry.

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[36] *Law Enforcement Assistance Reform,* Hearings on S. 241 before the Committee on the Judiciary, U.S. Senate, 96th Congress, 1st Sess., pp. 195-265 (1979).

This provision is derived from the general residual clause at the end of 18 U.S.C. 1503 and 1505, which has received varying interpretations. For example, the clause in 18 U.S.C. 1503 makes it an offense corruptly in influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice. Despite its broad scope, this clause has been narrowly construed by some courts, which have operated under the principle of *ejusdem generis,* i.e., that the clause must be read to embrace only acts similar to those mentioned in the preceding specific language.[37] Thus, it has been held that the filing of a false affidavit in support of a defendant's motion for a new trial does not come within the parameters of the general clause in 18 U.S.C. 1503. Other courts, by contrast, have given the clause its comprehensive, natural meaning of prohibiting "obstruction of justice . . . regardless of the means used to reach that result."[38]

The use of a broad residual clause was recommended by both the American Bar Association's Committee on Reform of the Federal Criminal Laws and the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code.[39] Although recognizing that a residual clause is at odds with one of the goals of a criminal code revision—to state an offense succinctly and precisely—the Committee deems that the arguments in favor of including a broad provision in this statute outweigh this general consideration. As one court has noted:[40]

> The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.

In the Committee's view, this observation leads to the conclusion that the purpose of preventing an obstruction or miscarriage of justice cannot fully be carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be protection against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice. Some examples of such conduct, actually prosecuted under the current residual clauses, which would probably not be covered in this series without a residual offense clause, are as follows:

(i) A conspirator arranging to have an unnecessary abdominal operation in order to cause a mistrial of an ongoing trial in which he was a defendant.[41]

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[37] See, e.g., *United States* v. *Metcalf,* 435 F.2d 745 (9th Cir. 1970); *United States* v. *Essex,* 407 F.2d 214 (6th Cir. 1969).

[38] *United States* v. *Howard,* 569 F.2d 1331, 1334 (5th Cir. 1978) (sale of grand jury transcript to persons under investigation held within 18 U.S.C. 1503); see also *United States* v. *Walasek,* 527 F.2d 676 (3d Cir. 1975) (destruction of records subpoenaed by grand jury within 18 U.S.C. 1503).

[39] Hearings, pp. 5788, 5806; 7735, 7736.

[40] *Catrino* v. *United States,* 176 F.2d 884, 887 (9th Cir. 1949); see also *Falk* v. *United States,* 370 F.2d 472 (9th Cir. 1966), cert. denied, 387 U.S. 826 (1967).

[41] *United States* v. *Minkoff,* 137 F.2d 402 (2d Cir. 1943).

(ii) Persons plying the illiterate administrator of an estate with liquor and obtaining documents from him which they then used in an effort to have a civil case dismissed.[42]

(iii) The defendant planting an illegal bottle of liquor on the victim's premises in order to discredit the victim, who was planning on being a witness against the defendant in a separate case.[43]

(iv) A conspiracy to cover up the Watergate burglary and its aftermath by having the Central Intelligence Agency seek to interfere with an ongoing FBI investigation of the burglary.[44]

In order to reach such cases, as well as the example previously referred to in which the conduct was found not to come within the scope of the current residual clause, the Committee determined to include subsection (a)(3). The Committee does not intend that the doctrine of *ejusdem generis* be applied to limit the coverage of this subsection. Instead, the analysis should be functional in nature to cover conduct the function of which is to tamper with a witness, victim, or informant in order to frustrate the ends of justice. For example, a person who induces another to remain silent or to give misleading information to a Federal law enforcement officer would be guilty under subsection (a)(3), irrespective of whether he employed deception, intimidation, threat, or force as to the person.[45]

The Committee decided to insert the word "improperly" to modify the term "influence." It was felt that otherwise it could be argued that such clearly appropriate acts as the final argument of counsel to the jury could be deemed to be within the scope of the section. The adverb "improperly" is meant to limit coverage to acts not authorized by law. No limiting adverb is, however, necessary as to the terms "obstruct or impair," as these terms carry their own connotiation of impropriety.

The first branch of the proposed subsection, referring to the "administration of justice," is designed to carry forward the basic coverage in 18 U.S.C. 1503. The latter two branches of the subsection, referring to the "administration of a law under which an official proceeding is being conducted" and to the "exercise of a legislative power of inquiry," are designed to continue the general scope of the final paragraphs of 18 U.S.C. 1505. That statute, however, embraces only Congressional legislative proceedings, whereas the language used here would extend to the obstruction of a State or local legislative proceeding.

B. Culpability

The conduct in subsection (a)(1) is using force, threat, intimidation, or deception. As the section is silent as to the applicable culpability level, the culpability element for the conduct is "knowing,"[46] thus requiring proof that the offender was aware of the nature of his conduct.

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[42] *United States* v. *Alo*, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850 (1971).

[43] *Knight* v. *United States*, 310 F.2d 305 (5th Cir. 1962).

[44] *United States* v. *Haldeman, et al.*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

[45] Compare *United States* v. *St. Clair*, 418 F.Supp. 201 (E.D.N.Y. 1979).

[46] See sections 303(b)(1) and 302(b)(1).

The elements in subparagraphs (A), (B), and (C)—that the prohibited forms of conduct were intended to influence the testimony of another person, or cause or induce another person to withhold testimony, etc., or engage in conduct constituting an offense under section 1325,[47] or evade legal process summoning him to testify, or absent himself from a proceeding to which he has been summoned, or to hinder, delay, or prevent the communication of information relating to an offense to a law enforcement officer—merely state the alternative motives or purposes of the defendant which must be proved. The element that the proceeding involved is an "official proceeding" is, as under section 1322, an existing circumstance as to which the applicable state of mind that must be demonstrated is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the proceeding was an official one,[48] as that term is defined in section 111.[49]

The conduct in subsection (a)(2) is hindering, delaying, preventing, or dissuading a person from attending or testifying in an official proceeding, or from doing any of the acts described in subparagraphs (B)(i), (B)(ii), or (B)(iii). Since no culpability level is specifically prescribed, the applicable mental state, as in subsection (a)(1), is at least "knowing." The elements that the proceeding is an "official proceeding" and that the person hindered, delayed, etc., is a witness, victim, or person acting on behalf of a victim are existing circumstances as to which the minimum applicable state of mind that must be proved is "reckless." The elements that the conduct is performed with intent to annoy, harm, or injure another person set forth a variety of specific purposes at least one of which must be shown to have accompanied the conduct.

The conduct in subsection (a)(3) is "doing any other act" and the requisite minimum state of mind is again "knowing." The remainder of the offense involves specific purpose elements, except that whether the proceeding was an official proceeding is, as in the previous subsections, an existing circumstance as to which "reckless" is the requisite standard.

3. *Affirmative Defense*

Subsection (c) of section 1323 makes it an affirmative defense to a prosecution under subsection (a)(1)(A) for using a threat to influence another's testimony in an official proceeding that the threat was of "lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully."

This provision is derived from the recommendation of the National Commission.[50] It is intended primarily to avoid the possibility that a prosecutor, judge, or presiding officer would violate this statute if he threatens a witness or potential witness with a perjury or false swearing prosecution if he testifies falsely. Conceivably, it could also extend to the situation where a person threatens to institute legal action to recover a debt unless another person testifies truthfully. The defense is made "affirmative," i.e., the defendant has the burden of proving the defense by a preponderance of evidence.[51]

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[47] By operation of section 303(d)(1)(A), no showing need be made that the defendant harbored any *scienter* as to the fact that the other's conduct would violate section 1325; he must only be shown to have intended that the other engage in conduct that, in fact, would have violated that section. A similar result occurs under section 1322(a)(1)(C).

[48] See sections 303(b)(2) and 302(c)(1).

[49] Whether this alters current law is unclear since the *mens rea* requirements under 18 U.S.C. 1503 are in a peculiar state of confusion. See Working Papers, pp. 578–581.

[50] See Final Report, § 1321(3)(a).

4. *Defenses Precluded*

Subsection (d) of section 1323 contains two defense precluded provisions identical to the ones in sections 1311(c), 1321(b)(1) and 1322(b)(1). The rationale for an effect of these provisions are discussed in connection with the aforementioned sections.

5. *Jurisdiction*

Subsection (f) of section 1323 sets forth five jurisdictional bases on which to support a prosecution under this section. These bases are similar to the ones in section 1322 (and the discussion there is incorporated here), with the exception of paragraph (e)(3). This provision affords jurisdiction where the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a Federal government function. It is added to track the elements found in subsection (a)(3) and to furnish automatic jurisdiction where a Federal government function is obstructed, impeded, etc. Notably, however, obstructions of a State official proceeding or legislative inquiry can be reached if a facility in interstate commerce or movement of a person occurs as defined in paragraphs (f)(4) and (5).

This subsection extends Federal jurisdiction in one significant respect. Currently, under 18 U.S.C. 1952, bribery of a State or local witness can be punished if the actor crosses a State line, but if a person crosses a State line to use force or to intimidate a witness in a local case no Federal offense is committed. This result is viewed as anomalous, and the Committee therefore decided to expand Federal jurisdiction to reach the latter situation.

6. *Grading*

An offense under subsection (a)(1) is graded as a Class D felony (up to six years in prison), reflecting the seriousness of this offense and its added danger of physical harm as compared with section 1322; and an offense under subsection (a)(2) or (a)(3) is graded as a Class E felony (up to three years in prison).

SECTION 1324. RETALIATING AGAINST A WITNESS OR AN INFORMANT

1. *In General*

This section carries forward Federal statutory law barring retaliation against the person or property of parties, witnesses and informants in official proceedings and criminal investigations presently contained in 18 U.S.C. 1503, 1505, and 1510. Retaliation against public servants is covered in section 1358. Although the National Commission combined these two offenses into a single section,[52] the Committee believes that coverage of party, witness, and informant retaliation in the obstruction of justice subchapter is a more logical approach.[53]

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[51] See section 111.
[52] See Final Report, § 1367.

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) engages in conduct by which he causes bodily injury to another person or damages the property of another person, or (2) unlawfully subjects a Federal public servant or, with respect to a government contract, an employee of a prime contractor of the United States, to economic loss or injury to his business or profession, because (as to both paragraphs) of (A) the attendance of a party or witness at the official proceeding, or any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or (B) any information relating to an offense or possible offense given by a person to a law enforcement officer.

As under present statutes, the types of injuries covered include harm to both person and property. It has been determined that the phrase in 18 U.S.C. 1503 and 1505 "injures any party or witness in his person or property" extends to the situation where the retaliation takes the form of forcing a person out of business,[54] and, presumably, it would also reach acts of discharging a person from his job on account of his testimony, or otherwise damaging him in his business or profession (e.g., by blacklisting). The Committee concurs that such forms of retaliation should be covered and so has included the "or unlawfully subjects" language in this section. An earlier version of subsection (a)(2) was broader in that it was phrased in terms of "improperly subjects another person" to economic loss or injury. The National Association of Manufacturers and others pointed out that such expansive language would make it criminal for employers in the private sector to discharge disloyal employees.[55] Accordingly, the Committee determined to limit this branch of the offense to those who retaliate against "whistleblowers" employed by the Federal government or by a prime contractor of the United States. The term "unlawfully" is designed to exclude from the ambit of the offense such actions as failing to vote for a candidate because of his testimony or failing to patronize the business establishment of a person because of information he gave to a law enforcement officer. The Committee believes such individual choices to be permissible. Where the retaliation takes the form of unlawful action, however, whether tortious, criminal, or otherwise wrongful, it should clearly be reached. The terms "business" and "profession" are intended to be broadly construed to reach all manner of callings, livelihoods, and occupations in which a person may be engaged.

Only serious acts of retaliation are included. These are delineated in paragraph (1) as those that cause bodily injury or damage the property of another person. The term "bodily injury" is defined in section 111 and is the kind of injury punished as battery in section 1613. The concept of "damages the property of another" is intended to mean physical damage to property of the sort covered in the arson and property destruction offenses (sections 1701–1703). Other forms of economic damage are covered in paragraph (2) via the phrase "economic loss or injury to his business or profession." This is intended to reach non-physical acts such as effecting the discharge or transfer of a person from his employment, causing labor problems to beset a person's business, breaching or failing to renew a contract, etc. This phrase is not, however, intended to reach strikes, boycotts, or picketing undertaken in support of lawful labor objectives, nor to interfere with the enforcement of conditions of employment such as the payment of union dues and initiation fees. Although this provision broadens the offense contained herein considerably, its scope is still far less expansive than that embodied in the notion of *any* harming by an unlawful act, as recommended by the National Commission.

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[53] In support of such a provision, see Report of the New York City Bar Association's Special Committee. Hearings, p. 7736.

[54] *United States* v. *Campanale*, 518 F.2d 352, 366 (9th Cir.), cert. denied, 423 U.S. 1050 (1975).

[55] See correspondence from National Association of Manufacturers to Senator Thurmond dated November 30, 1981.

As in section 1358 (Retaliating Against a Public Servant), the conduct can be directed against any person, not just the person who gave the testimony or the information or who attended the proceeding. Although current law with respect to witnesses appears to be limited to injuries to the person of property of the witness himself,[56] the Committee believes that it is important to protect family, friends, associates, etc., from acts of retaliation. Note also that it is not an element of the offense that the testimony or information was lawful (e.g., not perjured). Even where false testimony or information has been given by a witness, the Committee considers that society's remedy is to prosecute for perjury and that retaliation against the witness in the manner prohibited here should not be sanctioned.[57]

With respect to the informant retaliation branch, the Committee considered but rejected the idea of the National Commission of defining "informant" as a "person who has communicated information to the government in connection with any government function." [58] This would vastly increase Federal cognizance over such offenses without any need for an increase having been demonstrated. Thus, the Committee has retained the current restriction on the offense to the giving of information relating to an offense (or possible offense) to a law enforcement officer, as defined in section 111.[59]

The conduct in this section is, in paragraph (1), engaging in any conduct, and, in paragraph (2), unlawfully subjecting any person of the classes designated to economic loss or injury. By operation of section 303(b)(1), the culpability level needed to prove the offense is at least "knowing," thus requiring an awareness by the offender of the nature of his conduct. The elements in paragraph (1) that the conduct causes bodily injury to or damages the property of another person are results of conduct. By operation of section 303(b)(3), the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the result would occur. Under section 303(d)(1)(A), no state of mind need be proved concerning the fact that the result was caused "unlawfully." The terms "bodily injury," "person," and "property" are defined in section 111. In paragraph (2) the element that the economic loss or injury was to a person's business or profession is an existing circumstance as to which, by the operation of section 303(b)(2), the minimum culpability standard is "reckless." Finally, the element that the offender's conduct was "because of" any of the matters described in subparagraphs (1)(A) or (1)(B) states the alternative motives or purposes that must be proved to have instigated the conduct.

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[56] See 18 U.S.C. 1503, 1505. By contrast, 18 U.S.C. 1510, applicable to informants, appears to cover injuries to any person.

[57] See Comment to Final Report, § 1367.

[58] See Final Report, § 1367.

[59] 18 U.S.C. 15[illegible] refers to a "criminal investigator," which is defined in virtually the same manner as the [illegible] enforcement officer."

3. Jurisdiction

There is Federal jurisdiction over an offense under this section in four situations. The four bases enumerated are identical to those applicable to section 1322, and the discussion there suffices for this section also.

4. Grading

An offense in this section is graded as a Class E felony (up to three years in prison) in the circumstances set forth in subsection (a)(1) and as a Class A misdemeanor (up to one year in prison) in any other case. It should be noted that where aggravated bodily injury or property damage occurs, the conduct may also be reached under other appropriate sections of the Code.[60]

SECTION 1325. TAMPERING WITH PHYSICAL EVIDENCE

1. In General

This section covers the physical evidence aspects of the current obstruction of justice statutes, 18 U.S.C. 1503 and 1505, which are presently prosecuted under the residual phrase of obstructing the due administration of justice and the special alteration of court records provisions of 18 U.S.C. 1506. The National Commission, having deleted the residual clause, drafted a specific statute on tampering with physical evidence.[61] Although the Committee has sponsored retention of the residual clause in section 1323, it believes that a separate offense on this subject is nevertheless justified in the furtherance of the goal of specifically defining all offenses where possible.

2. The Offense

Subsection (a) states that a person commits an offense if, knowing an official proceeding is pending or likely to be instituted, he alters, destroys, mutilates, conceals, or removes a record, document, or other object with intent to impair its integrity or availability for use in an official proceeding. The Committee decided to require proof of a specific intent in light of the fact that destruction of records can often be an ambiguous act and criminal penalties should not attach save on proof that the actor's purpose was to thwart a proceeding.[62] The requirement of knowledge that an offisigned to guard against unmerited prosecutions, as is the proof provision in subsection (b), discussed later. It is the intent to impair the ultimate availability for use of the object in a proceeding that is in being or likely to be instituted that is the focus of the section. Thus, if a person destroyed records to avoid execution of a search warrant or other process, or to avoid an audit which was likely to lead to the commencement of an official proceeding, he would almost certainly be guilty under this section since his intent would normally have extended to the prevention of the records from being used in an ensuing proceeding.[63] Hence, the Committee deems it unnecessary to include an additional reference to "the purpose of process," as did S. 1, as originally introduced in the 93d Congress.[64]

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[60] See, e.g., sections 1610(d)(4) (Murder) and 1701(c)(10) (Arson).

[61] See Final Report, § 1323.

[62] See Working Papers, pp. 575–576.

The conduct in this section is altering, destroying, mutilating, concealing, or removing, records, documents, or other objects. As no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was destroying, etc., an object. The element that the conduct be done with an intent to impair the integrity of the object or its availability for use in an official proceeding sets forth the particular purpose which must be shown to have accompanied the conduct. The fact that the "official proceeding" as defined in section 111 was pending or likely to be commenced is an existing circumstance. The applicable mental state that must be proved is designated as "knowing," i.e., that the offender was aware or believed that the circumstances existed.

3. Proof

Subsection (b) provides that evidence that the record, document, or other object was destroyed pursuant to a destruction program gives rise to a presumption that the destruction was not with intent to impair its integrity or its availability for use in an official proceeding. This language was included to recognize that many organizational and individual operations involve standard procedures to destroy records and documents pursuant to destruction programs and that destruction in the ordinary course of business under such procedures should permit the trier of fact to conclude that the defendant did not have the requisite specific intent to prevent use of such records or documents in an official proceeding.

4. Defense Precluded

Subsection (c) of section 1325 provides that it is not a defense that the record, document, or other object would have been legally privileged or inadmissible in evidence. The effect and purpose of this provision have previously been discussed.[65] As with the similar defense precluded provision under section 1311, the provision is not intended to bar proof that the record, document, or other object was irrelevant or immaterial to an official proceeding if such proof is deemed relevant to whether the defendant intended to impair the integrity or unavailability of the record, document, or object for an official proceeding.

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[63] Destruction of property in order to prevent its seizure is presently punishable at a misdemeanor level by 18 U.S.C. 2232.

[64] See section 2-6C1(a)(2).

[65] See section 1311(c).

5. Jurisdiction

Subsection (e) provides that there is Federal jurisdiction over an offense hereunder if the official proceeding is or would be a Federal official proceeding. The term "official proceeding" is broadly defined in section 111.

6. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This reflects the Committee's judgment that the act of destroying evidence is a less serious and dangerous offense than the use of threats or force to effectuate the destruction of evidence.[66]

SECTION 1326. IMPROPERLY INFLUENCING A JUROR

1. In General

This section carries forward, with some changes, the basic thrust of 18 U.S.C. 1504. However, whereas that statute bars only "written communication" with a juror with intent to influence the juror's actions or decisions, the present section would reach persons who communicate "in any way" with jurors for the proscribed purpose of improperly influencing their official actions.

The National Commission suggested a somewhat broader offense that would bar not only communication with a juror with intent to influence his actions, but also harassing or alarming the juror with the same specific intent. The Committee believes that the basic purpose to fully insulate jurors, whether grand or petit, from external pressures while they are serving in their official capacity can equally be fulfilled by a statute generally limited to the reach of current law. Thus, the Committee has rejected inclusion of the separate offenses of harassing or alarming a juror. Because a juror is a "public servant,"[67] he receives the full range of protection against threats (section 1357), retaliation (section 1358), bribery (section 1351), and the assaultive provisions in chapter 16. With the panoply of protection, all that the present section is designed to reach is the non-assaultive type of communication that disturbs the principle of juror insulation.

2. The Offense

Subsection (a) makes it an offense for a person to communicate in any way with a juror, or a member of the juror's immediate family, with intent improperly to influence the official action of the juror.

The statute contains four basic features. First, as has been mentioned, any communication may violate the statute as opposed to only written communications.[68] The only apparent reason for the limitation of current law is that the quality of proof as to criminal oral communications is not as good.[69] The logic underlying this reasoning breaks down when one realizes that far more serious offenses—bribery, threats etc.—are often prosecuted based upon oral communications. If the policy of total juror insulation from improper communciations is to be carried out, oral as well as written communication (or any other form of communication such as hand signals or gestures) must be prohibited. Second, the bar on communication is extended to the immediate family of the juror. The term "immediate family" is defined in section 111. Because of the policy of preventing communications designed to influence the juror's official action, the Committee deems this to be a rational extension of present law. Third, the term "juror" is specifically defined in section 111 to include both grand and petit jurors and those persons who have been "selected or summoned to attend" as prospective jurors. While this may not be an extension of present law, this definition makes it clear that a person need not have been formally selected as a juror to receive the protection of this statute. The fourth principal feature of this section is the requirement that the communication be made with intent "improperly" to influence the official action[70] of a juror.[71]

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[66] Compare section 1323, where the offense is graded as a Class D felony.
[67] See the definition of this term in section 111.
[68] The term "communicate" is defined in section 111.

18 U.S.C. 1504 contains a specific provision excluding from its coverage requests for appearance before grand juries. This was prompted by a case interpreting the forerunner of 18 U.S.C. 1504 as applying to such a situation.[72] In part to continue the policy of not treating requests to appear before grand juries as illegal communications, the Committee has narrowed the statute to embrace only those communications done with intent improperly to influence the jurors. This language will permit not only requests to grand juries for appearances, but such other clearly proper communications as those involving the court, attorneys, and others who counsel the jurors as to their functions and duties.[73] Thus the arguments of counsel and the instructions of the court, although they are communications with intent to influence the official actions of jurors, would not constitute violations of this section. This exclusion from coverage because of lack of intent to influence improperly would apply normally even where the argument of counsel was overzealous and objectionable, or where the judge's instructions were erroneous or prejudicial.

The term "communicates" would probably not encompass such acts as shadowing a juror without contacting or approaching him. However, such acts might well constitute contempt or obstruction of justice.[74]

The conduct in this offense is communicating in any way. As no culpability is set forth for the section, the applicable culpability level for the conduct is "knowing" by virtue of sections 303(b)(1) and 302(b)(1). This requires proof that the offender was at least aware that he was communicating. The element of intent improperly to influence the official action of the juror states the purpose for which the conduct must be done. However, the particular motive or reason behind the defendant's intent to influence improperly need not be shown.[75]

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[69] See Working Papers, p. 584.

[70] The term "official action" is defined in section 111.

[71] Adoption of this limitation is in accord with the views of the New York Bar Association's Special Committee, Hearings, p. 7736.

[72] See *Duke* v. *United States*, 90 F.2d 840 (4th Cir.), cert. denied, 302 U.S. 685 (1937).

[73] See Working Papers, pp. 584–585.

[74] See *Sinclair* v. *United States*, 279 U.S. 749 (1929).

The element that the communication was with a "juror, or a member of a juror's immediate family" is an existing circumstance. As no culpability is specifically designated, the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the person he was communicating with was a juror or a member of the immediate family of a juror. Ordinarily, in view of the required intent to influence a juror's official action, the offender will know that a person is a juror when he communicates with such person. However, this section is designed to permit conviction in the situation, for example, where a defendant communicates with a juror's uncle with the intent improperly to influence the juror's official action, but does not know (although he is conscious of the risk) that the uncle is a member of the juror's immediate family.[76]

3. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that the communication was to a grand juror and consisted solely of a request to appear before the grand jury. This carries forward the second paragraph of 18 U.S.C. 1504 excepting "the communication of a request to appear before the grand jury." Since the defense is denominated as "affirmative," the defendant will bear the burden of establishing the elements thereof by a preponderance of the evidence.[77]

4. Jurisdiction

There is Federal jurisdiction over an offense under this section if the juror is a Federal juror.

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This is generally consistent with current law which, under 18 U.S.C. 1504, provides a maximum sentence of six months in prison. The penalty is considerably less than that authorized under section 1323, where force, threat, or intimidation may be involved.

SECTION 1327. MONITORING JURY DELIBERATIONS

1. In General

This section essentially carries forward 18 U.S.C. 1508, which forbids a person to knowingly and willfully record the proceedings of any grand or petit jury, or to listen to or observe the proceedings of such a jury of which he is not a member, while (in either case) such jury is deliberating or voting. The section contains an exception for the taking of notes by a juror in connection with and solely for the purpose of assisting him in the performance of his duties as a juror. A violation is punishable by up to one year in prison.

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[75] Compare *Kong* v. *United States*, 216 F.2d 665, 668 (9th Cir. 1954).

[76] The uncle would be within the forbidden class if he was living with the juror in his household.

[77] See the definition of "affirmative defense" in section 111.

Proposed section 1327 does not vary substantively from the offense in 18 U.S.C. 1508 except to substitute the culpability term "intentionally" for the less clear terms "knowingly and willfully" in present law. A provision very similar to this section was recommended by the National Commission.[78] S. 1, as originally introduced in the 93d Congress, also contained a similar offense but included an affirmative defense that the defendant was a "recognized scholar" and that his conduct was part of a "legal or social science study approved in advance by the chief judge of the court."[79] The Committee decided to reject this defense, deeming it more vital to protect the traditional wall of secrecy surrounding jury deliberations and the integrity of the judicial process that such secrecy is designed to foster than to permit such studies. Moreover, serious problems with construing such terms as "recognized scholar" and "legal or social science study" were anticipated.

2. The Offense

Subsection (a) of section 1327 provides that a person commits an offense if he intentionally (1) records the proceedings of a petit jury while such jury is deliberating or voting or (2) listens to or observes the proceedings of a grand or petit jury of which he is not a member while such jury is deliberating or voting. As under current law, the offense of recording the proceedings may be committed even by a member of the jury whose proceedings are recorded.

The conduct in this section is recording, listening to, or observing the proceedings of a jury. The culpability standard is stated as "intentional," therefore requiring proof that it was the offender's conscious desire to engage in the conduct.[80] The element "while such jury is deliberating or voting" is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "reckless," i.e., that the offender was aware of the substantial risk that the jury was deliberating or voting, but disregarded that risk.[81] Similarly, the fact that, in the case of observing or listening to the proceedings, the defendant was not a member of the jury being monitored is an existing circumstance carrying a mental state of "reckless".

3. Defense

Subsection (b) of section 1327 provides that it is a defense to a prosecution for recording the proceedings of a jury that the actor was a member for the jury that was deliberating or voting and that he was taking notes in connection with, and solely for the purpose of facilitating the performance of, his official duties. This provision is identical in substance to the final sentence of 18 U.S.C. 1508. Since the provision is a defense rather than a affirmative defense, the government, upon the introduction of sufficient proof to raise the issue, will bear the burden of proving beyond a reasonable doubt that the elements of the defense were not established, e.g., that the actor did not take notes "solely" to facilitate the performance of his official duties.

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[78] See Final Report, § 1326.
[79] See section 2-6C5.
[80] See section 302(a)(1).
[81] See sections 302(b)(2) and 302(c)(1).

4. Jurisdiction

There is Federal jurisdiction over an offense under this section if the jury is a Federal jury.

5. Grading

An offense under this section is graded as a Class B misdemeanor (up to six months in prison). This is half the maximum permitted under current law and represents the Committee's view that the offense is not as serious as, for example, the conduct proscribed in section 1326 of communicating with a juror with intent improperly to influence his official action.

SECTION 1328. DEMONSTRATING TO INFLUENCE A JUDICIAL PROCEEDING

1. In General

This section carries forward, with some changes, the provisions of 18 U.S.C. 1507. As is the case under that statute, this section is not only intended to protect judicial proceedings from the influence of demonstrations, it is also intended to avoid the appearance that judicial determinations are a product of this form of intimidation. Although there apparently have been no prosecutions under 18 U.S.C. 1507 since its enactment in 1950, the statute does serve as a potential protection from untoward influences on Federal judicial proceedings. A State statute derived virtually verbatim from 18 U.S.C. 1507 was upheld by the Supreme Court in *Cox* v. *Louisiana*[82] as properly furthering the State's legitimate interest in protecting its judicial system from pressures such as picketing near a courthouse, and as regulating conduct as distinguished from pure speech so that it could not be said to infringe on the First Amendment rights of free speech and assembly. In that case, the Court, in an opinion written by Justice Goldberg, made clear its view as to the importance of assuring that the judicial system operates free from pressures extraneous to the merits of a case before a court.

The Committee believes that it is essential to our system of justice that a criminal prosecution or a civil case be decided solely on the basis of the evidence presented in the courtroom. To tolerate the improper influencing of judges, jurors, defense counsel, and prosecutors—either at their homes or at the courthouse—would undermine the foundations of our judicial system. In the Nation's past, there have been cross-burnings by angry crowds, vigils by men in white hoods, and demonstrations by would-be vigilantes carrying ropes. While such persons may give expression to their views under our system of government, they may not do so at the expense of rights of defendants and litigants in a manner specifically designed to assert improper influence on a judicial proceeding—whether or not it involves noise, obstruction of access, or direct threats.

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[82] 379 U.S. 559 (1965).

2. The Offense

Subsection (a) states that a person commits an offense if, with intent to influence another person in the discharge of his duties in a judicial proceeding, he pickets, parades, displays a sign, uses a sound amplifying device, or otherwise engages in a demonstration either (1) in a building housing a court of the United States, or (2) on the grounds of, or within 100 feet of, a building housing a court of the United States, after being advised that such conduct is an offense; or (3) in, or on the grounds of, or, after being advised that such conduct is an offense, within 100 feet of, a building occupied by such other person.

Unlike 18 U.S.C. 1507, which speaks of an intent to interfere with, obstruct, or impede the administration of justice, in addition to an intent to influence persons in the discharge of their official duties, this section covers only the latter type of intentional conduct. Acts done with the intent to interfere with, obstruct, or impede the administration of justice are deemed reachable under section 1323(a)(2), discussed above, or under other provisions such as section 1302 (Obstructing a Government Function by Physical Interference) and section 1326 (Communicating with a Juror).

One of the major problems noted in the *Cox* case, *supra*, was the failure of the statute to be more precise than the word "near" in describing the area within which (if the demonstration was not in the courthouse or building occupied or used by a court official) a demonstration could not occur. The present section attempts to cure this vagueness by inserting a specific distance of 100 feet. A similar approach was taken in a New York statute, and a specified distance was also recommended by the National Commission.[83]

This section is broader than 18 U.S.C. 1507 in one respect. Whereas that statute refers only to an intent to influence enumerated officials—i.e., "any judge, juror, witness, or court officer"—this section uses the term with intent to influence any other "person" in the discharge of his duties, etc. Although the demonstration usually will be aimed at a person of the class described in current law, the Committee believed that demonstrations directed at others having official duties (e.g., attorneys), with intent to influence their actions in a judicial proceeding, should also be proscribed.

The conduct in this section is picketing, parading, displaying a sign,[84] using a sound amplifying device, or otherwise engaging in a demonstration. As no culpability level is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the actor was aware that he was performing the conduct described.[85] The element "with intent to influence another person in the discharge of his duties in a judicial proceeding" states the purpose for which the conduct must be shown to have been done. The remaining elements—that the demonstration or other conduct occurred (1) in a building housing a court of the United States,[86] (2), after being advised that such conduct is an of-court of the United States, or (3) in or on the grounds of, or after being advised that such conduct is an offense, within 100 feet of, a building occupied by such other person—are existing circumstances. As no culpability standard is specifically prescribed the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[87]

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[83] See Final Report § 1325; see also Working Papers, p. 623.

[84] The "displaying a sign" language, which is not in 18 U.S.C. 1507, is also derived from New York law. See McKinney's N.Y. Penal Law § 215.50(7).

[85] See sections 303(b)(1) and 302(b)(1).

[86] The term "court of the United States" is defined in section 111.

3. Defense

Subsection (b) provides a defense to a prosecution for a demonstration on the grounds of, or within 100 feet of, a building housing a court of the United States, if the demonstration is not conducted during the period thirty minutes before to thirty minutes after actual proceedings are conducted in the building and the conduct does not involve the making of unreasonable noise, obstructing entry to or exit from the building, or threatening or placing another person in fear of bodily injury, kidnapping, or property damage. This is a narrow defense directed at permitting interested persons at reasonable times to show to the public their position on an issue or case that many be pending before a court so long as the conduct is clearly an expression of an opinion and not an attempt to intimidate those persons responsible for or participating in the proceeding. Courts are and must remain undisputed places for the resolution of contested matters with impartiality and without intimidation.

Once properly raised, the government will bear the burden of disproving the defense beyond a reasonable doubt.

4. Jurisdiction

There is Federal jurisdiction over an offense under this section if the judicial proceeding is a Federal judicial proceeding.

5. Grading

Current law classifies this offense as a misdemeanor punishable by up to one year in prison. The National Commission recommended a drastic reduction in severity to a maximum of thirty days in prison. The Committee determined to grade this offense as a Class B misdemeanor punishable by up to six months' imprisonment. Although the Committee concurs that retaining the current grading level would be unwarranted given the fact that more serious misconduct may be reached under other provisions of the proposed Code, the offense is deemed to justify the possibility of more than a one-month jail sentence.

SECTION 1329. PROOF PROVISION FOR SUBCHAPTER C

This section provides that in a prosecution under section 1001 for an attempt to commit an offense described in sections 1322, 1323, 1324, or 1325, proof that the defendant endeavored to commit the offense is sufficient to establish that his conduct constituted a substantial step toward the commission of the offense. The section is designed to preserve, and in one respect enlarge, the scope of present law with respect to the current obstruction of justice statutes, 18 U.S.C. 1503, 1505, and 1510, which use the term "endeavors" in defining the conduct prohibited by sections 1322, 1323, and 1325. Application of the term "endeavor" to the conduct prohibited in section 1324 enlarges the scope of current law in this respect. While the general concept of "endeavors" is brought forward by the attempt offense as applied to sections 1322–1325, the standard definition of attempt, as contained in section 1001, is significantly more stringent than what Congress intended to apply in the area of obstruction of justice crimes.[88] The Supreme Court, in *United States* v. *Russell,*[89] has specifically noted that the word "endeavors" is broader than the notion of attempt and "describes any effort or essay to accomplish the evil purpose that the (obstruction of justice statute) was enacted to prevent."[90] Section 1329 will insure that the full scope of contemplated coverage for culpable acts designed to thwart justice will be maintained[91] by providing that proof that the defendant "endeavored" to commit the offense satisfies the element in section 1001 (Criminal Attempt) that the defendant's conduct in fact constitutes a substantial step toward the commission of the crime.

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[87] See sections 303(b)(2) and 302(c)(1).

SUBCHAPTER D.—CONTEMPT OFFENSES

(Sections 1331–1335)

This subchapter consolidates in five sections many contempt offenses that are currently located in a number of titles of the United States Code. Significantly, it also creates specific offenses to cover the most typical kinds of criminal contempt conduct now punishable only by a court under 18 U.S.C. 401. The result is intended to conplement the inherent power of the court to punish criminal contempt by making serious criminal contempts subject to prosecution as ordinary offenses.

This subchapter deals only with criminal contempt. The availability of simultaneous or alternative civil contempt proceedings is left unimpaired in the Code.[1] The distinction between the two forms of contempt has been held to depend upon the character and purpose of the sanction. If the sanction (e.g., incarceration) is remedial, i.e., designed to induce compliance with a court's order or decree, the contempt is deemed civil. If, on the other hand, the sanction imposed is punitive, i.e., intended to vindicate the authority of the court, the contempt is criminal.[2]

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[88] See, e.g., U.S. Code Cong. & Admin. News, 90th Cong., 1st Sess., p. 1762 (1967).

[89] 255 U.S. 138 (1921).

[90] *Id,* at 143.

[91] See, e.g., *United States* v. *Lazzerini,* 611 F. 2d 940 (1st Cir. 1979).

[1] See section 104.

[2] Compare *Shillitani* v. *United States,* 384 U.S. 364 (1966) (civil contempt), with *United States* v. *Harris,* 382 U.S. 162 (1965) (criminal contempt).

SECTION 1331. CRIMINAL CONTEMPT

1. In General and Present Federal Law

Not all existing Federal criminal contempt statutes specify the length of sentence that may be imposed. Where no maximum period is provided, the Supreme Court has held that, for purposes of determining the availability of the constitutional right to a jury trail, the classification of the offense depends upon the sentence actually meted out. If the period of imprisonment is six months or less, the crime is a "petty offense" [3] for which no jury trial need be afforded. If the period of imprisonment is greater than six months, a jury trial is necessary unless waived.[4]

Another unique feature of the criminal contempt offense is that, regardless of the punishment imposed, the Fifth Amendment right to indictment by a grand jury does not apply.[5] Although an indictment is a permissible means of instituting a criminal contempt prosecution,[6] the history and purpose of the offense have been found to support the conclusion that the court itself may institute proceedings to punish the contempt on proper notice.[7]

Similarly, since the contempt offense is peculiarly against the authority of the court, it has been held that the Double Jeopardy clause of the Fifth Amendment does not prohibit prosecution for contempt and another substantive offense directly arising out of the same conduct.[8]

A. Contempt of court

18 U.S.C. 401 empowers a United States court to punish such contempt of its authority, and none other, as:[9]

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The court is given authority to punish by fine or imprisonment "at its discretion." The only sentence foreclosed is one of death. However, a reviewing court can reduce a sentence imposed if it finds an abuse of discretion.[10]

18 U.S.C. 402 empowers a United States district court or any court of the District of Columbia to punish any person, corporation, or association that "willfully" disobeys its lawful writ, process, order, rule, or decree, if the act done also constitutes a criminal offense under any statute of the United States or under the laws of

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[3] See 18 U.S.C. 1.

[4] See, e.g., *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Frank* v. *United States*, 395 U.S. 147 (1969).

[5] See *Green* v. *United States*, 356 U.S. 165, 183–187 (1958); *United States*, v. *Bukowski*, 435 F.2d 1094, 1099–1102 (7th Cir. 1970), cert, denied, 401 U.S. 911 (1971).

[6] E.g., *United States*, v. *Mensik*, 440 F.2d 1232 (4th Cir. 1971).

[7] See Fed. R. Crim. P. 42.

[8] E.g., *United States*, v. *Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971) (defendant's hurling of a water pitcher at prosecutor during trial held to establish both a criminal contempt and an assault, each of which could be separately prosecuted and punished).

[9] Section 401 is derived without substantial change from the Act of March 2, 1831, 4 Stat. 487.

[10] E.g., *United States*, v. *Bukowski*, *supra* note 5.

the State in which the act was committed. The offense is a misdemeanor punishable by no more than six months in prison.

B. Contempt of Congress

2 U.S.C. 192 makes it an offense for a witness, summoned by authority of either House of Congress to testify or to produce papers, willfully to make default or to refuse to answer any questions pertinent to the inquiry. The offense is a misdemeanor punishable by imprisonment for between one and twelve months, a fine of $100 to $1,000, or both.

C. Contempt of administrative agencies

A large number and variety of statutes exist providing for the enforcement of agency subpoenas through a court's contempt power.[11] Typical of this class of statutes is section 499(m) of title 7 authorizing the Secretary of Agriculture to invoke the aid of any court to obtain an order to enforce agency subpoenas to appear, testify, or produce evidence. Failure to obey such an order is punishable by the court as contempt under 18 U.S.C. 401(3).

Many statutes, in addition to providing for the enforcement of agency subpoenas through contempt proceedings, also make disobedience of the agency subpoena itself a specific criminal offense. For example, disobedience of a subpoena issued by the Federal Trade Commission is a misdemeanor punishable by imprisonment for not more than one year, a fine of $100 to $5,000, or both.[12]

D. Contempt under the Civil Rights Laws

42 U.S.C. 1995 provides that a criminal contempt arising under the Civil Rights Act of 1957 is punishable by up to six months' im-

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[11] See Working Papers, pp. 631-640, for a list of such statutes.

[12] 47 U.S.C. 409. United States Code provisions identical or similar to 47 U.S.C. 409, with penalty provisions in parenthesis, include:

7 U.S.C. 15—Agriculture Department commodities exchange (enforced by 49 U.S.C. §§ 12, 46-48; $100 to $5000, 1 year, or both).

7 U.S.C. 222—Agriculture Department, stockyard dealers (enforced by 15 U.S.C. §§ 46, 48-50; $1000 to $5000, 1 year, or both).

15 U.S.C. 49, 50—Federal Trade Commission ($1000 to $5000, 1 year, or both).

15 U.S.C. 78u—Securities Exchange Commission ($1000, 1 year, or both).

15 U.S.C. 79r—Securities Exchange Commission, public contracts ($1000, 1 year, or both).

15 U.S.C. 80a—41 Securities Exchange Commission, investment companies ($1000, 1 year, or both).

15 U.S.C. 80b-9—Securities Exchange Commission, investment advisers ($1000, 1 year, or both).

15 U.S.C. 717m—Federal Trade Commission ($1000, 1 year, or both).

16 U.S.C. 825f—Federal Power Commission ($1000, 1 year, or both).

22 U.S.C. 703—Service courts, friendly foreign nations ($2000, 6 months, or both).

26 U.S.C. 6420(e), 6421(f), 6424(d), 7602—Internal Revenue Service (enforced by 26 U.S.C. § 7604; $1000, 1 year, or both and costs of prosecution).

33 U.S.C. 504, 506—Army, bridges over navigable waters ($1000, 1 year, or both).

46 U.S.C. 652—Coast Guard (up to $100 for each violation).

47 U.S.C. 409—Federal Communications Commission ($100 to $5000, 1 year, or both).

49 U.S.C. 12—Interstate Commerce Commission (enforced by 49 U.S.C. § 46; $100 to $5000, 1 year, or both).

49 U.S.C. 305(d)—Interstate Commerce Commission, motor carriers (enforced by 49 U.S.C. § 46; $100 to $5000, 1 year, or both).

49 U.S.C. 916—Interstate Commerce Commission, water carriers (enforced by 49 U.S.C. § 46; $100 to $5000, 1 year, or both).

49 U.S.C. 1472(g), 1484—Civil Aeronautics Board ($1000 to $5000, 1 year, or both).

50 U.S.C. 819, 824—Detention Review Board ($5000, 1 year, or both).

50 U.S.C. App. 643a, 643b—War Production Board ($5000, 1 year, or both).

50 U.S.C. App. 1152—Navy, war and defense contracts ($10,000, 1 year, or both).

50 U.S.C. App. 2155—Defense Production Act ($1000, 1 year, or both).

prisonment and a fine (in the case of a natural person) of no more than $1,000. The section does not apply to contempts under 18 U.S.C. 401(1) or to the misconduct or disobedience of any officer of the court with respect to its writs, orders, or process.

42 U.S.C. 2000h states that a criminal contempt arising under the Civil Rights Act of 1964 is punishable by up to six months' imprisonment and a fine of no more than $1,000. The section requires that the act or omission constituting the contempt be "intentional." As under 42 U.S.C. 1995, the section is not applicable to contempts under 18 U.S.C. 401(1) or to the misconduct or disobedience of any officer of the court with respect to its writs, orders, or process.

E. Procedural statutes and rules

In addition to the substantive contempt statutes referred to, there are a number of procedural statutes and rules pertaining to criminal contempt proceedings. Several of these deal with the right to jury trial.

For instance, 18 U.S.C. 402 requires a jury trial in accordance with 18 U.S.C. 3691 for willfully disobeying a court order if the act of contempt also constitutes a Federal or State crime.

18 U.S.C. 3692 requires a jury trial for criminal contempt cases arising under Federal laws governing the issuance of injunctions or restraining orders growing out of a labor dispute.

42 U.S.C. 1995 provides for a non-jury trial, in the discretion of the judge, in criminal contempts under that section, but permits a trial *de novo* before a jury if the sentence imposed is imprisonment for more than forty-five days or a fine exceeding $300.

42 U.S.C. 2000h, in contrast to section 1995, provides for a jury trial upon demand by an accused.

Some other statutes deal with the issue of double jeopardy. Thus, 18 U.S.C. 3285 provides that a criminal contempt proceeding under 18 U.S.C. 402 shall not be a bar to any criminal prosecution for the same act.[13] In contrast, 42 U.S.C. 2000h-1 provides that an acquittal or conviction for a specific Federal offense shall bar a criminal contempt proceeding under the Civil Rights Act of 1964 which arises from the same act, and vice versa.

Still other provisions deal with miscellaneous procedural matters. For example, under 2 U.S.C. 194 Congress can certify a statement of facts to the appropriate United States Attorney by the President of the Senate or the Speaker of the House, as the case may be, for prosecution of contempt of Congress.

Finally, Rule 42 of the Federal Rules of Criminal Procedure sets forth criteria for determining when a contempt may be tried summarily and when it must be tried upon notice and hearing. Rule 42(a) allows summary disposition of criminal contempt cases if the "judge certifies that he saw or heard the conduct constituting the contempt and . . . it was committed in the actual presence of the court." Rule 42(b) provides that all other criminal contempt cases must be prosecuted on notice stating the time and place of the hearing, allowing reasonable time for preparation of the defense, and stating the essential facts constituting the criminal contempt charged. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial except with the defendant's consent.

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[13] This section also prescribes a one-year statute of limitations for the institution of a criminal contempt proceeding under 18 U.S.C. 402.

2. The Offense

Subsection (a) provides that a person commits an offense if he:

(i) misbehaves in the presence of a court or so near to it as to obstruct the administration of justice;

(ii) disobeys or resists a writ, process, order, rule, decree, or command of a court; or

(iii) as an officer of a court, misbehaves in an official transaction outside the presence of the court.

The subsection is intended essentially to reenact 18 U.S.C. 401, but with one major change: whereas 18 U.S.C. 401 is stated in terms of the courts having jurisdiction to punish as contempt the conduct described, subsection (a) is stated in the usual terms of a person committing an offense if he engages in the conduct described. The subsection is designed to facilitate implementation of the Committee's decision in subsection (c) to permit either a Federal prosecutor, with the concurrence of the court, or the court to initiate appropriate action.

It should be noted that the phrase "such contempt of its authority, and none other, as"—which appears in 18 U.S.C. 401—is carried forward in section 510 of the bill as a conforming amendment adding a new section, 462, to title 28, which states that the power of a court to punish for criminal contempt is limited to conduct specified as an offense in this section.

Paragraph (1) of section 1331(a) is designed to codify 18 U.S.C. 401(1). The conduct element is misbehaving. As no culpability is specifically designated, the applicable state of mind is "knowing," i.e., the offender must be aware that he is misbehaving.[14] The elements of "in the presence of the court" or "near to it" are existing circumstances. Since again no culpability is stated, the applicable level is at least "reckless," that is, an awareness but disregard of the substantial risk that the misbehavior was in the court's presence or near to it.[15] The Committee intends to perpetuate existing law with respect to the meaning of "presence" or "nearness," which have been held to require an act in the "vicinity" of the court.[16] This element of geographical proximity is designed to distinguish between contempt and obstruction of justice offenses.

The element "so . . . as to obstruct the administration of justice" is a result of conduct. As no culpability is specifically provided, the state of mind that must be proved is "reckless," [17] i.e., an awareness but disregard of the substantial risk that the conduct will cause the administration of justice to be obstructed, the risk being such that its disregard constitutes a gross deviation from the care that a reasonable person would exercise in the circumstances.[18]

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[14] Sections 303(b)(1) and 302(b)(1). See also *United States* v. *Smith*, 555 F.2d 249 (9th Cir. 1977) (contempt for communicating with jurors by spectacular requires that communications be intentionally or knowingly made to juror; a communication uttered with wanton disregard of whether jurors might hear it is not sufficient).

[15] See sections 303(b)(2)(and 302(c)(1).

[16] See *Nye* v. *United States*, 313 U.S. 33, 48–52 (1941).

[17] See section 303(b)(3).

The culpability standards under this paragraph are intended, as closely as possible, to follow the interpretation given 18 U.S.C. 401(1) in *United States* v. *Seale*[19] and *United States ex. rel. Robson* v. *Oliver.*[20] In those cases the Seventh Circuit observed that four basic elements are required for conviction: (1) intentional conduct; (2) constituting misbehavior (defined as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel, or spectator");[21] (3) which causes an actual and material disruption or obstruction of the administration of justice;[22] (4) within the court's presence or near thereto. With respect to the nature of the intent required for conviction, the court in *Seale* rejected both the defendant's suggested standard that the actor must have a purpose to subvert the administration of justice and the government's suggested standard that he merely know what he is doing. Rather, the court adopted a middle ground, holding that the "minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful."[23] The Committee endorses this view and intends to codify this standard by the drafting technique of requiring "knowing" misbehavior, coupled with a "reckless" state of mind with respect to the result of causing an obstruction of the administration of justice.

In view of its purpose in this paragraph to reflect the culpability standard enunciated in *Seale,* the Committee also approves the *Seale* court's admonition that, in the case of "borderline conduct," a prior warning by the court or other circumstances indicating that the conduct is regarded as contumacious should be a prerequisite to a finding that the defendant acted with the required intent.[24]

Paragraph (2) is intended to codify 18 U.S.C. 401(3). The conduct element is disobeying or resisting a writ, process, order, rule, decree, or command of the court. As no culpability is specified, the applicable state of mind is "knowing," i.e., the offender must be aware that he is disobeying or resisting a court writ, process, etc. In the ordinary case this will mean that the offender has been served with or otherwise officially notified of the existence of the writ, process, etc. This standard is consistent with case law construing 18 U.S.C. 401(3), in which it has been held that, while knowledge of the order and a deliberate disobedience or resistance of it are essential elements, it need not be proved that the offender had an evil intent.[25]

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[18] See section 302(c)(2).

[19] 461 F.2d 345 (7th Cir. 1972).

[20] 470 F.2d 10 (7th Cir. 1972).

[21] *Supra* note 19 at 366.

[22] *Id.* at 369–371.

[23] *Id.* at 368. See also *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers,* 552 F.2d 498, 570 (3d Cir.), cert. denied, 434 U.S. 822 (1977).

[24] *Id.* at 366. See also *Commonwealth of Pennsylvania* v. *Local International Union 542, International Union of Operating Engineers, supra* note 23 at 512.

[25] See *Green* v. *United States, supra* note 5, at 172–174; *United States* v. *Fidanian,* 465 F.2d 755, 760 (5th Cir.), cert. denied, 409 U.S. 1044 (1972); *Yates* v. *United States,* 316 F.2d 718, 723 (10th Cir. 1963); see also *United States* v. *Schicksup Drug Co., Inc.,* 206 F. Supp. 801 (S.D. Ill. 1962).

Unlike the formulation of the National Commission, which used the phrase "lawful writ, process, order, rule, decree, or command," the Committee determined to eliminate the world "lawful" from the present formulation in 18 U.S.C. 401(3). The effect of adopting the National Commission's recommendation could give rise to the argument that a defense would exist where the defendant could show that the court's order was in fact not lawful. However, present law is clear that despite the wording of 18 U.S.C. 401(3) the invalidity of a court order is in itself generally not a defense in a criminal contempt proceeding alleging its disobedience or resistance.[26] The rationale for the current rule is that a person's belief that a court has erred in its order or command does not justify contumacious disobedience. Rather, the individual's recourse lies in appealing the order in question within the framework of the court system. The Committee considers such a result to be generally desirable and in keeping with the integrity of and respect due our Federal courts. Accordingly, it intends to preserve the existing doctrine that ordinarily illegality of the court's order is no defense.

Paragraph (3) is designed to codify 18 U.S.C. 401(2). The addition of the phrase "outside the presence of the court" is designed to clarify the relationship and distinction between this offense and the offense in paragraph (1). The change is not believed to have any substantive effect; the Committee is unaware of any case in which the "officer of the court" misbehavior branch of the current statute has been used to prosecute for conduct that occurred in the court's presence. The conduct element is misbehaving, and the culpability level is "knowing," i.e., the proof must establish that the actor was aware that he was misbehaving.[27] "Misbehaving" is intended to have the same meaning as under paragraph (1) herein, that is, it is intended to have the meaning placed upon that term (in its variant form) in *United States* v. *Seale, supra.*[28]

The elements of "as an officer of the court", "outside the presence of the court", and "in an official transaction" are existing circumstances. As no state of mind is specifically designated, the applicable culpability level is "reckless," i.e., an awareness but disregard of the substantial risk that the circumstances exist.[29] The terms "officer of the court" is not defined. It is intended, however, to have the meaning given the identical terms under present law. Thus, such conventional court officers as marshals, bailiffs, clerks, and court reporters are included, but not attorneys.[30] The latter may, of course, be prosecuted for misbehavior under paragraph (1) of this subsection.

The term "official transaction" is likewise not defined. Once again, the Committee intends to endorse the judicial interpretations of that term under 18 U.S.C. 401.[31]

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[26] See *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-294 (1947); *United States* v. *Seale, supra* note 19 at 361, and cases cited therein. Disobedience or resistance may be justified where the court order is "transparently" unlawful.

[27] See sections 303(b)(1) and 302(b)(1).

[28] See discussion under section 1331(a)(1), *supra*

[29] See sections 303(b)(2) and 302(c)(1).

[30] See *Cammer* v. *United States*, 350 U.S. 399, 405–408 (1956).

[31] See *In re Michael*, 326 U.S. 224 (1945); *Cammer* v. *United States*, 223 F.2d 322, 325–326 (D.C. Cir. 1955), rev'd on other grounds, 350 U.S. 399 (1956); *Farese* v. *United States*, 209 F.2d 312, 315 (1st Cir. 1954).

3. Affirmative Defenses

Subsection (b) provides for an affirmative defense to a prosecution for the disobedience or resistance to a court's order, writ, process, etc., under subsection (a)(2) if the order, etc.: "(1) was invalid and . . . the defendant took reasonable and expeditious steps to obtain a judicial review of its validity, or a judicial decision with respect to a stay thereof, prior to the disobedience or resistance charged, and was unsuccessful in obtaining such review or decision within a reasonable period of time; or (2) uncontrollable circumstances prevented the defendant from complying with the writ, process, order, rule, or command, and the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply."

Subsection (b)(1) is designed to recognize a very limited exception to the fundamental principle that ordinarily, when a court has jurisdiction over the parties and the subject matter, its orders must be obeyed, whatever their seeming invalidity, upon pain of contempt. As noted recently by the Supreme Court.[32]

> [It is a] basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

This general principle has been applied even with respect to judicial orders affecting constitutional rights, including certain rights under the First Amendment. Thus, in sustaining the contempt convictions of persons who, without seeking appellate redress, had disobeyed a temporary injunction against parading or encouraging mass street parades without a permit, and which they later sought to challenge on constitutional grounds, the Supreme Court observed:[33]

> The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. [Footnote omitted.] This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' commitment to their cause. But respect for ju-

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[32] *Maness* v. *Meyers*, 419 U.S. 449, 458 (1975).

[33] *Walker* v. *City of Birmingham*, supra note 26 at 320-321. See *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir., 1957), cert. denied, 355 U.S. 834, cited with approval in *Walker* at 321 note 16. There, a Federal court had ordered the public high school in Clinton, Tennessee, to desegregate. Kasper "arrived from somewhere in the East," and organized a campaign "to run the Negroes out of the school." The Federal court issued an *ex parte* restraining order enjoining Kasper from interfering with desegregation. Relying upon the First Amendment, Kasper harangued a crowd "to the effect that although he had been served with the restraining order, it did not mean anything. . . ." His conviction for criminal contempt was affirmed by the Court of Appeals for the Sixth Circuit. That court concluded that "an injunction order issued by a court must be obeyed," whatever its seeming invalidity, citing *Howat* v. *Kansas*, 258 U.S. 181.

> dicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Different considerations apply, however, when appelate court action is not meaningfully available to preserve the right or interest at issue. In these circumstances, the Committee believes it is appropriate to recognize a limited defense provided also that the order is invalid.[34] Affording a narrow defense in this situation will not, in the Committee's judgment, tend to encourage disobedience of court orders; on the contrary, the defense requires proof that the defendant took reasonable and expeditious, albeit unsuccessful, action in an attempt to obtain a judicial review or decision on a stay. Thus, the defense will exist only where no reasonable opportunity for an effective review by the courts, or for judicial action on a stay, was available. The interpretation of what constitutes "reasonable" steps and a "reasonable period of time" is left to the courts and the finders of the facts on a case by case basis. However, the Committee believes that in this context the defendant should be required to show that he exhausted all reasonable measures to try to secure a judicial review or decision on an application for a stay.

Subsection (b)(2) provides that it is an affirmative defense that uncontrollable circumstances prevented the defendant from complying with the writ, process, order, rule, or command, and the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply. A similar affirmative defense is contained in section 1312 (Bail Jumping), and the discussion of that provision should be consulted here.

The defenses are denominated as "affirmative", thus requiring the defendant to prove all the elements thereof by a preponderance of the evidence.[35]

Subsection (d) deals with the issue of successive prosecutions first for criminal contempt and then for another substantive offense arising out of the same conduct. The first sentence preserves existing doctrine by providing generally that a proceeding under this section shall not be a bar to a prosecution for an offense under another section of the United States Code.[36]

This subsection does not affect the existing doctrine permitting a person to be held in both civil and criminal contempt for the same act.[37] Likewise, the subsection does not affect the current rule permitting multiple prosecutions for successive contempts, or a single prosecution for multiple counts of contempt, where the contempts are genuinely distinct.[38] Nor does it affect current law concering simultaneous prosecutions under this section and another section violated by the same conduct, nor concerning prosecution first under another section and then for criminal contempt.

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[34] This is generally consistent with the Fifth Circuit's pronouncement, in *United States* v. *Dickinson*, 465 F.2d 496, 511 (1972), aff'd on second appeal, 476 F.2d 373, cert. denied, 414 U.S. 979 (1973).

"Of course, the rule that unconstitutional court orders must nevertheless be obeyed unitl set aside presupposes the existence of at least three conditions: (i) the court issuing the order must enjoy subject matter and personal jurisdiction over the controversy; (ii) adequate and effective remedies must be available for orderly review of the challenged ruling; and (iii) the order must not require an irretrievable surrender of constitutional guarantees."

[35] See the definition of "affirmative defense" in section 111.

[36] See e.g., *Jurney* v. *MacCracken*, 294 U.S. 125, 151-152 (1935); *United States* v. *Rollerson*, *supra* note 8; *United States* v. *Johansen*, 36 F. Supp. 30 (S.D.N.Y. 1940); see also 18 U.S.C. 3285. The only official expression of a contrary policy appears in the Civil Rights Act of 1964, 42 U.S.C. 2000h-1. The Committee perceives no reason to maintain this exception.

[37] E.g., *Yates* v. *United States*, 355 U.S. 66, 74 (1957).

The second sentence represents an amelioration of existing law[39] and provides that in a subsequent prosecution for an offense arising out of the same conduct at issue in the criminal contempt proceeding, a defendant shall receive credit toward his sentence for any time spent in custody or fine paid as a result of the contempt proceeding.

Subsection (c) of section 1331 provides that a prosecution for an offense under this section may be commenced by "the court, the authority of which was the subject of the contempt, or by the Attorney General with the concurrence of the court." The purpose of this subsection, as mentioned before, is to enable a Federal prosecutor, as well as the court,[40] to commence contempt proceedings.[41]

Granting the prosecutor authority to institute a prosecution under this section is deemed appropriate since the offense is not alone against the judge or the court, but is against the United States as well, and there is no sound reason for departing from the normal practice of permitting the Executive branch, which is generally charged with the enforcement of the criminal laws, from participating in the prosecutive decision.[42] Nothing herein is intended to preclude recourse to the present practice under which a prosecutor may apply to the court to issue an order to show cause why a particular person should not be held in contempt.[43]

The phrase "the court, the authority of which was the subject of the contempt" is intended to carry forward the grant of authority in 18 U.S.C. 401 which provides that a "court of the United States shall have power to punish . . . contempt of *its* authority." (Emphasis added.) Presumably, the word "its" is meant to convey the notion of an aggrieved court and to prevent, for example, a court of appeals from initiating a prosecution for disobedience of a district court's order.[44] The above phrase is similarly intended to permit a prosecution to be instituted only by the court against which the contumacious conduct was directed, so as to vindicate the breach of its authority.

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[38] See *United States* v. *Gebhard*, 426 F.2d 965, 968 (9th Cir. 1970), and cases cited therein; *Yates* v. *United States*, *supra* note 39 at 72–75.

[39] Compare *United States* v. *Rollerson*, *supra* note 8 (sustaining the imposition of consecutive sentences).

[40] The Committee does not intend, by the phrase "the court," to require the entire court (i.e., a majority of judges thereon) to give its concurrence, but rather only the individual judge or judges directly affected (usually the judge presiding over the proceeding in relation to which the contempt occurs).

[41] The definition of "Attorney General" in section 111 makes clear that any authorized officer of the Department of Justice, not the Attorney General alone, may institute a prosecution. The Committee does not intend that the reference to the Attorney General be construed to require specific authorization by the Attorney General, on a case-by-case basis, in order to commence a prosecution under this section.

[42] This provision is also intended to remove any doubt concerning the authority of appropriate law enforcement agencies to investigate certain instances of contemptuous conduct, such as grand jury leaks, at the request of the judicial authorities. In recent years, the existence of such authority has been questioned.

[43] See Rule 42. F.R. Crim. P.

[44] Cf. *United States* v. *Barnett*, 376 U.S. 681, 691–692 (1964).

4. Grading

Subsection (e) provides that an offense under subsection (a)(2) or (a)(3) is a Class B misdemeanor (up to six months in prison), and an offense under subsection (a)(1) is a Class C misdemeanor (up to thirty days in prison). Both offenses carry a maximum fine of $25,000 for an individual and $100,000 for an organization. This is a departure from the presently unlimited power of the court to impose any sentence of imprisonment or fine under 18 U.S.C. 401. However, the reduced maximum prison sentences are justified in view of the overall scheme of the subchapter which creates specific offenses heretofore punishable only by the court as contempt.[45] Moreover, the Committee believes that thirty days in prison is a sufficient deterrent and punishment for conduct occurring in the presence of the court, which may be summarily adjudicated under Rule 42 of the Federal Rules of Criminal Procedure. An exception to the specific misdemeanor fine to allow the imposition of a fine in any amount deemed just by the court is provided by this subsection when the offense involves disobedience of or resistance to the court's temporary restraining order, preliminary injunction, or final order other than an order for the payment of money, or if the prosecution is for violation of a release condition pursuant to section 3506(d). This continues the power of the court, subject to appellate review, to impose any fine it deems appropriate under this circumstance,[46] thereby retaining a flexible economic sanction available to the court, to adequately vindicate its authority in such matters.[47]

The reference to "final order" in this subsection is meant to denominate the class of orders which are appealable. Minor orders, such as to answer interrogatories by a certain date, remain in the petty category.[48] The subsection also corrects what was probably an unintentional consequence of the language used in 18 U.S.C. 401, i.e., its construction to prohibit imposition of both a fine and imprisonment.[49] Under the subsection both penalties may be meted out.

5. Jurisdiction

Subsection (f) provides that there is Federal jurisdiction over an offense under this section if the court is a court of the United States. The term "court of the United States" is defined in section 111. It includes the Supreme Court, the courts of appeals, duly convened three-judge district courts, United States District Courts, and other enumerated courts.[50] The scope of jurisdiction is intended to be at least as wide as under 18 U.S.C. 401, which also uses the term "court of the United States."[51]

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[45] See, e.g., section 1332 (Failing to Appear as a Witness); section 1333 (Refusing to Testify or to Produce Information); section 1335 (Disobeying a Judicial Order).

[46] Under present law, the offense under this section is committed by disobedience or resistance or a court's order without regard, in general, to its legality; see discussion, *supra.*

[47] CF. Working Papers, p. 605.

[48] See *id.* at 604–605

[49] See *id.* at 605–606, and cases cited therein.

[50] The fact that a three-judge district court (e.g., under 28 U.S.C. 2282) is found not to have been properly convened will not necessarily invalidate a contempt proceeding under this section. The proceeding may be viewed as brought by a regular United States district court, with the presence of two additional judges merely a superfluous and not prejudicial factor. See *O'Malley v. United States,* 128 F.2d 676, 687 (8th Cir. 1942), rev'd on other grounds, 317 U.S. 412 (1943).

SECTION 1332. FAILING TO APPEAR AS A WITNESS

1. In General

Section 1332 makes it an offense to fail to comply with an order to appear or to be sworn as a witness at an official proceeding. The conduct in question is presently covered by 18 U.S.C. 401(3) and by a number of statutes providing for the enforcement of agency subpoenas through contempt proceedings.[52] Section 1332 consolidates these statutes into a specific offense applicable to proceedings throughout the government, including contempt of Congress currently covered by 2 U.S.C. 192.

2. Present Federal Law

Current law requires notice and knowledge of the order and the willful disobedience of its command as essential elements of criminal contempt. Willfulness in the sense used by the courts describes a person's actions as deliberate, voluntary, or intentional, as distinct from accidental, inadvertent, or negligent.[53] It has been held that oral communication of a proposed surrender order is sufficient notice and knowledge of the order to warrant conviction.[54] However, where an attorney who had notified a court that he was not a member of the local bar was nonetheless appointed through clerical error to represent an indigent, the court found a lack of sufficient intent to sustain a conviction.[55]

3. The Offense

Under section 1332 a person commits an offense if he fails to comply with an order (1) to appear at a specified time and place as a witness, (2) to remain at a specified place where one is to appear as a witness, or (3) to be sworn or to make an equivalent affirmation as a witness, and, except as otherwise provided by statute, a Federal court, or in a proceeding that is conducted before a United States magistrate or a United States bankruptcy judge, the presiding officer, had directed him to appear, remain, or be sworn.

The conduct element of the offense is failing to comply with an order. As no culpability standard is specifically designated, the applicable state of mind that must be proved is "knowing," i.e., an awareness by the offender that he is failing to comply with an order of the kind described.[56] This type of culpability is designed to carry forward the present case law requiring a "willful" breach of the order under 18 U.S.C. 401(3). It should be noted that the orders, disobedience of which is proscribed, all relate to a person's appearance "as a witness." Thus, failure to obey a summons under Rule 4 of the Federal Rule of Criminal Procedure is not within this section, since it does not constitute an order to appear, remain, or be sworn "as a witness."[57]

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[51] For the Department of Justice's comments on criminal contempt see Hearings, pp. 7498–7499.

[52] See, e.g., 5 U.S.C. 1507; 7 U.S.C. 2115, 2354; 9 U.S.C. 7; 15 U.S.C. 49, 79r, 80b–9, 687b, 717m, 1267; 16 U.S.C. 825f; 21 U.S.C. 876; 22 U.S.C. 703; 26 U.S.C. 7456, 7604; 29 U.S.C. 528; 35 U.S.C. 24; 38 U.S.C. 3313; 39 U.S.C. 3008; 42 U.S.C. 1973, 1995, 2000h, 2000h–1; 45 U.S.C. 1124; 46 U.S.C. 1124; 50 U.S.C. App. 643b, 2155.

[53] See *United States* v. *Fidanian, supra* note 25.

[54] *United States* v. *Hall,* 198 F.2d (2d Cir. 1952). cert. denied, 345 U.S. 905 (1953).

[55] *In re Brown,* 454 F.2d 999 (D.C. Cir. 1971).

[56] See sections 303(b)(1) and 302(b)(1).

The element of "in an official proceeding" is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind that must be shown is "reckless," i.e., an awareness but disregard of the substantial risk that the proceeding from which the order emanated was an "official proceeding."[58] The term "official proceeding" is defined broadly in section 111 to mean "a proceeding or inquiry, including an investigative proceeding or inquiry, convened pursuant to lawful authority, or a portion of such a proceeding or inquiry, that is or may be heard before (a) a government branch or agency, or (b) a public servant who is authorized to take oaths, including a judge, a chairman of or a Member of Congress authorized by a legislative committee or subcommittee, a bankruptcy judge, an administrative law judge, a hearing examiner, and a notary." The term "government agency" is also defined in section 111 to mean, *inter alia,* "a subdivision of the executive, legislative, judicial, or other branch of government." Thus, the definition includes a proceeding before either House of Congress, presently covered in 2 U.S.C. 192.

The term "judge" (included in "official proceeding") is defined in section 111 to mean "any judicial officer". This has the effect, as in section 1333 through the definition of "court", of including official proceedings involving military courts. The purpose of including such proceedings is primarily to cover the case of a failure of a civilian to appear as a witness before a court martial or other military tribunal. This conduct, along with the conduct of refusing to testify or produce information before a military court, is presently punishable under 10 U.S.C. 847, part of the Uniform Code of Military Justice, which prescribes a maximum penalty of six months' imprisonment and mandates a trial in a United States district court. The Committee considers it appropriate to treat these offenses in the Federal Criminal Code rather than in the Uniform Code of Military Justice, and to treat them in the same manner as a failure to appear or testify before a Federal civilian court. 10 U.S.C. 847 is therefore repealed in the conforming amendments.[59]

As under current law, validity of the order is not an element of the offense.[60] Similarly, the fact that a person may have a privilege to refuse to testify or produce information will not excuse his failure to comply with an order the *appear* before the summoning body.[61] Nor would failure to appear be immunized on the ground specified for the person's appearance.[62]

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[57] See Working Papers, p. 611.

[58] See sections 303(b)(2) and 302(c)(1).

[59] The scope of "official proceeding" as including military courts also means that the Code reaches failing to appear or to testify before such courts when committed by a member of the armed forces. The same is true as to other offenses such as perjury under section 1341. Although members of the armed forces who commit these offenses are triable by military courts, concurrent jurisdiction exists today in Federal civilian courts over these crimes. E.g., *Owens* v. *United States,* 383 F. Supp. 780, 782–783 (M.D. Pa. 1974), aff'd, 515 F.2d 507 (3d Cir. 1975), cert. denied, 423 U.S. 996 (1976). Thus by continuing this jurisdiction which is exercised only infrequently, the Code does not expand the reach of current law. See also the discussion in connection with section 206 (Concurrent Federal Jurisdiction Generally Not Preemptive).

[60] See discussion in connection with section 1331.

[61] See *United States* v. *Romero,* 249 F.2d 371, 375 (2d Cir. 1957), Cf. *Branzburg* v. *Hayes,* 408 U.S. 665, 709–710 (Powell, J., concurring) (1972).

The element that, except as otherwise provided by statute, the defendant had been directed by a Federal court or, in a proceeding conducted by a United States magistrate or a United States bankruptcy judge, by the presiding officer, to appear, remain, or be sworn is an existing circumstance. Inasmuch as no culpability level is specifically prescribed, the applicable state of mind that must be proved is "reckless", i.e., an awareness but disregarded of a substantial risk that such direction had been given. This element has been added to the offense to limit its applicability in situations where the order is issued not by a judicial or congressional body, but by an executive or administrative agency. In such a case, unless some other statute provided otherwise, it would not be a crime to fail to appear, remain, or be sworn, in response to an agency supoena. Instead, the agency would have to obtain acourt order to compel the person to appear, remain, or be sworn.

4. Bar to Prosecution

Subsection (c) of section 1332 provides that, for an official proceeding involving the Congress, it is a bar to prosecution under this section that a certification pursuant to 2 U.S.C. 194 had not been issued. That statute provides that whenever a witness summoned under 2 U.S.C. 192 fails to appear, fails to produce records, books, papers, or documents, as required, or fails to answer any question pertinent to the subject under inquiry before either House, or any joint committee, committee, or subcommittee thereof, and the fact of such failure is reported to either House while Congress is in session, or is filed with the President of the Senate or Speaker of the House, as the case may be, when Congress is not in session, it shall be the duty of said President of the Senate or Speaker of the House to certify the statement of facts to the appropriate United States attorney for presentation to the grand jury.

Despite the wording of the statute, it has been held that the President of the Senate and Speaker of the House, respectively, are not required to transmit the statement of facts to the United States attorney. When the Congress is in session, the accepted practice, which the statute is deemed to incorporate, is that a committee's contempt report is submitted in the form of a contempt resolution, to the full House for consideration on the merits; and, when the Congress is not in session, the President of the Senate or the Speaker of the House still retains discretion to examine the sufficiency of the committee report and delay any action until approved by the whole House.[63]

Under present law, it is stated that failure to comply with the certification requirement is a "defense."[64] However, the Committee agrees with the National Commission that the cases in fact indicate that such certification is a condition precedent to initiating prosecution.[65] Accordingly, subsection (c) is drafted as a "bar to prosecution," requiring that the matter ordinarily be raised and determined prior to trial.[66] This seems appropriate since the question whether a proper certification has been made is readily susceptible to factual ascertainment and legal decision, and there is no reason to delay the question until the trial when the jury has been selected and evidence introduced.

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[62] Cf. *United States* v. *Bryan*, 339 U.S. 323 (1950).

[63] See *Wilson* v. *United States*. 369 F.2d 198 (D.C. Cir. 1966).

[64] See *In re Chapman*, 166 U.S. 661, 667 (1897); *United States* v. *Dennis*, 72 F. Supp. 417, 422 (D.D.C. 1947) aff'd, 171 F.2d 986 (D.C. Cir. 1948), aff'd, 339 U.S. 162 (1950).

[65] See Final Report § 1349(4) and (5); Working Papers, p. 625.

5. Affirmative Defense

Subsection (d) provides that it is an affirmative defense to a prosecution under subsection (a)(1) or (a)(2) that uncontrollable circumstances prevented the defendant from appearing at the specified time and place or from remaining at the specified place, and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or remain. A similar provision is contained in section 1312 (Bail Jumping) as well as in the complementary section 1333 (Refusing to Testify or to Produce Information). Since the defense is "affirmative", the defendant will bear the burden of proving the elements thereof by a preponderance of the evidence.[67]

6. Jurisdiction

There is Federal jurisdiction over an offense described in this section if the official proceeding in which the order not complied with was made is a Federal official proceeding. The term "official proceeding" has the meaning set forth in section 111.

7. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison) if the official proceeding was conducted under the authority of Congress or of either House of Congress. This essentially preserves the penalty level in 2 U.S.C. 192. Otherwise, an offense under this section is graded as a Class E felony (up to three years in prison). This significantly reduces the unlimited sentence imposable under 18 U.S.C. 401 and is designed to strike a reasonable balance among the widely disparate grading provisions that exist in current Federal statutes in this area.

SECTION 1333. REFUSING TO TESTIFY OR TO PRODUCE INFORMATION

1. In General

Section 1333 makes it an offense to refuse to testify or to produce information, when ordered to do so at an official proceeding. A requirement that the testimony or answer sought in fact be pertinent is made an element of the offense where the official proceeding is under the authority of Congress or either House thereof, as under present law. An affirmative defense is provided for a person who is legally privileged to refuse to testify or produce information.

2. Present Federal Law

The conduct punished in section 1333 is presently covered by 18 U.S.C. 401(3) (contempt of court), 2 U.S.C. 192 (contempt of Congress), and by a variety of statutes providing for enforcement of agency subpoenas.[68] Additionally embraced by this section is 28 U.S.C. 636(d) which defines the offense of contempt of a United States magistrate.

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[66] See the definition of "bar to prosecution" in section 111.

[67] See the definition of "affirmative defense" in section 111.

Under current law generally, except in a proceeding before the Congress, or before a United States magistrate, the Federal court or judge makes the determination whether the witness must comply with an order in an official proceeding to answer a question or furnish information, and contempt ensues only where the witness refuses to obey the court's direction.[69] For example, the Supreme Court has held that in grand jury proceedings there is no contempt until a judge directs the witness to respond.[70] Where the contempt is a refusal to answer a question before a magistrate under 28 U.S.C. 636(d) that official makes the initial determination and directive to answer. The statutes require that a magistrate certify the facts to a district court who then tries the case. In the instance of contempt of Congress under 2 U.S.C. 192, the contempt is also tried by the court, but the certification of facts is made to the United States Attorney, who is obliged to present the matter to the grand jury.[71] These special procedures are left unchanged by section 1333.[72]

3. The Offense

A. Elements

Section 1333(a)(1) states that a person commits an offense if he refuses to answer a question, in an official proceeding conducted under the authority of Congress or either House of Congress, after being directed to do so and after being warned by the presiding officer that failure to answer may result in criminal prosecution or if he fails to comply with an order to produce a record, document, or other object, after receiving notice that his failure to do so might subject him to criminal penalties. An additional requirement is that the question or object is pertinent to the subject under inquiry. Section 1333(a)(2) provides that person is guilty of an offense if, in any other official proceeding, he refuses to answer a question or fails to comply with an order to produce a record, document or other object, and except as otherwise provided by statute, after a Federal court, or in a proceeding that is conducted before a United States magistrate or a United States bankruptcy judge, the presiding officer, has directed him to answer or to produce and has advised him that his refusal to do so might subject him to criminal prosecution.

This section is designed, in the main, to preserve existing law. Thus, for example, paragraph (1) is intended to carry forward the offense of contempt of Congress under 2 U.S.C. 192. Under present law, it is necessary that the question posed or document sought be pertinent.[73] That requirement is expressly retained in paragraph (1). The Committee intends that a finding of pertinency be conditioned—as under present law—not only upon a holding that the question posed was relevant to the subject then being examined, but also upon a determination that the subject under inquiry was within the jurisdiction of the Committee on House of Congress, and that such pertinency has been adequately explained to the defendant.[74]

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[68] See note 54, *supra*.

[69] See Working Papers, pp. 631-640.

[70] *Brown* v. *United States*, 359 U.S. 41, 49-50 (1959).

[71] See 2 U.S.C. 194.

[72] See Working Papers, pp. 631-640.

[73] E.g., *Gojack* v. *United States*, 385 U.S. 702 (1966); *McPhaul* v. *United States*, 364 U.S. 372, 380-382 (1960).

Paragraph (2), on the other hand, is intended to carry forward the provisions of 18 U.S.C. 401(3), as well as the other statutes previously referred to dealing with contempt of administrative subpoenas and contempt of United States magistrates. Under these current statutes, the crime of contempt is established where the individual refuses to answer or to produce information after having been ordered by the judge or presiding officer to do so. There is no explicit requirement that the answer or information sought have been pertinent to the proceeding as exists under 2 U.S.C. 192. This distinction between contempt of Congress and ordinary contempt is preserved in paragraph (2),[75] which contains no express requirement of pertinence. Moreover, although it is not clear as a matter of judicial interpretation whether a relevancy requirement for contempt of a court's or magistrate's order exists, the Committee believes that no such elements or defense is appropriate and does not intend that one be read into paragraph (2).

The Committee does not propose that evasive answers, such as "I don't know" or "I don't remember," when the witness is capable of responding substantively, be viewed as a refusal to answer under this subsection. Such conduct can be punished a perjury (section 1341), false swearing (section 1342), or false statement (section 1343), depending upon whether the evasive answer was material and whether or not it was given under oath. In order to insure the possibility of prosecution for perjury or false swearing, an official or agency may always take the precaution of having the witness placed under oath.[76]

In addition to the requirement under present law that the offense consist of a continued refusal to answer following a direction to do so by a judge or appropriate presiding officer,[77] this section includes a further element that the defendant be actually advised that his refusal to respond to a question might subject him to criminal prosecution. Such a warning—which need involve no particular form of words—is deemed by the Committee already to a be-common practice, e.g., before grand juries and congressional committees. It is meant to serve fairness function, as well as facilitating proof of culpability where a person persists in his refusal to answer notwithstanding the warning. A warning as to consequences is also required for failure to produce a record, document, or other object. The Committee also notes the availability to the courts of the civil contempt procedures which permit the person who refuses to testify or produce information to "purge" himself by complying with the order. Except in unusual cases, it is anticipated that civil contempt will be the preferred first step to obtain compliance with such an order, since this procedure provides a non-criminal method of testing the validity of the order, such as when a reporter unsuccessfully invokes a "reporter's privilege".

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[74] E.g., *Gojack* v. *United States*, *supra* note 75; *Russell* v. *United States*, 369 U.S. 749 (1962); *Wilkinson* v. *United States*, 365 U.S. 399 (1961); *Watkins* v. *United States*, 354 U.S. 178 (1957).

[75] The National Commission also determined to continue the distinction. See Final Report, § 1344.

[76] A refusal to be sworn or make equivalent affirmation would, of course, be punishable under section 1332, discussed *supra*. See *Eisler* v. *United States*, 170 F.2d 273 (D.C. Cir. 1948). cert. dismissed 338 U.S. (1949).

[77] E.g., *Flaxer* v. *United States*, 358 U.S. 147, 151 (1958); *Emspak* v. *United States*, 349 U.S. 190, 202 (1955).

This subsection is, of course, intended to apply whether or not the person is appearing as a witness voluntarily.[78]

Under subsection (b), the term "court" is defined to include a court-martial, military commission, court of inquiry, provost court, any other military court, and a military judge as defined in 10 U.S.C. 801(10). The primary purpose of these special definitions, as noted in the discussion of section 1332, is to reach the case of a failure by a civilian to testify or produce information before a court-martial, currently punishable under 10 U.S.C. 847, part of the Uniform Code of Military Justice. The Committee considers it appropriate to treat this offense in the Federal Criminal Code, rather than in the Uniform Code of Military Justice, in the same manner as a failure to testify or produce information before a Federal civilian court or judge. 10 U.S.C. 847 is repealed in the conforming amendments.

B. Culpability

The conduct in this section is refusing to answer a question or failing to comply with an order to produce a record, document, or other object. As no culpability standard is specifically designated, the applicable state of mind which must be proved is "knowing," i.e., an awareness by the offender that he is refusing to answer a question or failing to comply with an order to produce the physical information sought.[79] This standard is designed to follow closely the test prevailing under current law, which requires a "deliberate" and "intentional" refusal or failure,[80] but does not admit a good faith failure to respond as a defense.[81]

The remaining elements are all existing circumstances. However, the elements in paragraph (1) that the question or object be "pertinent to the subject under inquiry" and that the official proceeding was conducted under the authority of Congress or either House thereof are designated as question of law in subsection (e)(2). Thus, no proof of a mental state is required as to these elements.[82] The elements in paragraphs (1) and (2) that the presiding officer, Federal court, United States magistrate, or United States bankruptcy judge directed the defendant to answer or to produce and advised him that his refusal to do so might subject him to criminal prosecution and that the conduct took place "in an official proceeding"[83] have no culpability standard specifically designated. Therefore, by the operation of section 303(b)(2), the minimum state of mind that must be established is "reckless", i.e., an awareness but disregard of the substantial risk that the circumstance existed.

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[78] See *Sinclair* v. *United States*, 279 U.S. 263, 291 (1929).

[79] See sections 303(b)(1) and 302(b)(1).

[80] E.g. *Quinn* v. *United States*, 349 U.S. 155, 165 (1955).

[81] See *Sinclair* v. *United States*, *supra* note 80, at 299; *United States* v. *Murdock*, 290 U.S. 389, 389, 397 (1933); *Licavoli* v. *United States*, 294 F.2d 207 (D.C. Cir.), cert. denied, 366 U.S. 936 (1961).

[82] See section 303(d)(3).

[83] The term "official proceeding" is defined in section 111.

4. Bar to Prosecution

Subsection (c) of section 1333 provides that it is a bar to prosecution under subsection (a)(1) that the procedures for certifying the facts of a contempt under 2 U.S.C. 194 have not been complied with. An identical provision is contained in the preceding section, and that discussion should be consulted here.

5. Affirmative Defenses

Subsection (d)(1) provides that it is an affirmative defense to a prosecution under this section that the defendant was legally privileged to refuse to answer the question or to produce the record, document, or other object. This defense is intended to codify existing law. Thus, a refusal to answer a question or to produce information based on a valid assertion of the Fifth Amendment privilege against compulsory self-incrimination would afford a defense, as would a proper invocation of the attorney-client or other evidentiary privilege recognized by law.[84] The Committee also recognizes that the existence or scope of a particular privilege, such as a reporter's privilege, may be in a state of flux as the courts chart an appropriate course. This provision in no way precludes judicial recognition of, or continued development with respect to, the existence or appropriate scope of an evidentiary privilege applicable to a reporter or other class of individuals. However, the person invoking a privilege assumes the risk that his reliance on it may be held to have been mistaken.[85]

The term "affirmative defense" is defined in section 111 to mean a defense that the defendant has the burden of proving by a preponderance of the evidence. Placing the burden on the defendant is consistent with current decisions.[86]

Subsection (d)(2) provides another affirmative defense (similar to that in section 1332), in a prosecution under subsection (a)(1)(B) or (a)(2)(B), that uncontrollable circumstances prevented the defendant from producing the record, document, or other object, and that the defendant did not contribute to the creation of such circumstance in reckless disregard of the requirement to produce the object. This essentially codifies the doctrine announced by the Supreme Court that inability to produce demanded records is a defense if the witness establishes that he made a good faith effort to do so.[87]

The fact that these defenses are set forth in this section is not meant to imply that they are the only ones available. On the contrary, the Committee intends that any other general defense or affirmative defense, for example duress,[88] may be asserted under this section. In addition, the Committee intends that existing law be adhered to with respect to the myriad of issues which can arise in connection with an obligation to testify or to produce records. For example, failure of a committee to follow its own rules regarding a witness's right to be heard in executive session is a defense.[89] Reliance on the orders of a superior not to testify or produce evidence authorized by agency regulations may also constitute a defense.[90] Lack of a quorum at the time of the return on a subpoena is, however, no defense.[91]

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[84] This statement probably must be qualified by the observation that mere evidentiary privileges need not be recognized by the Congress or its committees.

[85] See e.g., *Sinclair* v. *united States, supra* note 80; *Braden* v. *United States,* 365 U.S. 431. 437–438 (1961).

[86] See e.g., *McPhaul* v. *United States, supra* note 75 at 378–379; *United States* v. *Hintz,* 193 F. Supp. 325. 334 (N.D. Ill. 1961).

[87] See *United States* v. *Fleischman,* 339 U.S. 349, 358–364 (1950); *McPhaul* v. *United States, supra* note 75, at 378.

[88] See Working Papers, p. 620.

6. Proof

As previously noted, subsection (e)(2) of section 1333 provides, *inter alia,* that a determination of the issue of pertinency under subsection (a)(1) is a question of law for the court. This provision codifies present case law holding that the question of pertinency under 2 U.S.C. 192, like the issue of materiality in perjury, is for the court.[92]

Subsection (e)(1) provides that it is a question of law whether the defendant was legally provileged to refuse to answer the question or to produce the record, document, or other object. This provision is intended to make it clear that the existence of the affirmative defense set forth in subsection (d)(1) is a question of law to be determined by the court.

7. Jurisdiction

Subsection (g) of section 1333 provides that there is Federal jurisdiction over an offense described in this section if the official proceeding is a Federal official proceeding. This scope of jurisdiction under this section is identical to that under section 1332, and the discussion there of the term "official proceeding," defined in section 111, is applicable here.

8. Grading

An offense described in this section is graded as a Class E felony (up to three years in prison) in the circumstances set forth in subsection (a)(2) and as a Class A misdemeanor (up to one year in prison) in the circumstances set forth in subsection (a)(1). This is identical to the grading under section 1332, and the discussion there as to the reasons for choosing these levels of classification is equally pertinent to this offense.[93]

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[89] *Yellin* v. *United States,* 374 U.S. 100 (1963).

[90] See *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 463 (1951). This doctrine may well amount to an assertion of privilege so as to come within the explicit scope of subsection (c) . See *Appeal of United States Securities and Exchange Comm'n,* 226 F.2d 501, 517 (6th Cir. 1955). referring to the doctrine as a "privilege" See also *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 788, 793 (D.C. Cir. 1971), application for injunction in aid of jurisdiction denied, 404 U.S. 917 (1971).

[91] *United States* v. *Bryan, supra* note 64 at 330–339.

[92] E.g., *Sinclair* v. *united States, supra* note 80 at 298–299.

[93] See also *United States* v. *Patrick,* 542 F.2d 381, 392–393 (7th Cir. 1976), declining to reduce a sentence of four years' imprisonment for failing to testify pursuant to a court order of immunity.

SECTION 1334. OBSTRUCTING A PROCEEDING BY DISORDERLY CONDUCT

1. In General and Present Federal Law

Section 1334 makes it an offense to obstruct or impair an official proceeding that is a judicial or congressional proceeding by means of unreasonable noise, or by means of violent or tumultuous behavior or disturbance, or by similarly disruptive means. This section embraces the conduct now proscribed in 18 U.S.C. 1507 of picketing, parading, or demonstrating near a courthouse or building occupied by a judge, juror, witness, or court officer with intent to obstruct the administration of justice. It also creates a substantive offence out of conduct presently reachable as contempt under 18 U.S.C. 401(1) when it occurs in the presence of the court and amounts to an actual or material obstruction of justice.[94] However, the proposed statute is broader than either of the current laws and extends to the obstruction of legislative as well as judicial proceedings. This follows in part the recommendation of the National Commission.[95]

2. The Offense

The offense in section 1334 consists of obstructing or impairing an official proceeding by means of noise that is unreasonable, violent or tumultuous behavior or disturbance, or similarly disruptive means. The conduct element is obstructing or impairing a proceeding by means of noise, violent or tumultuous behavior or disturbance, or similar means. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his action.[96] That the proceeding was an "official" judicial or legislative proceeding and that the noise was unreasonable are existing circumstances. Since no culpability is specifically designated, the applicable state of mind that must be proved with regard to these elements is "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed and his disregard was such as to constitute a gross deviation from the standard of care a reasonable person would have exercised.[97]

This section is intended to reach instances, for example, where persons engage in boisterous conduct in the corridors of a courthouse, knowing that they are obstructing or impairing an ongoing trial. Similarly, persons who block ingress to a congressional building knowing that they are impeding an official proceeding would be guilty under this section.

The term "official proceeding" is defined in section 111 to mean a proceeding convened pursuant to lawful authority, or a portion thereof, which is or may be heard before any government agency or any public servant authorized to take oaths. The term "government agency," used in this definition, is also defined in section 111. It extends to any subdivision of the executive, legislative, judicial, or other branch of a government. However, the qualifying phrase "that is a judicial or congressional proceeding" is intended to preclude application of the section to executive or administrative proceedings.

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[94] See *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *United States ex rel. Robson* v. *Oliver*, *supra* note 20.

[95] See final Report. § 1344; Working Papers, pp. 621-622. The section is partly derived from New York law and the Model Penal Code.

[96] See sections 302 (b)(1) and 303 (b)(1).

[97] See sections 302(c)(1) and 303(b)(2).

3. Jurisdiction

There is Federal jurisdiction over an offense under this section if the official proceeding is a Federal official proceeding.

4. Grading

An offense described in section 1334 is graded as a Class C misdemeanor (up to thirty days in prison), one grade lower than the penalty for section 1328 (demonstrating to Influence a Judicial Proceeding), which it overlaps but which carries the added element of an intent to influence.

SECTION 1335. DISOBEYING A JUDICIAL ORDER

1. In General and Present Federal Law

Section 1335 makes it an offense to disobey or resist a court's major orders, specified to include a temporary restraining order, preliminary injunction, or final order other than an order for the payment of money.[98] The section creates a substantive offense from conduct currently punishable only as contempt under 18 U.S.C. 401(3). It also supplements the offense in section 1331 of this subchapter by providing a felony alternative to a prosecution there for contempt.

2. The Offense

The offense in section 1335 consists of disobeying or resisting a court order that is a temporary restraining order, preliminary injunction, or final order other than an order for the payment of money. The conduct element is disobeying or resisting a court order. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[99] That the order was a temporary restraining order, preliminary injunction, or final order other than an order for the payment of money are existing circumstances. Since no culpability is specifically designated, the applicable state of mind that must be proved with regard to these elements is "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed and his disregard was such as to constitute a gross deviation from the standard of care a reasonable person would have exercised.[100] This is in accordance with existing law, requiring knowledge that one is, e.g., disobeying a court order, but not requiring an evil intent.[101]

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[98] The class of orders covered is the same as that used in section 1331 to designate those violations as to which an unlimited fine may be imposed.

[99] See sections 302(b)(1) and 303(b)(1).

[100] See sections 302(1) and 303(b)(2).

[101] See *Green* v. *United States, supra* note 5, at 173-174; *United States* v. *Fidanian, supra* note 25 at 760; *Yaters* v. *United States, supra* note 25 at 723.

The reference to "final order" in this section is meant to denominate the class of orders which are appealable. Minor orders, such as to answer interrogatories by a certain date, are not within the scope of this section.

2. Affirmative Defenses

As under section 1331, validity of the order is not an element of the offense. However, a limited affirmative defense is provided in subsection (b)(1) to the same effect as in section 1331. In addition, subsection (b)(2) provides an affirmative defense, similar to that afforded in section 1331, 1332, and 1333, based on noncompliance with the order due to uncontrollable circumstances.

3. Jurisdiction

There is Federal jurisdiction over an offense under this section, as under section 1331, if the court is a court of the United States. The term "court of the United States" is defined in section 111 to include all Federal district courts, courts of appeals, and the Supreme Court, as well as a number of other specified courts.

4. Grading

An offense under this section is a Class E felony (up to three years in prison). This significantly reduces the unlimited sentence imposable under 18 U.S.C. 401, while preserving the ability to punish at a felony level for serious instances involving disobedience of court orders. The Committee believes it is important that all such forms of contempt not be downgraded to a petty offense level as in section 1331 and that there remain the alternative, in appropriate cases, of prosecuting the conduct as a felony.

An exception from the chapter 22 fine limitations, allowing the court to impose a fine in any amount deemed just by the court, is expressly provided. This provision, which carries forward current law, is identical to the grading provision in section 1331, discussed *supra*.

SUBCHAPTER E.—PERJURY, FALSE STATEMENTS, AND RELATED OFFENSES

(Sections 1341-1346)

This subchapter deals with offenses involving the making of false statements, both under oath and otherwise, in an official proceeding or government matter, and the alteration, destruction or concealment of government records. Numerous ambiguities and inconsistencies in existing laws have been removed and the Committee has proposed the creation of a new offense termed False Swearing, punishable as a misdemeanor, to cover those situations where a false statement is knowingly made under oath, irrespective of its materiality. The offenses in this subchapter are Perjury (section 1341), False Swearing (section 1342), Making a False Statement (section 1343), Tampering With a Government Record (section 1344), and Failing to Keep a Government Record (section 1345). Section 1346 contains general provisions for the foregoing sections, including a definition of "materiality" and a defense of retraction applicable to perjury and false-swearing.[1]

SECTION 1341. PERJURY

1. In General

This section carries forward the basic Federal perjury statutes, 18 U.S.C. 1621 and 1623. Various features of the older law (section 1621), particularly with respect to archaic evidentiary requirements such as the so-called "two witness" rule, have been modernized in accordance with the more recent treatment of those issues in 18 U.S.C. 1623.

2. Present Federal Law

As just indicated the two primary Federal enactments punishing perjury are 18 U.S.C. 1621 and 1623.

The former statute punishes by up to five years in prison whoever, under oath before a "competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered," "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true."

Although the statute requires that the false statement be under oath, it has long been held that an oath need not be in any particular form and that irregularities in the administration of the oath do not affect its validity.[2] However, a complete failure of authority of the person before whom the statement was made to administer the oath is a defense to perjury.[3]

Under 18 U.S.C. 1621 the false statement must be "material." Case law defines "materiality" as anything "capable of influencing the tribunal on the issue before it" or which "has a natural tendency to influence, impede, or dissuade [a grand jury] from pursuing its investigation."[4] It is universally acknowledged that materiality is a question of law for the court.[5] A number of commentators have advocated abolition of the materiality requirement, on the grounds that lying under oath in an official proceeding, even though the statements are not deemed material, should nevertheless be an offense, and that the issue of materiality is a constant source of debate in individual cases and has resulted in the needless dismissal of some prosecutions.[6] The Committee, however, like the National Commission, has determined to retain the materiality requirement for perjury, while proposing a new offense of False Swearing (section 1342) to punish instances of non-material false statement under oath.[7]

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[1] A general discussion of perjury and false statement statutes is found in Hearings, pp. 7500-7504.

[2] See Working Papers, p. 664, and cases cited therein.

[3] See *United States* v. *Curtis*, 107 U.S. 671 (1883).

[4] E.g., *United States* v. *Gremillion*, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); *Blackmon* v. *United States*, 108 F.2d 572 (5th Cir. 1940); *Carroll* v. *United States*, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

[5] See, e.g., *Vitello* v. *United States*, 425 F.2d 416, 423 (9th Cir.), cert. denied, 400 U.S. 822 (1970); see also *Sinclair* v. *United States*, 279 U.S. 263, 298-299 (1929).

[6] See Working Papers, pp. 661-662 and authorities cited therein; see also Hearings, p. 7501.

A further problem attending 18 U.S.C. 1621 has revolved around whether a statement must in fact be false. The statute requires, on its face, only that the defendant, contrary to his oath that he will testify "truly,"' willfully state any material matter "which he does not believe to be true." In *United States* v. *Remington,*[8] the court upheld the sufficiency of an indictment for perjury which charged that the defendant had denied the fact of membership in the Communist Party, believing the denial to be false, notwithstanding that the denial was objectively true. The National Commission and the Model Penal Code were critical of this holding on the ground that no harmful result in terms of impeding or misleading any official proceeding can flow from such conduct, albeit it is morally reprehensible. The National Commission proposed to deal with the problem by defining "statement" to include a "representation of opinion, belief or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation."[9] Under this definition, the result in *Remington, supra,* would be reversed, but if the defendant had falsely stated that he had not considered himself a Communist, he would be guilty of perjury, assuming his belief was material to the inquiry.[10]

The Committee, while not disagreeing with the thrust of the National Commission's recommendation, considers its suggeted definition of "statement" as being so confusing that it is likely to produce uncertainty and litigation. Accordingly, as will be further explained, the Committee has written the perjury offense to require that the statement be objectively false, while permitting the *Remington* situation to be reached by the general attempt statute (section 1001). This result is consistent with the Supreme Court's decision in *Bronston* v. *United States.*[11] There, in a hearing before a referee in bankruptcy, the defendant, upon being asked whether he had ever had any bank accounts in Swiss banks, responded that his "company had an account there for about six months." The defendant in fact had had a personal Swiss bank account in addition to the account of the company to which he referred. The Court reversed the ensuing perjury conviction, holding that the statute does not reach an answer which is literally true, even though it is nonresponsive and intended to mislead by conveying a false impression that the answer to the question actually asked would be in the negative. The Court stated that the remedy for such conduct lay in the ability of the questioner, by repeating or rephrasing the question, to elicit the precise information he seeks. In requiring that the statement be literally false in this context, the Court's opinion casts doubt upon the continuing viability of the holding in *Remington, supra.*

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[7] See Final Report, §§ 1351 and 1352(1); Working Papers, pp. 662–663.
[8] 191 F.2d 246 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952).
[9] See Final Report, § 1355(4).
[10] See Working Papers, p. 661.
[11] 409 U.S. 352 (1973).

18 U.S.C. 1621 is presently burdened by a number of archaic and apparently irrational doctrines relating to evidentiary and procedural matters. For example, notwithstanding the criticism of Judge Augustus Hand and others, it has been the rule for years that a perjury indictment may not be drawn in the alternative and that no conviction is possible for deliberately swearing to two contradictory statements, unless the prosecution alleges and proves which of the statements was false.[12] In addition, the Supreme Court and some lower courts have held[13] that the so-called two-witness rule for perjury, which derived from the common law, applies under 18 U.S.C. 1621, notwithstanding that it does not apply in prosecutions for making false statements under other Federal statutes such as 18 U.S.C. 1001, discussed in connection with section 1343, *infra*. The rule, which really is a misnomer and requires only one witness plus corroborative evidence and even then is fraught with qualifications and exceptions,[14] has been justly criticized as an anachronism, since there is no reason why the standard of reasonable doubt, applicable to other crimes, should not suffice for perjury, the danger of false accusation being no greater in this context than in any other.

Under 18 U.S.C. 1621 there is no defense of retraction of the statement. The Supreme Court in *United States* v. *Norris,*[15] in rejecting the broad defense of recantation urged by the defendant in that case, indicated that it was concerned about the defendant who retracted the falsity only when he was discovered (as in *Norris*) or who lied in the expectation of telling the truth only if and when his lie was discovered. The Court was also concerned about the harmful effect in terms of causing an investigation to be commenced that such lies, later recanted, would engender. Although these objections could be met by tailoring the defense to situations in which the objections do not exist, the Federal courts continue to refuse to recognize a retraction defense under 18 U.S.C. 1621.[16]

In 1970 Congress acted to modernize the offense of perjury with respect to statements before courts and grand juries by enacting a new statute, 18 U.S.C. 1623. That section punishes by up to five years in prison (the same as under 18 U.S.C. 1621) whoever "under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, documents, record, recording, or other material, knowing the same to contain any false material declaration."[17]

Unlike 18 U.S.C. 1621, which is ambiguously worded with respect to the issue of objective falsity of the statement, section 1623 seems plainly to require that the statement be false in fact and not merely believed to be false.[18]

18 U.S.C. 1623 also contains specific provisions dealing with the issues of inconsistent statements, the two-witness rule, and the de-

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[12] See *United States* v. *Buckner,* 118 F.2d 468, 470 (2d Cir. 1941); Working Papers, p. 666.

[13] E.g., *Weiter* v. *United States,* 323 U.S. 606 (1945).

[14] See Working Papers, p. 667, and cases cited therein.

[15] 300 U.S. 564 (1937).

[16] E.g., *United States* v. *Kahn,* 472 F.2d 272, 284 (2d Cir.), cert. denied, 441 U.S. 982 (1973).

[17] The section is made applicable "whether the conduct occurred within or without the United States." See 18 U.S.C. 1623(b).

[18] See *United States* v. *Williams,* 536 F.2d 1202 (7th Cir. 1976).

fense of retraction. In each instance, the result is contrary to that under 18 U.S.C. 1621. Thus, under 18 U.S.C. 1623(c), it is provided that an indictment or information which charges that the defendant knowingly made two or more inconsistent declarations need not specify which one is false if each was material, and that proof that the defendant, while under oath, made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury shall be sufficient to authorize conviction.

Under 18 U.S.C. 1623(e), the two-witness rule and related doctrines are effectively abolished for prosecution under this section by a provision stating that "proof beyond a reasonable doubt . . . is sufficient for conviction. It shall not be necessary that such proof be made by an particular number of witnesses or by documentary or other type of evidence."

Under 18 U.S.C. 1623(d) a defense of recantation is afforded, expressed as a bar to prosecution, where, "in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false . . . if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

It has been held that the two-witness rule is not of constitutional dimension and that Congress' abolition of it in this statute is therefore valid.[19]

One issue that appears not yet to be settled is the relationship between this statute and 18 U.S.C. 1621, specifically whether 18 U.S.C. 1623 is a supplementary provision, allowing for prosecutorial discretion in perjury cases involving proceedings before courts and grand juries, or whether, as a more specific enactment, Congress intended that all perjury prosecutions falling within its scope be brought under it rather than under the more general statute. Two different panels of the same court of appeals seems to have reached different conclusions on this question, one indicating that it viewed with great skepticism the government's contention that it had discretion to choose the statute under which to prosecute, selecting the older one where a potential defense of retraction existed,[20] while the other court found no difficulty in rejecting a defendant's contention that he was denied the equal protection of the laws by the prosecutor's decision to proceed under 18 U.S.C. 1623 and thereby deny him the benefits of the two-witness rule.[21]

In addition to 18 U.S.C. 1623[22] there are a large number of statutes scattered throughout the United States Code dealing with perjury in one way or another and providing diverse penalties. Thus, a false sworn statement making a claim for United States Government life insurance is said to be "perjury" with a two-year maximum prison penalty (38 U.S.C. 787). Filing a false sworn affidavit in an application to the Coast Guard for a certificate of service as an able bodied seaman, which is also termed "perjury," carries a sentence of imprisonment not to exceed one year (46 U.S.C. 672(d)). Title 18 itself contains a statute declaring that a false statement to obtain Federal employees' compensation is "perjury" and is to be penalized by imprisonment for not more than one year (18 U.S.C. 1920). Other statutes merely say that specific sworn false statements are deemed perjury and that violators are to be "subject to all the pains and penalties of perjury under the statutes of the United States" (16 U.S.C. 364), or subject to be "punished as provided by section 1621 of Title 18" (8 U.S.C. 1357(b)), or, in the most obscure form, "subject to the punishment provided therefor by section one hundred and twenty five of the Act of March fourth, nineteen hundred and nine, entitled 'An Act to codify, revise and amend the penal laws of the United States'." [23]

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[19] See *United States* v. *Ruggiero,* 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Isaacs,* 493 F.2d 1124, 1155–1156 (7th Cir.), cert. denied, 417 U.S. 976 (1974). This accords with the Supreme Court's observation in *Weiler, supra* note 13, that it was adhering to the common law rule only in the absence of an "enactment in derogation of it." See 323 U.S. at 610.

[20] See *United States* v. *Kahn, supra* note 16 at 282–283.

[21] See *United States* v. *Ruggiero, supra* note 19, at 606. The Seventh Circuit agrees with *Ruggiero.* See *United States* v. *Devitt,* 499 F.2d 135, 139 (1974), cert. denied, 421 U.S. 975 (1975).

[22] 18 U.S.C. 1622 proscribes the offense of subornation of perjury. Since this is essentially an offense involving solicitation or accomplice liability, it is not specifically carried forward in the proposed Code, but will be partially covered by the general accomplice liability (section 401) offense. See Working Papers, p. 668.

3. The Offense

A. Elements

Subsection (a) of section 1341 provides that a person commits an offense if, under oath or equivalent affirmation in an official proceeding, he (1) makes a material statement that he knows is false, or (2) affirms the truth of a previously made material statement that he knows is false.

This formulation is derived from the recommendation of the National Commission [24] and is designed to preserve the basic definition of perjury in 18 U.S.C. 1621 and 1623.

The term "official proceeding" is defined in section 1346(a)(5) to mean a "proceeding in which a Federal law authorizes an oath to be administered." This carries forward the current reach of 18 U.S.C. 1621 under cases interpreting the phrase "competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." [25]

As under present law, there is a requirement that the false statement be "material." A statement is defined as "material" in section 1346(b)(2) if "regardless of the admissibility of the statement or object under the rules of evidence, . . . it could have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter in which it is made, or, in the case of a record, if it could have impaired the integrity of the record in question." The National Commission proposed a similar definition.[26] The Committee's definition of "material" is intended to codify existing case law which, as noted before, broadly construes that term.[27]

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[23] 50 U.S.C. App. 19. See also 28 U.S.C. 1746, enacted in 1976, permitting certain unsworn declarations, made under a written acknowledgement that they are being submitted "under penalty of perjury", to be treated as if made under oath.

[24] See Final Report, § 1351(1).

[25] It also carries forward the concept, in 18 U.S.C. 1623, of a proceeding "ancillary to any court or grand jury of the United States". See *Dunn* v. *United States,* 442 U.S. 100 (1979). "Oath" generally includes an equivalent affirmation. See e.g., Fed. R. Crim. P. 54(c); *Gillars* v. *United States,* 182 F.2d 962 (D.C Cir. 1950).

[26] See Final Report, § 1355(1).

The final sentence of section 1346(b)(2) provides that the issue of whether a matter is material under the circumstances is a question of law for the court. This too continues existing law under both 18 U.S.C. 1621 and 1623. Making materiality a question of law, however, does not mean that where the issue of materiality depends upon disputed facts that the jury should not decide the factual issues. In such a case, the court should leave the factual decision to the jury with the instructions on the question of materiality to be applied after the factual determination.

The National Commission proposed to include a specific provision that mistaken belief in the immateriality of a false statement is no defense.[28] This is a clearly proper result since in an official proceeding the harmful consequences of a lie knowingly told do not depend upon the declarant's awareness of the importance of that lie. However, the Committee has deleted the specific defense precluded in this subchapter since the matter is fully covered by the fact that, under the prevailing common law defense of mistake of fact or law carried forward by section 501, such a mistake is not a defense unless it causes the defendant to lack the state of mind required with respect to an element of the offense. Since under the Code, no mental state need be proved as to any question of law,[29] it follows that the defense of mistake is not applicable to the issue of materiality.

The term "statement" is defined in section 1346(a)(6) to mean "an oral or written declaration or representation, including a declaration or representation of opinion, belief, or other state of mind; [and] for purposes of sections 1341 and 1342, a written statement made 'under oath or equivalent affirmation' includes a written statement that, with the declarant's knowledge, purports to have been made under oath or equivalent affirmation."

Under this definition, together with the requirement that the actor make or affirm the truth of a statement "that . . . is false," the crime of perjury will, as previously noted, require that a statement be objectively false. Unlike the National Commission, the Committee has not sought through the definition of "statement" to deal with the problem, discussed in connection with the *Remington* and *Bronston* cases, *supra,* of the person who testifies under oath that a material fact is true when he subjectively believes his statement to be false, even though the fact turns out to be true.

The Committee's decision not to approve or carry forward the *Remington* holding under 18 U.S.C. 1621 that perjury may exist under such circumstances is consistent with Congress' reformulation of the perjury offense in 18 U.S.C. 1623 as well as with the Supreme Court's decision in *Bronston,* which in the opinion of the Committee casts doubt on the *Remington* result. The Committee also concurs with the reasoning that, if the statement was not in fact false, a substantive charge of perjury is inappropriate.

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[27] The definition in section 1346(b)(2) is intended to include the interpretation given in the context of the false statement statute that the test of materiality is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances. See *United States* v. *Quirk,* 167 F. Supp. 462 (E.D. Pa.), aff'd, 266 F.2d 26 (3d Cir. 1959).

[28] See Final Report, § 1355(1).

[29] See section 303(d)(3).

The more appropriate approach to the *Remington* problem is to treat it exactly for what it is, an attempt under the general attempt statute (section 1001). There is no valid reason to immunize such a defendant. He did knowingly try to lie and thereby engaged in a conscious effort to frustrate the preceeding and violate his oath. Such action is a classic example of a criminal attempt. It is significant that section 1001 specifically provides that the factual impossibility of committing the crime is not a defense if the crime could have been committed had the circumstances been as the actor believed them to be.[30] The *Remington* situation seems precisely to come within this doctrine.

The Committee has also codified the modern rules contained in 18 U.S.C. 1623 dealing with proof of contradictory statements and the two-witness requirement of common law.

Section 1346(b)(1) states that, under sections 1341 and 1342, "proof of the falsity of a statement need not be made by any particular number of witnesses or by documentary, direct, or any other particular kind of evidence." This is virtually a verbatim rendering of 18 U.S.C. 1623(e) discussed above.[31]

Section 1346(b)(3) abolishes the seemingly irrational procedural limitation under 18 U.S.C. 1621 that prevents the government from charging or proving perjury by alleging and showing that the defendant made or affirmed two or more mutually inconsistent statements, without indicating which statement was false.[32] The language used to reverse this doctrine closely parallels that in 18 U.S.C. 1623(c). However, it should be noted that a conviction for the felony of perjury will not be possible on this basis if the government cannot show that both statements were material. If one or the other is immaterial, only a conviction of the lesser included offense of false swearing (section 1342) can be had by utilizing this technique. Of course, if the government proves that the material statement was the one that was false, such proof would establish perjury.

B. Culpability

The conduct in this section is making a statement or affirming the truth of a previously made statement. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is, at a minimum, "knowing," i.e., that the defendant was aware of the nature of his actions.[33]

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[30] This provision is explained in connection with the analysis of section 1001 in this report.

[31] The National Commission proposed to retain the one-witness-plus-corroboration requirement in the single instance in which the sole proof of falsity rests upon the contradiction of the statement of by one other person (i.e., the "oath against oath" situation noted in *Weiler* v. *United States, supra* note 13). However, even here the rule does not have logic on its side and was rejected by Congress in 1970. A substantial body of opinion in the National Commission indicated that they would have abrogated the rule entirely (see Final Report, § 1351(2) and Comment, pp. 128–129), and the Committee agrees with this view.

[32] Practical reasons supporting inclusion of a provision allowing conviction on the basis of irreconciliably contradictory statements are contained in the statement of Assistant Attorney General Philip Heymann on Criminal Code Reform submitted to the House Subcommittee on Criminal Justice, Judiciary Committee, Sept. 5, 1979, reprinted in Hearings, Part XIV, pp. 9918–9954. In brief, failure to include this provision will allow a witness who is influenced to change his testimony between his grand jury and trial appearances to escape punishment for perjury in those uncommon cases in which the government cannot prove which of the inconsistent statements he swore to was false.

The element that the statement was false is an existing circumstance. Since the culpability level is specifically designated as "knowing" in this section, the applicable state of mind to be shown is that the defendant was aware or believed that the statement was false.[34] This requirement of "knowing" the falsity of the statement is believed to be slightly stricter than current law and the "reckless" standard used by the National Commission.[35]

The elements that the statement was given under oath or equivalent affirmation in an official proceeding are also existing circumstances as to which, in the absence of a specific designation of culpability, the applicable state of mind is at least "reckless."

The fact that the statement was "material" is also an existing circumstance. However, since materiality is designated as a question of law under section 1346(b)(2), by the operation of section 303(d)(3) no state of mind need be proved as to this element.[36]

4. Defense Precluded

Section 1346(d) provides that it is not a defense to a prosecution under section 1341 or 1342 "that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not authorized to make the statement."

Two distinct defenses are precluded by this subsection. The first deals with the problem previously discussed as to irregularities in the administration or taking of the oath and is largely designed to codify existing Federal case law. Thus, as under 18 U.S.C. 1621, a mere irregularity or technical defect in administering an oath (e.g., a mistake in the use of a seal) will not suffice to insulate a person who makes a material false statement in an official proceeding from liability for perjury. On the other hand, a total failure to administer the oath or a total lack of authority in the public official before whom the statement was made to require an oath will, as under current law, constitute a defense.[37] Indeed, in such a case, it can properly be claimed that the statement was not made in an "official proceeding."[38] It should be noted, however, that person submitting a written statement purporting to be made under oath would be bound by his submission by virtue of the last part of the definition of the term "statement" in section 1346(a)(4), set forth above. This follows the suggestion of the National Commission.[39]

The second defense precluded under section 1346(d) provides that it is not a defense to a perjury or false swearing prosecution that the declarant "was not authorized to make the statement." This provision is designed to deal with a possible defense, not infrequently raised in State cases, that the accused did not have proper corporate or official authority to sign the false documents in question even though he did sign them. The courts have rejected these claims on the ground that one who verifies a statement as if he had authority to swear to it is liable for the falsehood it contains. This concept has been codified for decades in New York using the word "competent."[40] To avoid any confusion in this area as to the meaning of "competent" (e.g., insanity or infancy), the Committee has used the word "authorized"[41] to carry forward the concept developed in New York around the term "competent."

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[33] See sections 303(b)(1) and 302(b)(1).

[34] See section 302(b)(2).

[35] See Final Report, § 1351, Comment, p. 128; Working Papers, p. 660.

[36] See, supporting retention of the current law doctrine that no *scienter* is required as to materiality, the statement of Assistant Attorney General Philip Heymann, *supra* note 32.

[37] See Working Papers, p. 664, and cases cited therein.

[38] "Official proceeding" is defined in section 111. The declarant, however, could be guilty of attempted perjury if he believed or was reckless as to the fact that the official did have authority to take oaths. See section 1001.

[39] See Final Report. § 1355(2); Working Papers, pp. 664–665; see also *United States* v. *Curtis, supra* note 3; *United States* v. *Obermeier*, 186 F.2d 243, 246 (2d Cir. 1950), cert. denied, 340 U.S. 951 (1951), and cases cited therein.

5. Affirmative Defense

Section 1346(c) provides that is an affirmative defense to a prosecution under sections 1341 and 1342 that the actor "clearly and expressly retracted the falsification in the course of the same official proceeding in which it was made if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the official proceeding or of a related government matter".[42]

This essentially codifies the retraction defense provided by Congress in 18 U.S.C. 1623 and rejects the principle announced in *United States* v. *Norris*[43] that a defense of retraction does not exist under 18 U.S.C. 1621 for perjury. The National Commission urged a similar defense, as did the Model Penal Code.[44] The defense is designed to serve as an inducement to the declarant to voluntarily correct a false statement by eliminating the risk or penalty of conviction for perjury in order that the truth may be learned.[45] Significantly, however, stringent limitations have been placed on the availability of the defense in order to meet the Supreme Court's specific objections in *Norris*. Thus, as in *Norris*, the defense is not made available where the proffered retraction is not tendered until it becomes manifest to the defendant that the falsification would be exposed. Likewise the defense cannot be successfully invoked where the falsification has already caused the official proceeding to be substantially affected. In such an instance, the crime has had its harmful effect. Therefore, even if the actor interposed his retraction quite promptly and without knowledge of the fact that any adverse consequences have yet ensued, it appears just that he be held liable for the result of his deliberate falsification.[46]

Under section 303(e) no mental state need be proved as to the elements of the defense.

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[40] See *People* v. *Trumpbaur*, 64 Hun. 346, 19 N.Y.S. 331 (1892); *People* v. *Bowe*, 34 Hun. 528, 3 N.Y.Cr. 149 (1885). Apparently no Federal case raising this issue exists.

[41] Compare Final Report, § 1355(2), which uses the term "competent."

[42] The term "government matter" is defined in section 1346(a)(3).

[43] 300 U.S. 564 (1937).

[44] See Working Papers, pp. 665–666.

[45] See Final Report, § 1355(3), *United States* v. *Del Toro*, 513 F.2d 656, 665 (2d Cir.) cert. denied, 423 U.S. 826 (1975).

[46] The Committee also clarified the defense as recommended by the National Commission by adding the words "clearly and expressly" to modify the phrase "the actor retracted the falsification." This addition is designed to avoid the possibility that a subsequent inconsistent statement in the same official proceeding can be claimed to be a retraction unless clearly intended as such.

As the defense is denominated as "affirmative," the defendant will bear the burden of proving its existence by a preponderance of the evidence.[47]

In one recent case under 18 U.S.C. 1623, a panel of the Third Circuit held that, if the government undertakes to explain the provisions of offense of perjury to a witness before he testifies, it must also notify him of the recantation provision under that statute and that a failure to do so will warrant dismissal of the charges.[48] On rehearing the court reversed its decision and held that a prosecutor need not advise a witness of his statutory opportunity to recant. While the Committee believes that giving such notice of the opportunity for recantation may be desirable in some instances, it does not intend that a failure to do so shall result in invalidating a conviction or barrring a prosecution under this section.[49]

6. Jurisdiction

Section 1341(c) provides that there is Federal jurisdiction over an offense under this section if the official proceeding is a Federal official proceeding. This carries forward the current broad scope of 18 U.S.C. 1621. In addition, extraterritorial jurisdiction is afforded for this offense (as under 18 U.S.C. 1621 and 1623), under the operation of section 204(c)(2).

7. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). While this is slightly more than the five-year maximum prison sentence imposable under 18 U.S.C. 1621 and 1623, the Committee believes that the seriousness of the offense warrants this penalty as opposed to the next lower alternative of Class E felony (three years). Morever, Class E felony grading is used for the offense of making a false statement under section 1343. Grading perjury higher than false statements will eliminate the anomalous and often criticized feature of present law where a lie under oath as to a material matter before a court carries the same penalty as an oral, unsworn false statement.[50]

The Committee also intends to perpetuate existing law under 18 U.S.C. 1621 that the number of separate crimes of perjury for which discrete sentences may be imposed depends upon whether the false statements relate to different subjects. Thus, while no more than one offense may be created by eliciting a series of false replies to essentially the same question,[51] The Federal courts have upheld the finding of multiple offenses and the imposition of cumulative sentences where the false statements charged related to separate subjects, calling for discrete information material to the question under investigation, notwithstanding the fact that the false statements were made on the same day under the same oath.[52]

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[47] See ther definition of "affirmative defense" in section 111.

[48] See *United States* v. *Lardievi*, 497 F.2d 317 (3d Cir. 1974).

[49] 506 F.2d 319. See also, *United States* v. *Cuevas*, 510 F.2d 848 (2d Cir. 1975), reaching the same result.

[50] Compare 18 U.S.C. 1621 with 18 U.S.C. 1001.

[51] See *Arena* v. *United States*, 226 F.2d 277 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956); of *Yates* v. *United States*, 355 U.S. 66 (1957) (same rule as to contempt).

[52] E.g. *Masina* v. *United States*, 296 F.2d 871, 879-880 (8th Cir. 1961); *Richards* v. *United States*, 408 F.2d 884 (5th Cir.) cert. denied, 395 U.S. 986 (1969); *United States* v. *Tyrone*, 451 F.2d 16, 18 (9th Cir. 1971), cert. denied, 405 U.S. 1075 (1972).

The Committee considers that the contrary rule of "one oath, one crime," followed by some States, is unwarrantedly generous to perjurors, since each consciously false and material statement in a discrete area of inquiry may substantially impair, affect or impede the proceedings in which it is made.

SECTION 1342. FALSE SWEARING

1. In General and Present Federal Law

Present law has no counterpart to the offense proposed in this section. This section proposes to create a lesser included offense to perjury of false swearing, defined to reach instances of deliberate lying under oath in an official proceeding, but without regard to the materiality of the false statement. The Committee considers that the conduct of consciously giving false testimony is sufficiently blameworthy to warrant penal sanctions even if the falsification is not deemed to fall within the definition of "material" in section 1346(b)(2). Moreover, the concept of materiality is necessarily somewhat imprecise, and in some cases, as noted by the senior counsel to the National Commission, "prosecutions for perjury have been dismissed, perhaps needlessly, because of holdings that the defendant, though he may have lied deliberately under oath, did not, under the circumstances of the case, lie as to material matter. Such difficult cases have led to proposals such as that of the National Conference of Commissioners on Uniform State Laws, to eliminate materiality altogether from the definition of perjury."[53]

Rather than follow the drastic suggestion of the National Conference of Commissioners, the Committee has retained the requirement of materiality for the serious offense of perjury defined in section 1341, while eliminating the requirement of materiality for the misdemeanor of "false swearing" defined in this section. The National Commission and the Model Penal Code also advocated this approach.[54] The lack of materiality and the resultant lessened adverse influence on the official proceeding warrant grading nonmaterial false swearing as a misdemeanor.

2. The Offense

Subsection (a) of section 1342 provides that a person commits an offense if, under oath or equivalent affirmation in an official proceeding that is a judicial or congressional proceeding, he (1) makes a statement that he knows is false, or (2) affirms the truth of a previously made statement that he knows is false.

As noted, this section is defined in terms identical to those uses in the perjury offense under section 1341, except that the additional element of materiality, present in the perjury offense, has been eliminated, and except that the requirement that the proceeding be a judicial or congressional proceeding has been added. This additional requirement reflects the Committee's view that the scope of this new offense should be confined to judicial and congressional proceedings and should not extend to executive or administrative proceedings. All of the other elements of this offense are contained in and have been explained in connection with perjury; thus there is not need to repeat the discussion of those elements here, and the foregoing discussion should be consulted.

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[53] Working Papers, pp. 661–662 (footnotes omitted). See also the cases and discussion therein.
[54] See Final Report, § 1252(1); § 241.2 (P.O.D. 1962).

It should be noted that, although this offense is clearly defined as a lesser included offense of perjury, the only time, it would appear, that a court could instruct a jury on both the felony of perjury and the misdeameanor of false swearing is the situation where materiality depends on disputed facts in the case.[55] In such an instance, the jury could exercise its power of mercy and convict of the lesser offense, even if it found the facts to be such as to make the statement material and despite the court's contrary instructions in such event.

It has been suggested that the jury should be able to indulge in such "mercy" in all cases of perjury.[56] Such a result, however, would not be logical or proper where the court finds, pursuant to its function of determining materiality where the facts surrounding the issue are not in dispute, that the false statement in question is material as a matter of law.[57] In such a case the Committee does not intend that a charge on the lesser offense of false swearing should be permitted. This result is consistent with present law regarding the availability of lesser included offense instructions.[58]

3. Jurisdiction

There is Federal jurisdiction over an offense described in this section if the official proceeding (a term defined in section 1346(a)(5)) is a Federal official proceeding. This is identical to the scope of jurisdiction under the previous section. As with respect to perjury, extraterritorial jurisdiction for this offense exists by virtue of section 204(c)(2).

4. Grading

An offense under this section is graded as Class A misdemeanor (up to one year in prison). As noted above, misdemeanor treatment seems appropriate in light of the deletion of the materiality element and the consequent lack of proof of a substantial adverse effect on an official proceeding. Similar grading was proposed by the National Commission.[59]

SECTION 1343. MAKING A FALSE STATEMENT

1. In General

This section consolidates a number of existing false statement statutes the principal of which is 18 U.S.C. 1001. Largely because of the fact that 18 U.S.C. 1001 is presently graded identically with the more serious offense of perjury, some courts have tended to narrow their interpretations of the false statement provision to exclude various types of conduct from its purview, based upon the theory that to construe the statute broadly would tend to obliterate the distinction between false statements and perjury. These narrow interpretations of 18 U.S.C. 1001, most of which the Committee disapproves, will be explored below. The Committee, following the general recommendation of the National Commission, has created a substantial grading distinction between the proposed offenses of Perjury (section 1341) and Making a False Statement (this section).[60] One benefit that is hoped will flow from this more rational grading structure will be to reduce the incentive for courts to create exceptions to the coverage under this section, which is intended to have broad application.

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[55] See *Sansone* v. *United States*, 380 U.S. 343 (1965). This is so because, where the facts are not disputed, the question of materiality would be decided by the court as a question of law (see section 1346(b)(2), rather than by the method, where the facts are at issue, of the court instructing the jury as to the elements of materiality and leaving to it the decision of which crime, if any, has been committed on the basis of its resolution of such disputed facts.

[56] See discussion in Model Penal Code, pp. 113–115 (Tent. Off. Draft No. 6, 1957).

[57] See section 1346(b)(2) and the discussion of the provision in connection with the previous section.

[58] See Fed. R. Crim. P. 31(c); *Sansone* v. *United States*, *supra* note 55; *Keeble* v. *United States*, 412 U.S. 205, 208 (1973), and cases cited therein.

[59] See Final Report, § 1352(1).

2. Present Federal Law

As indicated above, the basic and general false statement provision in current Federal law is 18 U.S.C. 1001. There are, additionally, literally dozens of other specific false statement statutes, scattered throughout the United States Code, often including within their coverage elements of fraud or theft. These statutes are frequently graded lower than the general false statement statute so that the prosecution is afforded a choice of proceeding under the general statute, carrying a greater penalty, or under one of the specific statutes.[61] This has been another cause for criticism of 18 U.S.C. 1001, which reduced grading of the general false statement offense should help to alleviate.

There is no need in this report to review in detail the provisions of all the myriad false statement enactments that now exist.[62] This section is meant primarily to replace 18 U.S.C. 1001 and an analysis of that statute is adequate to point out the basic problems and issues to which this section is directed.

18 U.S.C. 1001 punishes by up to five years in prison whoever, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry."

It has been held that, unlike in perjury under 18 U.S.C. 1621, the evidentiary requirement of the so-called "two-witness" rule is not applicable to a prosecution under 18 U.S.C. 1001.[63] This additional disparity between the offenses of perjury and making a false statement under 18 U.S.C. 1001 has been cited by some courts as a further basis for narrowly interpreting the latter statute.

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[60] See Final Report, § 1352(2); Working Papers, pp. 668–670. The National Commission however, proposes to downgrade the offense to a misdemeanor, whereas the penalty proposed by the Committee for the most part preserves felony grading for this offense.

[61] See e.g., *United States* v. *Gilliland*, 312 U.S. 86 (1941); *United States* v. *Eisenmann*, 396 F.2d 565, 567–569 (2d Cir. 1968); *Cohen* v. *Unites States*, 201 F.2d 386, 392–393 (9th Cir.), cert. denied, 345 U.S. 951 (1953).

[62] A lengthy, but nevertheless incomplete, list of specific false statement provisions other than 18 U.S.C. 1001 is contained in the Working Papers, pp. 675–683. Two additional statutes dealing with false statements not set forth in the Working Papers are 18 U.S.C. 911 and 1546. Others undoubtedly also exist. See, e.g., 26 U.S.C. 9012(d), 42 U.S.C. 1383a, 1395nn, and 1396h.

[63] See *United States* v. *Marchisio*, 344 F.2d 653 (2d Cir., 1965); *United States* v. *Killian*, 246 F.2d 77 (7th Cir. 1957); *Fisher* v. *United States*, 231 F.2d 99 (9th Cir. 1956).

One example of a restrictive construction of 18 U.S.C. 1001 concerns the phrase "within the jurisdiction of any department or agency of the United States." In *United States* v. *Bramblett,*[64] the Supreme Court held that the statute covered a false statement made by a Congressman to the House of Representatives Disbursing Office. In its opinion, the Court broadly stated that the word " 'department' as used in this context was meant to describe the executive, legislative, and judicial branches of the Government." [65] However, despite the dictum in *Bramblett,* some decisions have held that the statute applies only to false statements made in judicial matters that involve the administrative or housekeeping functions of the courts and not a false statement that might influence the outcome of a judicial proceeding.[66] These holdings were apparently influenced by the fact that a contrary outcome would permit the prosecution to avoid bringing a perjury prosecution by substituting a prosecution under the false statement statute with its similar penalties but without the encumbrance of the two-witness rule.[67]

The term "jurisdiction" in 18 U.S.C. 1001 has also been construed narrowly by some courts in another sense. In *Friedman* v. *United States,*[68] the court held that section 1001 did not penalize the making of a knowingly false oral allegation to F.B.I. agents that a local highway patrol officer had committed violations of the civil rights laws. The court, disturbed that a contrary ruling might jeopardize an open dialogue between members of the public and law enforcement agents and also cognizant that the statute, if construed broadly, would tend to eliminate the distinction between perjury and false statement, ruled that the matter was not one within the "jurisdiction" of the F.B.I. It interpreted that term to refer only to matters over which a government agency has regulatory or adjudicatory power—not as in *Friedman, supra,* merely investigatory power.[69]

The analysis in *Friedman* was rejected in *United States* v. *Adler,*[70] the court holding that it was an offense under 18 U.S.C. 1001 to make a knowingly false oral accusation to the F.B.I. of bribery by public officials. The court stated.[71]

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[64] 348 U.S. 503 (1955).

[65] *Id.* at 509.

[66] See *United States* v. *Erhardt,* 381 F.2d 173, 175 (6th Cir. 1967) (statement made in criminal prosecution); *Morgan* v. *United States,* 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963); *United States* v. *Allen,* 193 F. Supp. 954 (S.D. Cal. 1961); *contra, United States* v. *Stephens,* 315 F. Supp. 1008, 1010, (W.D. Okla. 1970). All these authorities were reviewed in *United States* v. *D'Amato,* 507 F.2d 26 (2d Cir. 1974), the Court holding that 18 U.S.C. 1001 did not apply to a false statement submitted in a *private* civil action. The opinion may be read, however, as intimating a different result if the government had been a party to the action since it would then have been directly defrauded.

[67] As previously noted, this section eliminates the former concern, and the discrepancy in regard to the application of the two-witness rule has also been removed by abolishing this requirement for the perjury offense (section 1341). See also 18 U.S.C. 1623.

[68] 374 F.2d 363 (8th Cir. 1967).

[69] Cf. *United States* v. *Bedore,* 455 F.2d 1109 (9th Cir. 1972), where the court held it not a violation of 18 U.S.C. 1001 for a person falsely to deny his identity to an F.B.I. agent who came to his door seeking to serve a subpoena. The court reasoned that such a denial would not "pervert or corrupt" an authorized function of the F.B.I. since it would not cause the agency to act. But see *United States* v. *Goldfine,* 538 F.2d 815 (9th Cir. 1976) (*Bedore* not applicable to false denial by registrant to agents of regulatory agency conducting investigation to determine the manner in which he was complying with the law).

[70] 380 F.2d 917 (2 Cir.), cert. denied, 389 U.S. 1006 (1967).

[71] *Id.* at 922.

> The making of intentionally false statements to the F.B.I. calculated to provoke an investigation by that agency may cause more "perversion" of authorized agency functions—and more harm to individuals—than false pecuniary and property claims which are clearly covered by the statute. We agree with the views of Judge Register, who dissented in *Friedman*, that individuals acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F.B.I. Insofar as the penalty for a violation of § 1001 may exceed the penalty for perjury, the Supreme Court stated in *Gilliland, supra* that "the matter of penalties lay within the discretion of Congress." 312 U.S. at 95.

Other courts of appeals have also declined to follow the approach in *Friedman.*[72]

A corollary problem involves the so-called "exculpatory no" cases. In the leading case on the subject, *Paternostro* v. *United States,*[73] the Fifth Circuit held that, even though sworn, a defendant's negative answers to an I.R.S. agent's questions as to the defendant's involvement in criminal activity, where the defendant did not initiate the conference nor volunteer any misinformation, were not "statements" within the scope of 18 U.S.C. 1001. The court reached this result on the grounds that a denial of guilt to an investigator that creates false statement liability would effectively end "the age-old conception of perjury" and that the denial of culpability in these circumstances somehow implicated Fifth Amendment values.[74]

Another problem that has arisen in construing 18 U.S.C. 1001 is whether the word "material" applies to every portion of the statute. The word appears only in the first clause, dealing with a trick, scheme, or device. The second clause, dealing with false statements, and the third clause, dealing with writing or documents, do not use the word "material." The vast weight of appellate authority takes the view nevertheless that materiality must be shown in all prosecution under 18 U.S.C. 1001.[75] The Second Circuit, however, has taken a strong minority stand that a false oral statement or writing need not be material.[76]

The standard for determining whether a statement is "material" has been variously stated in terms of whether it has a natural tendency to influence, or is capable of influencing, the decision of the tribunal in making a required determination,[77] or whether the falsification is calculated to induce action or reliance by an agency of the United States.[78] The test is the intrinsic capability of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.[79]

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[72] See, reaching the same result as *Adler,* United States v. *Lambert,* 501 F.2d 943, (5th Cir. 1974) (*en banc*); see also *United States* v. *Rose,* 570 F.2d 1358, 1363-1364 (9th Cir. 1978), the court holding that 18 U.S.C. 1001 reaches unsworn false oral statements that substantially may impair basic functions entrusted by law to the agency employing the officer to whom the statement was made.

[73] 311 F.2d 298 (5th Cir. 1962).

[74] See also *United States* v. *Schnaiderman,* 568 F.2d 1208 (5th Cir. 1978). *Paternostro* has been held inapplicable, however, to exculpatory denials "given to agents of a regulatory agency conducting a criminal investigation legitimately within its purview," *United States* v. *Goldfine, supra,* note 69 at 821. Compare also *Makonjio-Ruzic* v. *United States,* 402 F.2d 836 (9th Cir. 1968), vacated on other grounds, 394 U.S. 454 (1969); *United States* v. *McCue,* 301 F.2d 452 (2d Cir.), cert. denied, 370 U.S. 939 (1962); *United States* v. *Isaacs,* 347 F. Supp. 743, 755–756 (N.D. Ill. 1972).

[75] E.g., *Gonzales* v. *United States,* 286 F.2d 118 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961); *Robles* v. *United States,* 279 F.2d 401 (9th Cir. 1960), cert. denied, 365 U.S. 836 (1961); *United States* v. *Larocca,* 245 F.2d 196 (3d Cir. 1957); *Freidus* v. *United States,* 223 F.2d 598 (D.C. Cir. 1955); *Rolland* v. *United States,* 200 F.2d 678 (5th Cir.), cert. denied, 345 U.S. 375 (1953).

[76] *United States* v. *Silver,* 235 F.2d 375 (2d Cir.), cert. denied, 352 U.S. 880 (1956); *United States* v. *Marchisio, supra* note 63, at 666.

With regard to *scienter*, the courts have held that the phrase "knowingly and willfully" in 18 U.S.C. 1001 does not require proof of any evil motive and that even actual knowledge of falsity of the statement is not necessary; a conviction can be based on a finding that the defendant acted with reckless disregard of whether a statement was true and with a conscious purpose to avoid learning the truth.[80]

3. The Offense

A. Elements under paragraph (a)(1)

Subsection (a) of section 1343 sets forth three false statement offenses in separate paragraphs. The first is the basic statute intended to replace 18 U.S.C. 1001 and the numerous other false statement provisions in title 18 dealing with false statements relating to specific agencies, matters, or proceedings.

Paragraph (1) provides that a person commits an offense if "in a government matter" he (A) makes a material oral statement that he knows is false to a person who he knows is (i) a law enforcement officer or (ii) a person assigned noncriminal investigative responsibility by statute, or by a regulation, rule or order issued pursuant thereto, or by the head of a government agency, and, in either case, in fact the statement is volunteered or is made after the person has been advised that making such a statement is an offense, (B) makes a material written statement that he knows is false, (C) omits a material fact that he knows is necessary to make a written statement not misleading, or conceals a material fact in a (i) written application for a benefit; (ii) in a registration statement or other document filed or required to be filed by a statute, regulation, rule, or order issued pursuant thereto; or (iii) in a written statement submitted to secure or modify, or submitted in the administration or implementation of, a government grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance, (D) submits or invites reliance on a material writing or recording that he knows is false or he knows is forged, altered, or otherwise lacking in authenticity, (E) submits or invites reliance on a sample, specimen, map, photograph, boundary-mark, or other object that he knows is misleading in a material respect, or (F) fraudulently uses a trick, scheme, or device that he knows is misleading in a material respect.

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[77] See, e.g., *Blake* v. *United States*, 323 F.2d 245 (8th Cir. 1963); *Gonzales* v. *United States*, *supra* note 75.

[78] See *United States* v. *Parten*, 462 F.2d 430 (5th Cir.), cert. denied, 409 U.S. 983 (1972); *United States* v. *East*, 416 F.2d 351 (9th Cir. 1969).

[79] See *United States* v. *Quirk*, 167 F. Supp., *supra* note 27 at 464; *Brandow* v. *United States*, 268 F.2d 559, 565 (9th Cir. 1959).

[80] See *United States* v. *Egenberg*, 441 F.2d 441, 444 (2d Cir.), cert. denied, 404 U.S. 994 (1971); *United States* v. *Clearfield*, 358 F. Supp. 564, 574 (E.D. Pa. 1973).

The term "government matter" is defined in section 1346(a)(3) to mean a "matter within the jurisdiction, including investigative jurisdiction, of a government agency, and includes a government record."[81] This definition is designed to endorse the broad construction of 18 U.S.C. 1001 in the *Bramblett* case, *supra,* and to reverse the results in decisions, such as *Friedman* and *Erhardt* noted above, in which courts have given restrictive interpretations to the term "jurisdiction" in the current law. The Committee considers that a false statement, for example, tending to cause the F.B.I. or the I.R.S. to commence a criminal investigation, or a false statement during such an investigation, may have consequences at least as harmful as the typical false statements made to a government agency in a claim for money or property. As noted in *Adler, supra,* it is unrealistic to believe that the lack of an exception for false statements knowingly or recklessly given in the course of a criminal investigation will inhibit citizens from imparting information to law enforcement authorities in good faith. Moreover, the failure to punish the making of such false statements would, in the judgment of the Committee, tend to further disrespect for law and, to the extent that it might encourage certain knowledgeable malefactors to lie to government investigators under protected circumstances, would also make the task of law enforcement unnecessarily more difficult.[82]

Materiality is made an element of each of the offenses in paragraph (1). Thus, the Committee has adopted the majority rule and rejected the view of the Second Circuit that a false oral statement or writing under 18 U.S.C. 1001 need not be material. The National Commission made a like determination,[83] and retention of materiality as an element of these offenses was advocated by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code.[84] In the view of the Committee, materiality should be an element of all false statement prosecutions where felony treatment is retained (as is generally proposed here). Such a requirement also avoids the possibility of abusive inquiries by government agencies in areas where they have no jurisdiction.[85]

The definition of the term "material" in section 1346(b)(2) applies to this section and section 1341 and is designed in the main to codify existing law. (See discussion on section 1341.) However, in this regard, the Committee specifically disapproves the decision in *United States* v. *Bedore,*[86] since a false denial of identity to an agent seeking to serve a subpoena clearly could affect or impede the course, outcome, or disposition of the government matter at issue.

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[81] The term "government agency" is expansively defined in section 111. The term "government record" is defined in section 1346(a)(4).

[82] See, criticizing *Freidman,* Note, *Fairness in Criminal Investigations Under the Federal False Statements Statute,* 77 Col. L. Rev. 316, 323–325 (1977). S. 1400 and the Final Report of the National Commission each included a separate section dealing with false reports to a law enforcement officer that a crime has been committed or implicating another in a crime, or to a public servant responsible for dealing with emergencies (e.g., a fireman) that an incident has occurred that calls for an emergency response. Such conduct is clearly encompassed within the definition of "government matter," discussed above, and "statement," defined in section 1346(a)(6), discussed *supra* in connection with section 1341.

[83] See Final Report, § 1352, Comment, pp. 130–131.

[84] Hearings, p. 7736.

[85] See Working Papers, p. 673.

[86] *Supra* note 69.

Subparagraphs (A) and (B) together carry forward the aspect of 18 U.S.C. 1001 dealing with the making of any false, fictitious, or fraudulent statement or representation. Present law generally covers false oral as well as written statements, although, as previously noted, some cases have construed the current statute as not including certain exculpatory denials. The Committee has defined "statement" in section 1346(a)(6) expressly to include oral statements. With respect to the so-called "exculpatory no" cases, the Committee has determined to perpetuate a limited version of this doctrine through the defense afforded in subsection (b).[87] Under this provision it is a defense to a prosecution for an oral false statement to a law enforcement officer under section 1343(a)(1)(A)(i) that the statement was made "during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense." Thus, the defense will be available only when the false statement consists solely of a denial of involvement in a crime. Such a denial if accompanied by any other false statement (e.g., the assertion of an alibi) would not exculpate and indeed would render the false denial a chargeable offense under this section. It should also be noted that the defense exists only under this section and not sections 1341 and 1342. Thus, a sworn statement consisting of a denial of involvement in a crime (the situation in *Paternostro* v. *United States,* discussed above) would be prosecutable under those sections. The Committee has rejected any broader defense, based on a belief that the values of the Fifth Amendment privilege against self-incrimination would be offended by a finding of liability, since such reasoning is rebutted by the principle, recently affirmed by the Supreme Court in the context of a prosecution under 18 U.S.C. 1001, that, although a person may decline without penalty to respond to a question the government had no right to ask him or which might incriminate him, he may not with impunity answer untruthfully.[88]

Although false oral as well as written statements are penalized under this section, the Committee has imposed certain additional requirements with respect to oral false statements to a law enforcement officer or other person assigned noncriminal investigative responsibility. In order to be guilty of making an oral false statement, the defendant must be shown to have known that the person to whom the statement was addressed was a law enforcement officer or an individual assigned noncriminal investigative responsibility, and the statement must have been volunteered or given after the defendant was advised that his making of a false statement would be an offense. The inclusion of these additional elements reflects a middle ground between the *Friedman* court's position that no oral statement to a Federal investigator is within 18 U.S.C. 1001 and the contrary view of the *Adler* and *Lambert* courts that such statements are and ought to be so punishable. Under the Committee's formulation, a significant degree of protection is afforded to the individual in his dealings with Federal government agents, while the ability is retained to prosecute those persons who make a deliberately misleading statement to a known government agent, where the statement is either volunteered (e.g., a false alarm or an unsolicited false accusation that another person has committed an offense) or is made after a warning, designed to impress on the defendant the seriousness of the interrogation and his obligation to speak truthfully, that a false statement will subject him to criminal sanctions. In short, the additional elements in subparagraph (A) safeguard the individual defendant against being entrapped or deceived by a government agent into making a false statement, while permitting prosecution of persons intent upon causing serious mischief through false utterances.

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[87] The "exculpatory no" situation was dealt with in the grading of the offense in previous versions of the criminal code bills. See section 1343(b)(2), S. 1722, 96th Cong.

[88] *United States* v. *Wong,* 431 U.S. 174 (1977), and cases cited therein: see also criticizing *Paternostro,* Note, *Fairness in Criminal Investigations Under the Federal False Statements Statute, supra* note 80 at 320–323. The Committee has endorsed the holding in *United States* v. *Goldfine, supra* note 69, that *Paternostro* is inapplicable to exculpatory denials given to agents of a regulatory agency, by confining the defense to false oral denials to law enforcement officers under subsection (a)(1)(A)(i) but not under (a)(1)(A)(ii).

The National Commission by contrast urged that false statements should be principally confined to written statements and the only false oral statements punishable should be certain false reports intended to implicate another and directed to law enforcement officials.[89] The Committee disagrees. For, while it is true that most dealings between government agencies and citizens are eventually reduced to writing, the writings are often not written or signed by the citizen, and there are certainly situations even apart from those involving a criminal investigation[90] where oral false statements can have serious consequences. For instance, an oral false statement to an internal revenue tax return examiner who is responsible only for civil tax liability could be misleading to the government and cause a monetary loss. Such oral false statements are likely to be a recurring problem and should, in the opinion of the Committee, remain criminal.

The Committee, in section 1346(b)(4), has included a provision requiring that for a conviction for an oral false statement the proof that the defendant made the statement must include corroborating evidence. This is meant to guard against a conviction based solely on a "one to one" allegation—the officer's word against that of the defendant. It is not intended to derogate from the rule that conviction is to be permitted on proof beyond a reasonable doubt. It indicates only that something more than the officer's word alone is required.

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[89] See Final Report §§1325, 1354. For a comparison of the Final Report with section 1343 as proposed in S. 1 of the 94th Congress on this issue and others, see Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials, 63 Va. L. Rev. 451 (1977).*

[90] The National Commission proposed to endorse the general view in *Friedman, supra*, and exclude all statements given during the course of a criminal investigation, unless made in an official proceeding or under a legal duty. See Final Report, §1352(3). One reason given for this resolution of the issue was the then recent passage by Congress of 18 U.S.C. 1510, punishing obstruction of criminal investigation by, *inter alia*, misrepresentation, the legislative history of which the Commission believed supported in the *Friedman* results. See Working Papers, p. 672. However. 18 U.S.C. 1510 is an obstruction of Justice statute focusing not on the potential harm that may flow from a deliberate false statement but on the actual impairment or obstruction of a government function, 18 U.S.C. 1510 is carried forward in the proposed Code in sections 1322 and 1323. The Committee does not believe that the enactment of 18 U.S.C. 1510 has any bearing on the proper construction of 18 U.S.C. 1001, or, in any event, on the proper breadth to be accorded section 1343 of this proposed Code.

It should be noted that, while the Committee has extended the scope of the false statement statute, with respect to written false statements, broadly to all judicial proceedings, as urged by the National Commission,[91] the oral false statements offense in subparagraph (A) does not reach false utterances to a judge or magistrate. Thus, for example, an accused who is interrogated by a committing magistrate as to his community contacts and who gives unsworn, knowingly false answers as to his job or residence would not be punishable under this section. The same is true of a defendant, addressed by the court as to the voluntariness of his guilty plea under Rule 11, F.R.Crim.P., who gives a knowingly false, unsworn response. Although such false statements can be extremely serious, the Committee believes that the better solution is to require the courts, if they believe that a risk exists that an accused or other person will lie, to place the individual under oath. Following such an oath, any false oral statement may be presecuted under section 1341 (Perjury) or 1342 (False Swearing).

Subparagraph (C) of paragraph (1) of section 1343 deals with the creation of a false impression by the omission of information necessary to prevent a material statement from being misleading in a written application for a benefit, in a registration statement or other document filed or required to be filed by law, or in a written statement required to be submitted to secure or modify, or administer or implement a government contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance. This provision, which carries forward the concealing or covering up aspect of 18 U.S.C. 1001, expands on a suggestion of the National Commission,[92] and is designed to make certain that this type of omission in a written statement can result in a prosecutable offense.[93]

Subparagraph (D) is also derived from the recommendations of the National Commission and covers the submission of or invitation to rely on a material writing that is false, forged, altered, etc. This essentially carries forward the aspect of 18 U.S.C. 1001 dealing with the making or use of "any false written documents knowing the same to contain any false, fictitious or fraudulent statement or entry." The term "fraudulent" has been deleted as superfluous and as better reserved for the proposed Code's sections on fraud.

Subparagraph (E), covering the submission of, or invitation to rely on a sample, specimen, etc., that is misleading in a material respect, was suggested by the Model Penal Code and is included in the bill, as reported, to assure completeness of coverage in the false statement section.

Subparagraph (F) deals with misleading tricks, schemes, or devices. The language is derived from 18 U.S.C. 1001 and has been used to prosecute complex schemes the cumulative effect of which is misleading in a material manner.[94] In the context of this section the clause serves a residual function and continues the provisions found in both the Final Report and S. 1, as originally introduced in the 93d Congress.[95]

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[91] See Final Report § 1352(2)(b).

[92] Cf. Working Papers, p. 674.

[93] Compare section 1761(a)(2) (Securities Offenses). No corresponding provision applicable to oral false statements is included in light of the Committee's decision to adhere in section 1341 to the holding in *Bronston* v. *United States*, 409 U.S. 352 (1973), that a literally true statement, albeit designed to create a false impression, does not constitute perjury.

[94] See, e.g., *Harrison* v. *United States*, 279 F. 2d 19 (5th Cir.) cert. denied, 364 U.S. 864 (1960).

The Committee intends that current law be followed as to the lack of necessity for any particular kind of proof to establish a violation of this section. Hence the so-called "two-witness" rule does not apply under this section.[96]

B. Culpability under paragraph (1)

The conduct in the various offenses contained in paragraph (1) is making a statement (subparagraph (A)), making a written statement (subparagraph (B)); omitting or concealing a fact (subparagraph (C)), submitting or inviting reliance on a writing or recording (subparagraph (D)), submitting or inviting reliance on a sample, specimen, map, photograph, boundary-mark, or other object (subparagraph (E)), and fraudulently using a trick, scheme, or device (subparagraph (F)). Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[97]

The common element that the conduct was performed in a "government matter" is an existing circumstance. Since no culpability is specifically designated, the applicable state of mind that must be proved is at a minimum "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[98]

The element of materiality, also common to all the offenses in this paragraph, is similarly an existing circumstance. Since materiality is declared in section 1346(b)(2) to be a question of law, no state of mind need be proved as to this element.[99]

The element that the statement is false (in subparagraph (A)), and the equivalent elements in the other clauses are also existing circumstances. Since the culpability is specifically designated as "knowing" in this section, the applicable state of mind that must be shown is that the offender was aware or believed that the circumstance existed.[100] This culpability level, coupled with the requirement that the conduct be knowingly engaged in, is slightly stricter than the *scienter* needed for a conviction under 18 U.S.C. 1001 [101] and the proposal of the National Commission.[102] The phrase "in fact" precedes the circumstance (in subparagraph (A)) that the oral statement was volunteered or made after the specified advice, so no state of mind must be proved as to that circumstance.

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[95] See Final Report, § 1352(2)(e); section 2-6D2(5) of S. 1 of the 94th Congress.

[96] See Working Papers, p. 667.

[97] See sections 303(b)(1) and 302(b)(1).

[98] See sections 303(b)(2) and 302(c)(1).

[99] See section 303(d)(3). The designation of materiality as a question of law to be decided by the court, is, as in the case of perjury, a reflection of present law. E.g., *United States* v. *Bernard*, 384 F.2d 915 (2d Cir. 1967); *United States* v. *Ivey*, 322 F.2d 523 (4th Cir.) cert. denied, 375 U.S. (1963); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961).

[100] See section 302(c)(1).

[101] See *United States* v. *Egenberg*, *supra* note 80.

[102] See Working Papers, p. 674. The remaining element in subparagraph (B) and (C) that the statement is "written" is also an existing circumstance as to which the culpability standard is at least "reckless."

C. Elements under paragraphs (2) and (3)

Paragraph (2) is intended in part to bring forward the third paragraph of 18 U.S.C. 1005.[103] That statute punishes by up to five years in prison whoever makes any false entry in ay book, report, or statement of a Federal Reserve bank, member bank, national bank, or insured bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System.[104]

Paragraph (2) provides, more simply, that a person commits an offense if in a credit institution record, with intent to deceive or harm the government or a person he, as an agent of such credit institution, engages in any conduct described in subparagraphs (B) through (F) of paragraph (1).

Although 18 U.S.C. 1005 is written in terms of "whoever," the Committee has limited the class of persons covered to agents of credit institutions since only such persons would have access to credit institution records. The concept of an "agent" is expansive under the definition in section 111 and means a person authorized to act on behalf of another person (a term itself defined to include an organization), and includes a partner, director, officer, manager, and representative, and, except for purposes of receipt of service of process, a servant and employee. This offense thus continues to guard against the serious consequences that may atend the making of material false statements by persons acting for or on behalf of a credit institution.[105]

Paragraph (3) of section 1343 is designed, with some modifications, to carry forward 18 U.S.C. 1014, as amended in 1970, which covers a category of serious false statements that cannot be reached by the proposed definition of "government matter."

18 U.S.C. 1014 punishes by up to two years in prison whoever knowingly makes any false statement or report, or willfully overvalues any land, property, or security, upon any application, advance, loan, etc., for the purpose of influencing the action of a number of enumerated agencies, including various agricultural corporations and financial institutions the deposits of which are Federally insured. It is the inclusion of these latter financial institutions whose deposits are Federally insured that requires special coverage under paragraph (3), since the other institutions listed, in which the government has a proprietory interest, are within the definition of "government matter" in section 1346(a)(2).

Paragraph (3) provides that a person commits an offense if, in a statement intended to influence the action of a credit institution, he engages in any conduct described in paragraph (1) (B) through (F).

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[103] Other aspects of 18 U.S.C. 1005 are covered in section 1744.

[104] Paragraph (2) also carries forward the "makes any false entry" aspect of 18 U.S.C. 1006, a related statute that also has a five-year maximum prison penalty.

[105] The phrases "credit institution" and "credit institution record" are discussed in connection with paragraph (3) *infra*.

The term "credit institution record" is defined in section 1346(a)(1) to mean a record, book, or statement of a credit institution that is kept in the usual course of business by an agent of such institution. The term "credit institution" itself is not defined, but the term acquires meaning by reference to the definition in section 111 of "national credit institution" (used in the subsection of this section dealing with jurisdiction) which lists a variety of Federal and Federally insured financial institutions, including those enumerated in 18 U.S.C. 1014.[106]

Paragraph (3) carries forward the essential scope of 18 U.S.C. 1014. No limitation is placed on the types of actions of a credit institution that may be intended to be influenced. Since the list of classes of transactions in 18 U.S.C. 1014 that might be the subject of criminal intent was apparently meant to be exhaustive, the same result is attained in simpler fashion by omitting any mention of such specific classes.[107] The conduct described in subparagraphs (B) through (F) of paragraph (1) roughly corresponds to the phrase "makes any false statement or report" in 18 U.S.C. 1014 but is perhaps more definite, as well as inclusive, in the kinds of falsifications and misleading representations that are covered.

D. Culpability under paragraphs (2) and (3)

The conduct in paragraphs (2) and (3) is engaging in any conduct described in subparagraphs (B) through (F) of paragraph (1). Since no culpability level is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his action.[108]

The element in paragraph (2) of an intent to deceive or harm the government or a person and the element in paragraph (3) of an intent to influence the action of a credit institution state the particular purposes for which it must be established that the respective conduct was performed.

The remaining elements (e.g., in paragraph (2) that the conduct related to a credit institution record) are existing circumstances. As no culpability standard is specifically set forth, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[109]

4. Defense

Section 1343(b) provides that it is a defense to a prosecution under subsection (a)(1)(A)(i) that the statement was made to a law enforcement officer during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense. This defense covers the so-called "exculpatory no" situation which arises when a person makes a false oral denial of complicity in a crime to a law enforcement officer. As explained above, however, the defense is available only if the false denial of complicity in crime is the sole respect in which the statement is false.

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[106] This definition is endorsed by the A.B.A. Committee on Reform of Federal Criminal Laws of the Criminal Section. Hearings pp. 5789, 5807.

[107] See *United States* v. *Sabatino,* 485 F.2d 540, 542-544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974).

[108] See sections 303(b)(1) and 302(b)(1).

[109] See sections 303(b)(2) and 302(c)(1).

5. Affirmative Defense

Section 1346(c)(2) provides that it is an affirmative defense to a prosecution under section 1343 that the actor clearly and expressly retracted the falsification and communicated the retraction to the same individual, agency, or institution to which it had been communicated, if he did so within seven calendar days after the falsification had been received, and if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the government matter or credit institution action, or of a related government matter or official proceeding.

Present Federal law does not include a retraction defense for making a false statement. The National Commission, however, proposed affording the same retraction defense for this offense as for perjury.[110] The Committee, although concurring in the general policy decision to establish a retraction defense in this area, has concluded that the defense should be more limited than for perjury in view of the fact that the false statement offense reaches beyond the formal context of an "official proceeding." The "official proceeding" context provides a manageable framework in which to determine the issues whether the retraction was made before it became manifest that the falsification had been or would be exposed, and whether it substantially impaired, affected, etc., the course, outcome, or disposition of the government matter, etc. Hence, there is no need to impose a time limit within which the retraction must occur. Because a false statement under section 1343 may not involve an official proceeding, the Committee deems it appropriate to require that the retraction be made within seven calendar days, in addition to the other requirements of the defense, in order to facilitate the practical resolution of those issues.

Since the defense is denominated as "affirmative," the defendant will bear the burden of proving the elements thereof by a preponderance of the evidence.[111]

6. Jurisdiction

There is Federal jurisdiction over an offense in paragraph (1) in two circumstances. The first is if the government is the government of the United States. The terms "government" and "United States" are broadly defined in section 111, the former so as to include, *inter alia,* the legislative, executive, and judicial branches and any subdivision of the foregoing. Hence, this section in its jurisdictional aspects is at least as broad as 18 U.S.C. 1001 as interpreted in the *Bramblett* case, *supra.*

The second circumstance is if the government is a State, local, or foreign government and the falsity constituting the offense is that the declarant is a citizen of the United States. This carries forward in part the present coverage of 18 U.S.C. 911 which makes it a three-year felony for any person to falsely and willfully represent himself to be a citizen of the United States.[112]

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[110] See Final Report, § 1355(3).

[111] See the definition of "affirmative defense" in section 111.

This statute currently reaches those aliens who knowingly lie about their citizenship in any governmental matter, whether Federal, state, or local, as well as false statements in non-governmental matters. The two most prosecuted situations concern aliens who lie about their citizenship in order to vote in Federal and State elections and those who lie in order to obtain private employment.

This subsection carries forward in the Code Federal cognizance over the first situation, but not over the second. This is in accord with the recommendation of the National Commission[113] and appears appropriate since the perjury and false statements provisions are designed to deal with falsehood involving governmental matters, not private affairs. False representations of citizenship in order to obtain a private job may be properly left for prosecution by State or local authorities.

As under present 18 U.S.C. 911, this jurisdictional provision covers only the case where the declarant falsely claims to be a citizen; it does not extend to the situation where one person makes a false statement that another individual is a citizen. Such cases will be relatively rare and the Committee sees no need now to enlarge Federal jurisdiction to cover them.[114]

In addition to the foregoing jurisdictional purview, there is extraterritorial jurisdiction over an offense in paragraph (1) pursuant to the provisions of section 204(c)(3).

With respect to the offenses in paragraphs (2) and (3), there is Federal jurisdiction if the credit institution is a "national credit institution," as defined in section 111, or a small business investment company, as defined in 15 U.S.C. 662. As previously indicated, the definition of "national credit institution" includes virtually every financial institution the transactions of which the Federal government has a substantial interest in protecting and carries forward the current broad scope of 18 U.S.C. 1014. Small business investment companies, which are not embraced within the definition of "national credit institution" generally, are included here in order to preserve the coverage of 18 U.S.C. 1006 and 1014.

7. Grading

As noted in connection with section 1341, the penalty structure concerning perjury and false statement offenses in current law is clearly anomalous. Perjury, which requires a sworn statement under oath before a competent tribunal, officer, or person, is punishable by five years' imprisonment and a $2,000 fine; false statement, on the other hand, also carries a maximum five-year prison sentence but has a higher fine—$10,000. Yet, the latter statute requires no oath or competent tribunal, only that the matter be within the jurisdiction of any department or agency of the United States. This similarity in penalty for disparate offenses has been a major reason why courts have been reluctant to give 18 U.S.C. 1001 the broad construction that, abstractly, it would seem to warrant, since to permit the application of 18 U.S.C. 1001, e.g., to legislative and judicial proceedings, would permit a conviction carrying the same penalty as perjury but without the necessity to prove other elements of this offense required under the perjury statute.[115]

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[112] 18 U.S.C. 911 has also been discussed in connection with section 1303.

[113] Where the government is the government of the United States, the conduct would be encompassed within the first jurisdictional circumstance. In addition, if the false representation enabled the alien to elude inspection or to obtain entry into this country, the conduct could be punished under section 1211. Final Report section 1352(5)(b) is a comparable provision. The Final Report proposal, however, unaccountably omits the situation where the government is a foreign government. The Committee has continued jurisdiction in this circumstance in view of the clear Federal interest to be vindicated.

[114] If the false statement was in support of an alien's illegal entry into the United States, or other offense (including a violation of this section), the declarant could be guilty as an accomplice under section 401.

The National Commission proposed to remedy this situation—and thereby remove the incentive to construe the false statements statute in an artificial and niggardly fashion—by grading perjury as a seven-year offense and false statements at the next lower level, i.e., a Class A (one-year) misdemeanor. The Committee concurs with the general concept of creating a significant grading difference between perjury and false statement offenses. However, the Commission's scheme results in a severe downgrading of the penalty for false statements provided by current law and, even more importantly, alters the congressional judgment—to which the Committee, with a minor exception, continues to adhere—that the deliberate making of a false statement should be a felony rather than a misdemeanor.

It was to take account of just this type of situation and to avoid this sort of unnecessarily sharp diminution in penalty that the Committee created an intermediate felony range (Class E) between the six-year and one-year classification. Thus, an offense under this section will generally be graded as a Class E felony (up to three years in prison). This has the effect of preserving the existing felony treatment of the offense while still creating a substantial distinction between it and perjury, which is graded at a six-year level. The Committee deems it appropriate to retain felony grading for false statements in view of the fact that misdemeanor punishment does not seem an adequate deterrent to or vindication of a variety of false statements the net effect and purpose of which may be to cause a government agency to award a contract or confer a benefit involving a very large sum of money. False accusations of crime and the like, which may cause an agency to commence or cease an investigation, also must be regarded as serious criminal conduct warranting more than mere misdemeanor grading.

SECTION 1344. TAMPERING WITH A GOVERNMENT RECORD

1. *In General and Present Federal Law*

This statute consolidates a number of offenses found in various titles of the United States Code concerned with improper handling of government records. The basic statute is 18 U.S.C. 2071 which covers all government records; that section is overlapped by 18 U.S.C. 1506, which deals specifically with judicial records. In addition, while some acts now covered by 18 U.S.C. 641 (involving theft or embezzlement of government records) would generally be prosecuted under the theft provisions of chapter 17, there also exists potential coverage under this section.

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[115] In addition, as observed before, the two-witness rule, applicable to perjury under 18 U.S.C. 1621, has not been held applicable under 18 U.S.C. 1001.

18 U.S.C. 2071 punishes by up to three years in prison whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys or, with intent to do so, takes and carries away, any record, proceeding, map, book, paper, document, or other thing filed or deposited with any clerk or officer of a court of the United States or in any public office, or with any judicial or public officer of the United States. It also makes it a three-year offense for whoever, having the custody of any such record, etc., willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same.

The term "willfully" in this statute has been construed to require some knowledge by the defendants that their actions are in violation of law, but not to require proof of any evil motive so that a belief in the moral correctness of the conduct does not immunize the person performing it from criminal liability.[117]

The purpose of 18 U.S.C. 2071 has been held to be to prevent conduct that deprives the government of the use of its records. Because of this purpose, the statute has been construed as not extending to the act of unauthorizedly photocopying government documents, where the documents themselves were not removed from the premises or altered in any way.[118] It has been noted, however, that the act of photocopying might well be sufficient to constitute the offense of theft under 18 U.S.C. 641.[119]

18 U.S.C. 1506 punishes by up to five years in prison whoever, *inter alia,* feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect. This statute, which is seldom used as a prosecutive vehicle, is carried forward in part also under sections 1325 (Tampering with Physical Evidence) and 1731 (Theft) of the proposed Code.[120]

2. The Offense

Subsection (a) of section 1344 provides that a person commits an offense if he alters, destroys, mutilates, conceals, removes, or otherwise impairs the physical integrity or availability of a government record with intent to impair its a availability to the Federal government.

The term "government record" is defined in section 1346(a)(4) to mean a record, document, or other object (A) belonging to, or received or kept by, a government for information or record purposes, or (B) required to be kept by a person pursuant to a statute or a regulation, rule, or order issued pursuant thereto, or pursuant to a contract or grant.

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[117] See *United States* v. *Moylan,* 417 F.2d 1002, 1004-1005 (4th Cir. 1969), cert. denied. 397 U.S. 910 (1970); *United States* v. *Cullen,* 454 F.2d 386, 390-392 (7th Cir. 1971); *United States* v. *Simpson.* 460 F.2d 515, 518 (9th Cir. 1972). These cases all arose in the context of prosecutions of persons for destroying records of the Selective Service System in which knowledge of the law was conceded

[118] *United States* v. *Rosner,* 352 F. Supp. 915, 919-922 (S.D.N.Y. 1972), aff'd and remanded for resentencing, 485 F.2d 1213 (2d Cir. 1973).

[119] *Id.* at 921-922

[120] See also 18 U.S.C. 641 and 1361. The latter section deals with the destruction of government property (including records) and is carried forward in sections 1701-1704 of the proposed Code. The former section covers theft and embezzlement of government records and is brought forward principally in section 1731.

The offense is written so as generally to follow the recommendation of the National Commission[121] and to implement the Committee's decision to punish hereunder any act, done with the requisite intent, which lessens the physical integrity, usability, or accessibility of government records. Thus the term "otherwise impairs" in this section is designed to reach all conduct of the type just described.[122] The fact that, despite the defendant's conduct, the government may retain equivalent access to the information contained in the record that was destroyed, altered, removed, etc., does not render the defendant's action any less culpable and hence was rejected by the Committee as the basis for a defense. Moreover, equivalent access to the information may not remove the harm in the defendant's crime since having the information available in the form of the particular record that was impaired may have independent importance, such as in terms of unsuitability in an official proceeding.

The Committee emphasizes that this offense deals solely with the protection of government records to preserve their availability for official use. It is not intended as, and plainly is not susceptible for use as, a vehicle for punishing mere possession of government records or for preventing reporters from obtaining information contained in government records. *A fortiori*, the provision has no application to the publishing of information obtained from a government record.

The National Commission used the phrase "without lawful authority" in its definition of the offense. However, the Committee has rejected this language since the defense of public authority is available to a public servant charged with violating this section.[123] In addition, a private person who is required to keep a government record is protected if he destroys the record pursuant to official authority, since under the definition in section 1346(a)(4)(B) the record would no longer be a "government record."

The Committee specifically endorses the interpretation placed on 18 U.S.C. 2071 in *United States* v. *Rosner, supra,* and does not intend that mere acts of photocopying or photographing government records be punishable under this section. As noted in *Rosner,* the basic wrongdoing involved in photocopying a government record does not relate to the impairing of the physical integrity of the record but to the unlawful capture of its contents.

The conduct in this section is altering, mutilating, concealing, removing, destroying, or otherwise impairing the integrity or availability of a record. Since no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of his action.[124] The "with intent" phrase sets forth a particular purpose for which it must be proved that the defendant engaged in the conduct.

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[121] See Final Report, § 1356.

[122] Impairing the availability of a record is not, however intended to reach instances in which a person fails to maintain a record as required by law. "Impairs the . . . availability" implies the existence of a record as well as the performance of some affirmative conduct, e.g., disguising, with respect to such record. Statutes punishing failure to maintain records, e.g., 7 U.S.C. 221, 205(c), 2146(c), and 2919(c), are retained as offenses outside title 18. See also section 1345 (Failing to Keep a Government Record), *infra.*

[123] See section 501. Where authority is not claimed, however, there seems no reason why the prosecution should be required to prove the defendant's lack thereof.

The element that the record is a "government record" as defined in section 1346 is an existing circumstance. Since no culpability standard is set forth in this section, the applicable state of mind to be proved is, at a minimum, "reckless" i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstance existed, the risk being such that its disregard constituted a gross deviation from the standard of care that a reasonable person would exercise under the circumstances.[125]

The Committee considers that the construction placed upon the term "willfully" in 18 U.S.C. 2071 by some courts as requiring knowledge that the conduct is unlawful is at odds with the general principle that knowledge of the law is not an essential requisite of criminal liability. Thus is will be sufficient for criminal liability under this section if a person knowingly engages in the prohibited conduct with the prescribed culpable intent, being reckless as to the kind of record at issue.

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the government record is a Federal government record. This carries forward the extent of subject matter jurisdiction currently in 18 U.S.C. 2071.

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison) if the record, document, or other object belongs to, or is received or kept by, a government for information or record purposes. This is similar to the present penalty level in 18 U.S.C. 2071 and parallels the grading found in section 1325. The offense is graded as a Class A misdemeanor (up to one year in prison) if the record, document, or other object is required to be kept by a person pursuant to a statute, or a rule, regulation, or order issued pursuant thereto. This reflects the Committee's judgment that the offense is less serious if the record is one over which the government itself does not have physical custody.

SECTION 1345. FAILING TO KEEP A GOVERNMENT RECORD

1. In General and Present Federal law

This offense has no counterpart in present Federal law. It is designed to complement the new jurisdictional base added to section 1731 (Theft), permitting Federal prosecution of certain thefts from federally funded programs, by creating a lesser misdemeanor crime of failing to maintain a government record required to be kept as a condition of receiving Federal benefits, if such failure is done with intent to defraud. The experience of prosecutors within the Department of Justice is that, quite frequently, persons engaged in theft or fraud involving government programs attempt or are able successfully to "cover their tracks," and thereby avoid prosecution for the more serious fraud offense, by consciously, and with fraudulent intent, failing to keep adequate records as required by the program. This offense is aimed at deterring such conduct and affording a basis for prosecution and punishment when it does occur.

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[124] See sections 303(b)(1) and 302(b)(1).

[125] See sections 303 (b)(2) and 302 (c)(1).

2. The Offense

Subsection (a) provides that a person commits an offense if, being an agent of an organization, or a State or local government agency, that is required to maintain government record as a result or condition of such organization's or agency's administering or receiving benefits pursuant to a Federal program through a grant, contract, a subsidy, a loan, a guarantee, insurance, or another form Federal assistance and being responsible for maintaining such a record for the organization or agency, he fails to maintain such a government record with intent to defraud.

The terms "agent" "organization", "State", "local", and "government agency" are defined in section 111. The term "government record" is defined in section 1346 (a)(4) and specifically includes a record, document or other object required to be kept by a person pursuant to a contract or grant, or pursuant to a statute or regulation issued thereunder. The conduct in this section is failing to maintain a record. Since no culpability level is specifically prescribed, the applicable minimum mental state that must be proved is "knowing", that is, that the offender was aware of the nature of his actions.[126] By "failing to maintain" the Committee intends more than just a failure to keep any records. Failing to maintain would also include the keeping of inadequate or incomplete records. The "intent of defraud" element—denoting the particular purpose for which it must be shown that the defendant engaged in the conduct—asssures that the offense will not be applied overbroadly to punish mere breaches of contract or of statutory obligation so far as the keeping of records is concerned, even though done deliberately, so long as no intent to defraud is present.

The element that the record is a government record as defined in section 1346, as well as the remaining elements embodied in the phrases "being an agent . . . federal assistance" and "being responsible . . . agency" are existing circumstances. Since no culpability standard is specified, the applicable mental state is at least "reckless", i.e., that the defendant was aware of but disregarded a substantial risk that the circumstances existed.[127]

3. Jurisdiction

This section contains no subsection setting forth the extent of jurisdiction. Accordingly, pursuant to the provisions of section 201 (2)(2), there is Federal jurisdiction over the offense if it is committed within the general or special jurisdiction of the United States.

4. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison).

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[126] See sections 303 (b)(1) and 302 (b)(1).
[127] See sections 303 (b)(2) and 302 (c)(1).

SECTION 1346. GENERAL PROVISIONS FOR SUBCHAPTER E

This section contains general provisions applicable to the offenses in this subchapter, including certain definitions, defenses, and provisions dispensing with or clarifying proof requirements. All these provisions have been discussed in connection with the sections to which they apply, and there is no need to repeat that discussion here.

SUBCHAPTER F.—OFFICIAL CORRUPTION AND INTIMIDATION

(Sections 1351-1359)

This subchapter consolidates a number of bribery and conflict of interest offenses in chapter 11 of title 18, United States Code, involving public officials, as well as certain offenses aimed at influencing or retaliating against public officials by force or intimidation. Bribery of persons engaged in nongovernmental activities is covered in subchapter F of chapter 17 of the proposed Code. In addition, bribery of, tampering with, or retaliating against a witness or informant is dealt with in subchapter C of chapter 13, discussed above. Bribery of voters, which also poses unique problems in terms of defining the offense, is dealt with separately in subchapter B of chapter 15.[1]

The offenses in this subchapter are Bribery (section 3151), Graft (section 1352), Trading in Government Assistance (section 1353), Trading in Special Influence (section 1354), Trading in Public Office (section 1355), Speculating on Official Action or Information (section 1356), Tampering with a Public Servant (section 1357), and retaliating against a Public Servant (section 1358). Section 1359 contains general definitions and other provisions for the foregoing offenses.

SECTION 1351. BRIBERY

1. In General and Present Federal Law

This section is principally designed to replace 18 U.S.C. 201(b) and (c). In addition, the bribery aspects of 18 U.S.C. 1511 and 1952 will be carried forward in this section. Other statutes outside title 18 punishing bribery of specific classes of Federal public servants will be repealed as unnecessarily duplicative.[2]

As drafted by the Committee, this section reflects—with refinements—some of the changes suggested by the National Commission.[3] On the whole, however, most of the basic features of current 18 U.S.C. 201(b) and (c) have been retained.[4]

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[1] See Working Papers, pp. 689-690.

[2] See, e.g., Working Papers, p. 685, for a partial list of such statutes.

18 U.S.C. 201(b) punishes by up to fifteen years in prison whoever, directly or indirectly, "corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or person selected to be a public official to give anything of value to any other person or entity, with intent—(1) to influence any official act; or (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any action in violation of his lawful duty."

18 U.S.C. 201(c) punishes by an identical penalty whoever, being a public official or person selected to be a public official, directly or indirectly, "corruptly asks, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) being induced to do or omit to do any act in violation of his official duty."

The term "public official" is defined in 18 U.S.C. 201(a) to mean a Member of Congress or the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of government or a juror.[5]

The term "person who has been selected to be a public official" is also defined in section 201(a) and means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed.

Finally, the term "official act" is defined in section 201(a) to mean any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time by pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

Section 201(b) is, of course, violated even though the official offered a bribe is not corrupted or the object of the bribe cannot be attained.[6] While a specific intent to influence official action must be shown, it is not an element of the offense that the briber knew that the person to whom he was offering a bribe was a Federal rather than a State official.[7] With respect to the solicitation or demand of a bribe by a public official, section 201(c) is violated even though the official did not have authority to make a final decision, provided that his advice and recommendation would be influential.[8] Apparently, 18 U.S.C. 201(b) and (c) would reach even situations where the performance of a purely ministerial act was involved (e.g., the recording of a properly presented deed), in view of the broad definition of "official act" in section 201(a).

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[3] See Final Report, § 1361.

[4] 18 U.S.C. 201(d) and (e), and (h) and (i) deal with bribery of witnesses and are covered in sections 1321 and 1322 of the proposed Code.

[5] See *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), interpreting this definition as not extending to a city employee working on a federally funded project with ultimate supervision in a Federal agency. The *Del Toro* result is effectively reversed by means of the addition of jurisdictional bases to sections 1352 (Graft) and 1751 (Commercial Bribery) to cover bribery of persons who administer federally funded programs.

[6] See *United States* v. *Jacobs*, 431 F.2d 754, 759–760, (2d Cir. 1970), cert. denied, 402 U.S. 950 (1971).

18 U.S.C. 1952, the Travel Act, punishes by up to five years in prison whoever travels in interstate or foreign commerce or uses any facility in such commerce, including the mail, with intent to (1) distribute the proceeds of any unlawful activity, (2) commit any crime of violence to further any unlawful activity, or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in paragraphs (1), (2), or (3). The term "unlawful activity" is defined, *inter alia,* to mean bribery in violation of the laws of the State in which committed or of the United States. The term "bribery" is to be given a generic meaning and the reference to State law also means that applicable defenses under State law are assimilated into the Federal statute.[9]

In addition to the previously discussed statutes, 18 U.S.C. 1511 indirectly reaches bribery by outlawing a conspiracy to obstruct enforcement of local laws with intent to facilitate an illegal gambling business where one of the coconspirators is a State or local official or employee. In such illegal gambling businesses, bribery of local officials is usually an integral part of the operation and the thrust of section 1511 is against such bribery. To the extent that section 1511 proscribes bribery, it will be reflected in this proposed section.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if: (1) he offers, gives, or agrees to give to a public servant, or (2) as a public servant, he solicits, demands, accepts, or agrees to accept from another person, "anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby, or that the recipient will violate a legal duty as a public servant."

This formulation, like the one suggested by the National Commission, combines the offenses of giving a bribe and receiving a bribe in 18 U.S.C. 201 (b) and (c) into a single statute. This enables the offenses to be more succinctly stated, by eliminating the need to repeat all the elements of the offense, save only the reference to whether the bribe is given, offered, etc., or asked, demanded, etc. In addition, a number of redundant verbs used in current law, such as

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[7] See *United States* v. *Jennings*, 471 F.2d 1310 (2d Cir,). cert. denied, 411 U.S. 935 (1973).

[8] See *United States* v. *Heffler*, 402 F.2d 924, 926 (3d Cir. 1968), cert. denied, 394 U.S. 946 (1969).

[9] See *United States* v. *Nardello*, 393 U.S. 286 (1969); *United States* v. *Kahn*, 472 F.2d 272, 277 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

"promises," "asks," "exacts," "seeks," and "receives," have been deleted, making for a tighter and more readable statute. None of these verbs adds anything not encompassed by the verbs used in paragraphs (1) and (2) above.[10]

The gravamen of the bribery offense under current law is that a thing of value is given or offered "corruptly" with the intent to influence or induce the prohibited action. The word "corruptly" serves to distinguish the act from a mere gift or a payment in the hope of favorable action by the recipient. It implies an offer or agreement contemplating the violation of the public servant's duty. However, it also serves to denote the state of mind of either the bribe offeror or recipient, or both, and is thus a word designating the culpability.[11] The word is somewhat ambiguous and subject to differing interpretations.[12] Moreover, by suggesting state of mind, its incorporation here would needlessly introduce a variant to the carefully defined culpability terms used in the new proposed Code. The National Commission deleted the word, following the similar 1962 decision of the Model Penal Code. The Model Penal Code drafters thought the term ambiguous in two contexts—first, where the briber seeks to justify his act on the ground that he was merely opposing other "corrupt" offers and, second, where the bribe is an offer of appointment to or promotion in a government position or of political support in exchange for other agreements. The Committee is in agreement and accordingly has deleted the term "corruptly."

Instead of the use of the word "corruptly" to describe the central aspect of the offense, emphasis is placed on the bargain or agreement—the fact that the bribe offer or payment is a *quid pro quo* for the violation of an official or legal duty.[13] This was the ultimate resolution in both the Model Penal Code and the Final Report of the National Commission. Both of these bodies used the term "as consideration for" in defining the *quid pro quo* aspect—i.e., that the payment was in exchange for certain conduct. The term "consideration" is used in a number of similar contexts in present law.[14] The term is used by the National Commission in bribery to distinguish between cases of real agreement between offeror and offeree and other less serious cases involving graft.

The Committee approves the approach of stressing the *quid pro quo* or agreement in bribery. However, it deems the phrase "as consideration for" inadequate to fully express the concept. As will be seen, the Committee has written the graft offense (section 1342) so as to cover payments made in the future "for or because of" official action. The Committee's change is made to comport more fully with current 18 U.S.C. 201 (f), (g). However, the language "as consideration for" appears to be too closely related to "for or because of" sufficiently to differentiate the two offenses. Thus, the Committee has proposed the substitution of the phrase "in return for an agreement or understanding that." It is believed that this phrase is a clearer and more accurate representation of the idea of a *quid pro quo.*[15] The phrase is used in the 1967 New York bribery statute and is not novel to Federal law.[16]

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[10] The National Commission proposed to delete also the word "demands." See Final Report, § 1361. However, the Committee opted to retain this term since, in reference to the corrupt public servant, it may supply missing meaning to the other words used (i.e., "solicits" and "accepts"), implying as it does the arrogant insistence upon payment as the recipient's due rather than the mere requesting of an unlawful reward.

[11] See Working Papers, p. 692.

[12] See *Bosselman* v. *United States,* 239 Fed. 82, 86 (2d Cir. 1917).

[13] See *United States* v. *Arthur,* 544 F.2d 730, 734 (4th Cir. 1976).

[14] See 18 U.S.C. 205, 210, 211, 600.

Current law requires that the bribe payment be made with intent to influence the performance of any official act, to aid in the commission of a fraud on the United States, or to induce any act in violation of a legal duty. The National Commission, because of its requirement that a *quid pro quo* or "deal" for the payment be established, eliminates the need to prove a specific intent to accomplish the prohibited actions. Instead, the illegal purposes need only be shown with the same culpability standard that is required for showing the agreement.

Thus, in the Commission's language, the thing of value must be offered or paid knowingly as consideration for (a) the recipient's official action as a public servant or (b) the recipient's violation of a known legal duty as a public servant.[17] The third purpose—to assist in a fraud on the United States—was deleted because it is hard to envision a payment made as a *quid pro quo* for assistance in perpetrating a fraud on the United States that would also not either be a violation of a legal duty or be made to influence an official act. Moreover, the complicity statute should reach the bribe recipient in the fraud case. Significantly the only reported decision discussing this specific intent of the current bribery statute concluded that intent to assist in a fraud scheme was demonstrated by facts showing both of the other specific intents as well.[18]

The Committee generally agrees with the resolution of these issues by the National Commission. Thus, it has dropped the specific intent requirement as well as the deletion of commission of a fraud on the United States as a separate purpose of bribery. The latter conduct will fall within the general complicity section (section 401) or be covered by the proposed general statute punishing fraud on the United States (section 1301).

One problem arises in connection with eliminating the specific intent required to violate 18 U.S.C. 201 (b) or (c). It has been held by the Second Circuit that when a government officer threatens economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury consider this a form of extortion—not as a complete defense like duress, but as a potential defense to the extent that it bears on the specific intent required for the commission of bribery.[19] Discarding the specific intent for bribery probably eliminates this "defense" in all cases, a result the Committee, on balance, considers proper because reported cases like *United*

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[15] The presence of a *quid pro quo* element for bribery, while requiring no agreement or understanding that official action will be influenced to commit the lesser offense of graft, should serve to demarcate those offenses more clearly than does current law. See *United States* v. *Brewster,* 506 F.2d (D.C. Cir. 1974).

[16] Two of the thirteen bribery statutes consolidated by Congress into present 18 U.S.C. 201 in 1962 used the term "agreement or understanding:" 18 U.S.C. 209 (offer to witness) and 18 U.S.C. 210 (acceptance by witness). The legislative history is clear that this term was replaced by "intent to influence" in present 18 U.S.C. 201 in the interest of uniformity.

[17] See H. Rept. No. 748, 87th Cong., 1st Sess., pp. 15-16 (1961). See also Final Report, § 1361; Working Papers, p. 692.

[18] *Parks* v. *United States,* 355 F.2d 167 (5th Cir. 1965).

[19] See *United States* v. *Barash,* 412 F.2d 26, 29-30 (2d Cir.), cert. denied, 396 U.S. 832 1969).

States v. *Barash* are rare and because, in true cases of extortion, prosecutorial discretion can be relied upon.

Consideration was also given to adopting a defense for the person who is approached by a corrupt public servant and, in essence, forced into a bribe situation because his competition is paying or because it is cheaper to pay the bribe and thus avoid costly harassment or even loss of a valuable and warranted contract. The defense would apply only if the payer comes forward and reveals the crime before his participation comes to light. The problem with this kind of defense is that it can too easily immunize a not-so-innocent businessman who is guilty of entering into a corrupt deal with a public servant. The proper recourse in such situations is for a businessman to report the bribe demand immediately and not make the initial payment. Because it is doubtful that such a defense would cause a significant number of bribe payers to come forward before their crimes are discovered, and because the defense could be subject to serious abuse, the Committee rejected its inclusion in the code.

The agreements or understandings covered by the bill are those to the effect "that the recipient's official action as a public servant will be influenced thereby [by the payment], or that the recipient will violate a legal duty as a public servant." The phrase "will be influenced" is taken from current law and is adopted because it seems broader and more inclusive than other proposed language. It should be noted that the above-quoted clauses are couched in the future tense. The intended effect is to exclude the situation in which a bribe assumes the form of a *quid pro quo* agreement for a past act. Such conduct is covered by the next section dealing with graft.[20]

It is intended that the official act need not be an improper one. An individual can be bribed to perform an act as a public servant that would be performed in any event.[21] That nothing officially wrong took place should be no defense to a bribe payment. The use of the words "will be influenced thereby" should not be construed to affect or change this result.

Violation (as opposed to performance) of a "legal duty" is also included as a prohibited purpose of a bribe. It reaches misdeeds or omissions committed by the public servant which are outside his decision-making powers or the discretionary action scope of his employment. This is consistent with current law that the bribee cannot claim a defense on the ground that the action contemplated or taken was not an "official action" for which he was responsible. While undefined, it is intended that "legal duty" be broadly interpreted, and that it include duties that derive from all sources—the Constitution, statutes, agency regulations, agency policy, whether written or oral, and directions from supervisors.

It has been suggested that the legal duty be a "known legal duty." [22] The proposed draft deletes the word "known." While the

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[20] However, where the recipient has concealed or misrepresented the fact that the official action to be influenced has already occurred, the conduct would still amount to bribery rather than graft since the phrase "in return for an . . . understanding" used in the bill "brings into play the purpose of the bribe and thus the mind of the bribepayer". *United States* v. *Arroyo*, 581 F.2d 649, 654 (7th Cir. 1978).

[21] See *United States* v. *Jacobs*, *supra* note 6.

[22] See Final Report, § 1361(1)(b).

Committee agrees that the person bribed should be aware of the seriousness of what he is doing, and thus that he should be aware that he is indeed violating a legal duty, the general culpability rules (discussed subsequently) are sufficient to establish the appropriate mental state.

The term "official action" is defined in section 111 to mean a "decision, opinion, recommendation, judgment, vote, or other conduct involving an exercise of discretion by a public servant in the course of his employment." As under the similar definition suggested by the National Commission, the phrase is intended to cover "conduct ranging fron high decision making to minor ministerial actions within the public servant's discretionary powers."[23] However, a purely ministerial act involving no discretion—e.g., getting a court clerk to accept certain legal papers for filing in connection with a docketed case—is deliberately not covered by this definition. Although current law would apparently embrace such ministerial acts under the definition of "official act" in 18 U.S.C. 201(a), the Committee has concluded that a bribe involving a wholly ministerial act, while worthy of criminal penalties, does not rise to the level of a bribe involving a discretionary act. Accordingly, bribery under this section will be confined to discretionary acts, whereas bribery involving ministerial functions will be included in the following section on graft, as encompassed by languge concerning the performance of a "legal duty."

The Committee has defined the term "public servant" in section 11 to mean an officer, employee, advisor, consultant, juror, or other person "authorized to act for or on behalf of a government or serving a government in a civil or military capacity, and includes a person who has been elected, nominated, or appointed to be a public servant." This broad definition implements the Committee's determination that, no matter how humble a public servant's position, the criminal law should severely punish efforts to corrupt his conduct by bribery, as well as efforts by such servants to solicit or demand any payment in return for the exercise of any discretionary act. The phrase "public servant" would include part-time employees and those persons charged with responsibility for carrying out governmental orders, even though their compensation may not come directly from the Federal Government, such as an examining physician appointed by a local Selective Service Board. It would also cover persons licensed to perform certain regulatory functions, such as grain inspection (7 U.S.C. 450) and fruit and vegetable grading (7 U.S.C. 1622(h)), as well as persons under contract to perform similar functions, such as contracts with private veterinarians for services in connection with the control and eradication of animal disease (21 U.S.C. 114a). This accords with current law.[24] Moreover, the phrase "authorized to act for or on behalf of the government" is intended to reach civilian employees of the military post exchange system, comissary operations, officers and non-commissioned clubs, and the like, even if such employees are not United States citizens. This accords with current interpretations of 18 U.S.C. 201(a).[25]

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[23] Working Papers, p. 696.

[24] See Working Papers, p. 687, and cases cited therein.

[25] E.g., *Harlow* v. *United States*, 301 F.2d 361 (5th Cir.). cert. denied, 371 U.S. 814 (1962).

As previously observed, present law covers a person "who has been selected to be a public official," a term defined as "any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed." [26] The former categories are included within the definition of "public servant" in section 111. In addition, section 1359(a)(1)(4) sets forth a special definition of "public servant" applicable to this subchapter, which provides that the term "public servant" includes a person who has been "officially informed that he will be nominated or appointed to be a public servant, but does not include a public servant of a foreign government." This substantially carries forward the corresponding aspect of 18 U.S.C. 201(a).[27] It also allows the Foreign Corrupt Practices Act, which is incorporated by cross reference in section 1751(a)(2), to control the prosecution of bribery involving public servants of foreign governments.

Current law bars the corrupt payment of "anything of value." The term is not defined, but the House Report on present 18 U.S.C. 201 states that the words "anything of value" comprehend anything that conceivably could be offered as a bribe.[28] The term and similar variants are used frequently in title 18.[29]

"Anything of value" is defined in section 111 to mean any direct or indirect gain or advantage or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to any other person, but does not include bona fide salary, wages, fees, or other compensation paid in the usual course of business. This language is designed to be broad enough to equal the House Report's interpretation of the meaning of the term in 18 U.S.C. 201.[30]

A problem that has plagued code reform in the bribery area has been the breadth of the term "anything of value" which literally taken might even reach the trading of votes during legislative compromise. There are three potential resolutions to this problem—leave the definition as it stands; limit anything of value to anything of pecuniary value; or attempt to write exclusions for the more obvious situations.

Current law follows the first choice, with no exceptions to the presently used term "anything of value." The word "corruptly," suggesting as it does an evil state of mind, would probably preclude prosecutions based on such accepted practices as election promises.

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[26] See 18 U.S.C. 201(a).

[27] The Committee intends that the phrase "officially informed" receive a broad construction in view of the clear Federal interest in prohibiting the corruption of an individual before he actually enters upon his duties as a public servant. See Working Papers, p. 689.

[28] H. Rept. No. 748, 87th Cong., 1st Sess., p. 18 (1961).

[29] See statutes cited in Working Papers, p. 690. n. 14.

[30] H. Rept. No. 748, *supra* note 28. Current law in defining bribery speaks of persons who directly or indirectly give anything of value to a public servant or promise a public official to give anything of value to any other person or entity. The use of "direct or indirect" in this context appears to be intended to cover what is essentially the giving of something of direct value to the recipient but which is given or received indirectly, such as the transmission of a payment through a third person or the building of a highway close to property owned by the recipient. It is doubtful that a modern code should be required to spell out that possibility in detail. If "direct or indirect". must be included in bribery to cover such examples, it should also be included in many other offenses. For instance, murder can be committed directly by the actor himself, or indirectly by hiring an assassin. Yet, those words do not appear in the homicide statute. The Committee believes that the words "directly or indirectly" are not necessary to the offense itself and that inclusion of the words in the definition of "anything of value" will serve to make the coverage as broad as desired.

Nevertheless, the absence of the word "corruptly" in the lesser included offenses in 18 U.S.C. 201[31] makes such conduct technically criminal under current law. Here current law relies upon prosecutorial restraint. There is no record of any government abuse in the bribery area by means of prosecutions based on events such as an agreement between legislators trading their votes on respective pieces of legislation. But to say that such a prosecution, even if technically possible, is inconceivable in practice, does not seem to be an adequate answer.

The second alternative is to limit the offense to the offering or soliciting of anything of pecuniary value. An argument for this suggestion is the fact that, as the National Commission observed, all the reported Federal bribery cases have involved pecuniary payments,[32] implying that the addition of "pecuniary" to "anything of value" would not significantly change the present law. This was the resolution adopted ultimately by the Model Penal Code[33] after its drafters had made initial efforts to create suitable exclusions.

The problem with this solution is that it would effect a radical change in existing law, even though the Federal prosecutions under existing law have so far been limited to pecuniary payments. There are any number of possible non-pecuniary payments that should be prosecutable but that would be immune from prosecution under such a limitation. The Working Papers suggested as an example the case of a college administrator who readmitted the suspended son of a Federal official to school in return for government funds for the school."[34]

The third alternative, and the one the Committee prefers, is to draft exclusions from the definition of "anything of value" which will eliminate the possibility of abusive prosecutions but still leave the term broad enough to reach those non-pecuniary cases that should be prosecuted.

The concept of a so-called log-rolling exception was rejected by the Model Penal Code on the theory that such an "explicit exception might be interpreted as an affirmative approval of log-rolling and similar practices, and because of the difficulty in drafing a proper line of separation between the criminal or exempt activities."[35] However, in the Committee's view, log-rolling must realistically be viewed as a permanent feature of our governmental system and as an unavoidable and not undesirable technique for bringing public servants of differing persuasions together on some common ground.[36] In order to delimit the definition of "anything of value" to exclude log-rolling in the context of the bribery statutes, the Committee in section 1359(a)(1)(A) has provided that that phase shall "not include . . . concurrence in official action in the course of legitimate compromise between public servants."

Normal, accepted bargaining among public servants in any branch of government would come within the compass of "legitimate compromise." On the other hand, an attempt to influence the vote of a member of an administrative agency in a case pending before him by a promise of some independent political benefit would be outside of the normal concept of governmental give and take and should not, therefore, be within the boundaries of "legitimate compromise."

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[31] E.g., 18 U.S.C. 201 (f) and (g).

[32] See Working Papers, p. 691.

[33] Section 240.1 (P.O.D. 1962).

[34] Working Papers, p. 692.

[35] Model Penal Code, § 208.10 (Tent. Draft No. 8, 1958).

[36] See Working Papers, p. 691.

There is one more area in which the exclusion from "anything of value" should apply. That concerns the problem of campaigning candidates making political promises in return for votes or other support. It is difficult to reconcile the goal of a modern criminal code with the possibility that a candidate for political office would commit a technical act of bribery when he promises to end inflation in return for votes—ludicrous as the possibility of a prosecution on such a basis would seem to be.

Accordingly, in section 1359(a)(1)(ii), the Committee has excluded from the definition of "anything of value" in this subshapter "support, including a vote, in any primary, general, or special election campaign solicited by a candidate solely by means of representation of his position on a public issue." Obviously, "support" is broader than the mere quest for votes and will include the traditional forms of raising the large sums of money that are needed to wage today's campaign battles. However, by limiting the support sought by the candidate to that solicited "by means of representations of his position on public issues," the exclusion will not protect a candidate who is bought by some private interest or one who sells a public appointment in return for a campign contribution.

The offense of bribery is, of course, separate from that of conspiracy and criminal solicitation, and the Committee intends that—as under current law—a person may be convicted and sentenced (subject, of course, to the limiting guidelines promulgated by the Sentencing Commission under 28 U.S.C. 994(a)(1)(D)) for both conspiracy (or solicitation) to commit bribery and the substantive offense itself.[37] In addition, the Committee intends to perpetuate the prevailing construction of 18 U.S.C. 201 under which each of the verbs used in the statute is deemed to set forth a distinct offense, even when, for example, the offer and giving of a bribe are parts of the same transaction.[38]

One other matter should be addressed. S. 1, as introduced in the 93d Congress, followed the recommendation of the National Commission and included a proposal that a *prima facie* case of bribery be established by proof that a thing of pecuniary value was offered by or received from a person who had an interest in an imminent or pending specified governmental matter. The purpose of this provision was to insure uniform treatment by the courts of situations which circumstantially establish bribery and to provide an explicit warning to public servants and others of the conduct, even if innocent, which they ought to avoid. It was also designed to be of assistance to the prosecutor in those cases where there is difficulty in proving the *quid pro quo* aspect of the transaction but where the circumstances strongly indicate wrong-doing. In addition it was felt that this *prima facie* case provision would eliminate the need for a statute making gratuities to public servants illegal.[39]

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[37] See e.g., *United States* v. *Rosner*, 352 F. Supp. 915, 923-924 (S.D.N.Y. 1972), aff'd and remanded for resentencing, 485 F.2d 1213 (2d Cir. 1973). The term "solicit" as used in this section is not referring to the offense of criminal solicitation under section 1003. See section 111. Rather, the committee intends that the word carry its dictionary meaning of "importune," "approach with a request or plea," or "try to obtain by asking for."

[38] See e.g., *United States* v. *Michelson*, 165 F.2d 732 (2d Cir.), aff'd, 335 U.S. 469 (1948); *United States* v. *Barnes*, 431 F.2d 878 (9th Cir. 1970); *United States* v. *Lubomski*, 277 F. Supp. 713, 716-717 (N.D. Ill. 1967).

However, on further reflection the Committee has determined to omit the provision. To begin with it is doubtful that such a provision is even necessary because proof of the elements of the *prima facie* case (that a pecuniary payment was offered or solicited; that the payer had an interest in a pending case; and that such interest could be affected by the payee's official action) should be enough to create a circumstantial *prima facie* case sufficient to go to the jury even without the statutory provision. Second, the very existence of a bribery statute is sufficient warning to public servants without creating a method to sweep in the innocent official who accepts pecuniary gifts with no criminal knowledge or intent. Third, an anti-gratuities statute is essentially regulatory and should be broader in reach than a statute dealing with pecuniary gifts.[40] Moreover, the *prima facie* case proposal would not reach payments made before official action is taken with no agreement or *quid pro quo* involved, but made with the idea of inducing some favorable future action. Current law reaches such payments for future acts. Without this provision on future acts, bribery statutes may be subject to the defense that no agreement was made and that any payment made was more out of optimism and wish than agreement. The Committee believes that it is better to follow current law by punishing such optimistic gifts for future action as a lesser included offense to bribery (see the following section covering graft) and dispensing with the artificial and otherwise unnecessary *prima facie* case provision.

B. Culpability

The conduct in this offense is, in paragraph (1), offering, giving, or agreeing to give something, and, in paragraph (2), soliciting, demanding, accepting, or agreeing to accept something. Since no culpability standard is specifically designated in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[41]

The elements that what is offered, solicited, etc., is "anything of value" and that the offer, etc., was to, or the solicitation, etc., was by, a "public servant" are existing circumstances. Since no culpability level is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[42]

The common element that the offer, etc., or solicitation, etc., of anything of value was in return for an agreement or understanding, etc., is an existing circumstance. Since no culpability standard is provided in this section, the applicable state of mind that must be proved is at least "reckless," denoting an awareness but disregard of the substantial risk that the agreement or understanding was formed.[43]

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[39] See Working Papers, pp. 694–695.

[40] It should reach such things as free lunches, liquor, cigars and the like—clearly items that should not generally be subject to harsh criminal penalties.

[41] See sections 303(b)(1) and 302(b)(1).

[42] See sections 303(b)(2) and 302(c)(1). As to "public servants", this carries forward the recent interpretation of 18 U.S.C. 201 as not requiring proof of knowledge by the defendant that the prospective bribee was a Federal public official. See *United States* v. *Jennings, supra* note 7.

3. Jurisdiction

Although it is virtually self-evident that Federal jurisdiction over bribery offenses should exist if the official action or legal duty involved is that of a Federal public servant, the proper scope of Federal jurisdiction in cases of corruption of State or local public officials is more difficult to ascertain. Although a number of State Attorneys General have suggested that a new Federal criminal code should, in the bribery area, be restricted to corruption of Federal public servants, the Committee has concluded that some Federal coverage over State and local bribery offenses is plainly warranted. The pervasive and corrupting influence of organized crime on local government, as demonstrated by recent prosecutions, illustrates the occasional inability of local law enforcement, both at the investigative and prosecutive levels, to respond to the situation. Moreover, the Congress in recent decades has repeatedly enacted legislation establishing Federal jurisdiction over essentially local cases of corruption.[44] No persuasive case has been made to restrict this existing, concurrent Federal jurisdiction over State and local bribery, especially in the light of experience that demonstrates a material Federal interest in preserving the effectiveness of local law enforcement.[45] The true interests of Federalism are often better served by occasional Federal intervention (or at least by the recognized possibility of Federal intervention) acting as an impetus to local vigilance than by a legislatively-mandated hands-off policy leaving exclusive authority for enforcement of the bribery laws to the very officials who are most apt to be the subject of bribery attempts.[46]

In accordance with these general precepts, the Committee has provided in subsection (c) that there is Federal jurisdiction over bribery in six circumstances.

The first occurs when the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 to include, in essence, Federal enclaves, the high seas and various vessels, and certain aircraft while in flight. This represents a slight expansion of Federal jurisdiction in that the offense will be punishable if committed on a Federal enclave irrespective of the Federal status of the briber or bribee, so long as he is a "public servant." [47]

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[43] See sections 303(b)(2) and 302(c)(1).

[44] See, e.g., 18 U.S.C. 1951; 18 U.S.C. 1952; 18 U.S.C. 1511.

[45] See the discussion in Working Papers, pp. 709–711.

[46] The Deputy Director and the Associate Director of the National Commission initially proposed Federal jurisdiction over local bribery offenses when any of the common bases of jurisdiction set forth in section 201 of the Final Report was present. These would include cases of interstate travel, use of interstate facilities, and, most significantly, cases where the offense affected interstate or foreign commerce. This latter provision alone would probably reach every case of local corruption in the country. The Study Draft proposal would also have created Federal jurisdiction where the official action or duty involved was that of any elected local public servant and contended that power to do so existed pursuant to the constitutional obligation (see Art. IV, Sec. 4) of the Federal government to insure to every State a republican form of government. See Working Papers, pp. 711–712, 720–721. Because of substantial criticism of the expansive treatment of Federal bribery jurisdiction in the Study Draft, the National Commission in its Final Report sharply reduced the scope of such jurisdiction vis-a-vis local officials to a point approximating that in existing law.

The second circumstance exists if the official action or legal duty involved is that of a Federal public servant. The term "federal public servant" is defined in section 111 generally to carry forward the purview of 18 U.S.C. 201, but to exclude a District of Columbia public servant. Although District of Columbia officials and employees are presently included in 18 U.S.C. 201, such coverage overlaps the bribery provisions in section 22–704 of the District of Columbia Code which is encompassed within the current criminal code revision efforts of the District of Columbia government.

The third circumstance occurs when the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

The fourth circumstance occurs when movement of a person across a State or United States boundary occurs in the planning, promotion, etc., of the offense.

These last two bases bring forward the essential scope of 18 U.S.C. 1952 as it relates to bribery, except that the travel branch has been broadened to include interstate or foreign travel by any person involved in the offense.[48]

The fifth circumstance exists if the offense occurs during the commission of an offense, over which Federal jurisdiction exists, that is described in sections 1403 (Alcohol and Tobacco Tax Offenses), 1722 (Extortion), 1804 (Loansharking), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1841 (Engaging in a Gambling Business), or 1843 (Conducting a Prostitution Business). This represents an application of the ancillary jurisdiction concept discussed in connection with chapter 2. The National Commission suggested a much wider application of this concept to permit bribery to be prosecuted when it occurred in the course of any other Federal offense.[49] The relatively few offenses here, by contrast, were selected because bribery of State and local officials is commonly an integral part of the commission of these Federal offenses.[50] The Committee believes that to permit Federal prosecution for bribery when committed in conjunction with any other Federal crime would tend to encroach unnecessarily into an area traditionally reserved for the States.

The sixth circumstance exists if the public servant is an agent of a State or local government charged by a Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, and the official action or legal duty is related to the administration of such program. This provision, in conjunction with a similar base in section 1751 (Commercial Bribery), is designed to overcome the holding in the *Del Toro* case, *supra* note 5, and extend Federal jurisdiction to corrupt payments made to persons who are administering federally sponsored or funded programs, although not themselves Federal public servants. The Committee believes that the Federal government has a sufficient interest in the integrity of the programs it supports, involving in aggregate many millions if not billions of dollars, to warrant the creation of such jurisdiction. The terms "agent", "State", "local", and "government" are defined in section 111. By the phrase "monies or property derived from" the Committee intends to reach those programs (and official acts or legal duties relating thereto) to which the Federal government has contributed significant funds, irrespective of whether the particular monies or property whose administration is sought to be corruptly influenced can be traced to the Federal government. Whether it is Federal monies that are affected, or other monies that, upon being diverted, may have to be replaced in part by the Federal funds, the effect on Federal taxpayers is the same.

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[47] See Final Report, § 1369(2), Comments, p. 140.

[48] See. e.g., *United States* v. *Villano,* 529 F.2d 1046, 1052–1053 N.6 (10th Cir.), cert. denied, 426 U.S. 953 (1976). In addition, the purview of 18 U.S.C. 1952 has been broadened in that the offense in this section does not depend or rely upon a violation of a State bribery statute.

[49] See Final Report, §§ 201 (b) and 1369(2).

[50] 18 U.S.C. 1511 is carried forward in this way by the inclusion of section 1841 (Engaging in a Gambling Business).

Under section 204(c)(4), there is also extraterritorial jurisdiction over the offense of bribery involving a "Federal public servant." [51]

4. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison). This preserves, approximately, the penalty level of the offense under current law, a level that the Committee deems justified by the reprehensible nature of the crime, which strikes at the basic integrity of the governmental system. The National Commission proposed downgrading of the offense to a seven-year felony.[52]

SECTION 1352. GRAFT

1. In General and Present Federal Law

This section will replace 18 U.S.C. 201 (f) and (g), which in part are lesser included offenses to 18 U.S.C. 201 (b) and (c).[53] It will also replace a number of statutes of more limited jurisdictional scope proscribing the acceptance or demand of gratuities or rewards by public servants.[54] The principal difference between this section and section 1351 is that, in this offense, the element of a corrupt bargain is absent. Therefore, the offense here is graded at a reduced level, the potential for harm being less.

18 U.S.C. 201(f) punishes by up to two years in prison whoever, otherwise than as provided by law for the proper discharge of offical duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public offical, "for or because of" any official act performed or to be performed by such public official, former public official, or person selected to be a public official.

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[51] The National Commission proposed to afford extraterritorial jurisdiction over the Federal public servant who solicited a bribe but not over a private person who offered it. The Committee's formulation is intended to cover both situations.

[52] See Final Report §§ 1361 and 3201: Working Papers, pp. 696–698.

[53] See *United States* v. *Umans*, 368 F.2d 725, 730, (2d Cir. 1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967). As will be seen, subsections (f) and (g) are only lesser incuded offenses in those cases dealing with future acts and present public officials. As to past acts and former public officials, there is no parallel coverage in subsections (b) and (c).

[54] See, e.g., 26 U.S.C. 7214(a)(2).

18 U.S.C. 201(g) punishes, by an identical penalty, whoever, being in one of the categories of official specified insubsection (f), otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself.

The terms "public official" and "person selected to be a public official" are defined in 18 U.S.C. 201(a) and have been discussed in connection with the previous section (1351) on bribery.

As distinct from 18 U.S.C. 201 (b) and (c), it should be noted that subsections (f) and (g) are broader in that they reach the offering or soliciting of anything of value by former as well as present public officials. However, subsections (f) and (g) are narrower in that an offense is committeed only if the payment is made to the public official himself. A further basic distinction between the two pairs of statutes is that the latter reach payments "for or because of" official action, i.e., they apply to money given for past acts, as well as payments made in the apparent hope of influencing future official actions, whereas subsections (b) and (c) extend only to bribery with intent to affect future actions. The offenses described in subsections (f) and (g) have also been held (unlike 18 U.S.C. 201 (b) and (c)) not to require proof of a specific intent. One consequence of this is that a claim of economic pressure is not relevant (as it is under 18 U.S.C. 201 (b) and (c)) as bearing on the requisite intent to commit the offense.[55]

The scope and purpose of subsections (f) and (g) have been stated in detail by the Second Circuit in *United States* v. *Irwin* [56] as follows:

> It is apparent from the language of the subsection that what Congress had in mind was to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity for or because of any official act already done or about to be done.
>
> The awarding of gifts thus related to an employee's official acts is an evil in itself even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not. The preference may concern nothing more than fixing the time for a hearing or giving unusually prompt consideration to the application of a donor while earlier applications of non-donors are made to wait, even though there is no evidence that the donor sought the particular preference. Moreover, the behavior prohibited by § 201(f) embraces those cases in which all of the essential elements of the bribery offense (corrupt giving) stated in § 201(b) are present except for the element of specific intent to influence an official act or induce a public official to do or omit to do an act in viola-

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[55] See *United States* v. *Barash*, 412 F.2d 26, 29 (2d Cir.) cert. denied, 396 U.S. 832 (1969).

[56] 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966).

tion of his lawful duty. The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts "for or because of any official act," is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of law.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if (1) he offers, gives, or agrees to give to a public servant or former public servant, or (2) as a public servant or former public servant, he solicits,[57] demands, accepts or agrees to accept from another person, anything of pecuniary value for or because of an official action taken or to be taken, a legal duty performed or to be performed, or a legal duty violated or to be violated by the public servant or former public servant.

The formulation is based on the recommendation of the National Commission [58] but has been somewhat recast in order more closely to reflect the coverage of present Federal law. For example, the National Commission's proposal reached only payments made for having engaged in past act, thus creating a complete gap in criminal liability in the situation where a defendant can convince the jury that his payment was only a wishful deed done in the hope of possibly influencing a future official act by the pubic servant. Since it is clear that existing law, which is intended to protect the integrity of government operations, reaches payments made both in relation to past and future official action, the Committee has redrafted this section so that it clearly covers payments tendered (or solicited) with either kind of intent (e.g., for or because of an official action "taken or to be taken").

The terms "public servant" and "official action" are defined generally in section 111; special definitions of those terms for this subchapter are also contained in section 1359. These definitions have been explained in detail in connection with the prior section, and that discussion should be consulted here. The Committee has continued the existing coverage of former public servants in order to avoid any problem in cases where payment is deferred until after a public servant leaves office.

The proposal expands current law slightly. Under 18 U.S.C. 201(g) the payment must be directed to the pubic servant himself and not alternatively, as in 18 U.S.C. 201(c), to "any other person or entity." The Committee believes that restricting section 1352 to payments designed to benefit the public servant directly and not those designed to do so indirectly, e.g., by going to third parties (family members, political parties, corporations, etc.) would be anomalous, and that the section—like section 1351—should cover payments that are of gain or advantage to any person. The

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[57] See the discussion of this term in the previous section.

[58] See Final Report § 1362.

Committee's draft reflects this decision through the definition of "anything of value" (incorporated in the definition of "anything of pecuniary value" discussed below) as including gain or advantage "to any other person." [59]

The National Commission suggested that this offense should be limited to payments or gifts of "pecuniary" value.[60] The Committee generally concurs with this idea. Absent the *quid pro quo* of an agreement to sell official action, the criminal code should be wary of making felonious the practice of taking government officials to lunch or presenting them with theater tickets, flowers, and the like. Such matters should be handled by means of regulatory statutes or administrative rules employing sanctions such as dismissal or forfeiture of pay. Limiting this section to things of pecuniary value assures that these kinds of gifts, even if given with the hope of influencing future official acts, will not be made felonious. The line between friendship and corruption in the context of a free dinner is hard to draw; a gift of cash is, however, another matter clearly indicating graft and corruption.

The term "anything of pecuniary value" is defined in section 111 to mean (a) anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage or (b) any other property or service that has a value in excess of $100. The latter branch of this definition is included since it may be very difficult to draw a clear line between those gifts having economic advantage as their primary significance and those that do not, e.g., an expensive watch. Such an item would far exceed in value the cost of a normal meal or a box of cigars, yet it is conceivable that it would not be considered to have economic gain as its primary significance. To avoid this problem and to make the prohibitions of the graft statute more precise,[61] the Committee has inserted a specific (albeit inevitably somewhat arbitrary) value limitation of $100. This will eliminate the candy, meals, and theater ticket cases but include major gifts.

The term "anything of pecuniary value" is also given a special definition in section 1359 (a)(1)(A), in order to exclude from coverage certain types of "log-rolling and political support for which criminal liability would be plainly inappropriate. This special definition (which applies also to the phrase "anything of value" as used in section 1351) has been discussed in some detail in connection with that section, and that discussion is incorporated here.

The Committee has expanded current law in one other significant respect. 18 U.S.C. 210 (f) and (g) cover only payments made "for or because of any official act performed or to be performed." There is nothing in the present statutes to cover payments made for or because of the violation of a legal duty as public servant. This extension—which is drawn from New York law and recommended by the National Commission [62]—seems warranted in order to reach instances in which a defendant makes payment in the hope of inducing a future violation of a legal duty (no *quid pro quo* being present), but not in the hope of influencing any discretionary action [63] to be taken by the public servant in question.

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[59] See also discussion in relation to section 1351 as to why the phrase "directly or indirectly" in 18 U.S.C. 201 was eliminated from the proposed statutes.

[60] See Working Papers, p. 701.

[61] This same rationale applies to proposed sections 1354-1356, which use the term "anything of pecuniary value."

[62] See Working Papers, p. 700.

B. Culpability

The conduct in this section is, in paragraph (1), offering, giving, or agreeing to give something, and, in paragraph (2), soliciting, demanding, accepting, or agreeing to accept something. As no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[64]

The elements that the offer, etc., is made to a public servant or former public servant and that the solicitation, etc., is by a public servant or former public servant are existing circumstances. Since no culpability level is prescribed in this section, the applicable state of mind that must be shown is at a minimum "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[65] The element that what is offered, etc., or solicited, etc., is "anything of pecuniary value" is also an existing circumstance which, under the same analysis, requires proof of at least a "reckless" state of mind.

The common element that the offer, etc., or solicitation, etc., was "for or because of an official action taken or to be taken," etc., states the particular purpose for which it must be proved that the conduct was performed.[66]

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if a circumstance set forth in section 1351 exists or has occurred. These jurisdictional provisions have been discussed in connection with section 1351 and that discussion is equally applicable here. There is also extraterritorial jurisdiction over an offense under this section involving a Federal public servant.[67]

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison), comparable to that provided under 18 U.S.C. 201.[68] The Committee believes that continued felony treatment of this offense is warranted in view of its serious tendency to undermine confidence in government. The National Commission, by contrast, proposed downgrading the offense to a Class A misdemeanor.

SECTION 1353. TRADING IN GOVERNMENT ASSISTANCE

1. In General and Present Federal law

This section brings forward certain aspects of 18 U.S.C. 203, 205, and 209; other portions of those provisions are deemed to be essentially regulatory in nature and will be transferred to title 5, United States Code. The conduct drawn from existing laws for inclusion in the proposed criminal code is believed to pose a greater danger to governmental integrity than the rest of the provisions. It is aimed at payments made to public servants for their advice or assistance in government matters, especially payments in the course of what could generally be termed promotional activities, where the public servant will be exercising discretionary authority concerning the matter in question. This section is patterned after the recommendation of the National Commission.[69]

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[63] The definition of "official action" in section 111 limits the phrase to discretionary matters.

[64] See sections 303 (b)(1) and 302 (b)(1).

[65] See sections 303 (b)(2) and 302 (c)(1).

[66] See also section 1322.

[67] See section 204 (c)(4).

[68] The similar offense in 26 U.S.C. 7214 (a)(2), applicable to agents enforcing the revenue laws, carries a maximum five-year prison sentence.

18 U.S.C. 203 punishes by up to two years in prison whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—(1) at a time when he is a Member of Congress, Member of Congress-elect, Delegate or Delegate-elect from the District of Columbia, Resident Commissioner or Resident Commissioner-elect, or (2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of government, or in any agency of the United States, including the District of Columbia, "in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission."[70]

It also punishes, by a like penalty, whoever knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered is or was such a Member, Delegate, Commissioner, officer, or employee.

18 U.S.C. 205 punishes by up to two years in prison whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in its prosecution, or (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest. The section excludes certain "special government employees" (a term defined in 18 U.S.C. 202), essentially parttime employees, from coverage. How-

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[69] See Final Report. § 1363.

[70] See also 26 U.S.C. 7214 (a)(9), a similar law applicable to agents enforcing the revenue laws.

ever, the exclusion does not apply to matters with which these employees themselves are concerned in their official capacity.

As is apparent, sections 203 and 205 contain broad areas of overlap.[71] There are, however, certain differences. Section 203 specifically includes Members of Congress while section 205 does not apply to such persons. Section 203 prohibits offers to or acceptance by public servants of compensation for any services "in relation to" any "particular matter" coming before Federal departments or agencies (but not before courts).[72] Section 205, by contrast, forbids public servants to act as "agent or attorney," regardless of compensation, in the prosecution of any claim against the United States or in any particular matter in which the United States has a direct or substantial interest or is a party. As summarized in the Working Papers:[73] "The basic distinction between the sections is that section 203 applies to any services rendered for compensation and it includes Members of Congress, but excludes court proceedings. Section 205, on the other hand, applies to acting as agent or attorney regardless of compensation, excludes Members of Congress, but includes court proceedings."

Under 18 U.S.C. 203 it has been held that a specific criminal intent in the sense of a conscious purpose to violate the law is not necessary to convict for receiving compensation for services rendered before a government department; but some *scienter* is implicit and it must be shown that the defendant had "knowledge of the nature or purpose of the receipt" of the payment while he was in one of the classes of persons prohibited from doing so (e.g., a Member of Congress).[74]

In one respect 18 U.S.C. 203 has been subject to differing interpretations. One view is that it covers all services rendered for compensation by a public servant in any case in which the United States has an interest. A more conservative reading of the statute places emphasis on the phrase "before any department, agency, etc." and holds that this phrase qualifies the preceding language "in relation to any . . . matter in which the United States . . . has a direct and substantial interest." The result is that the services rendered by the public servant must, under this view, be representational in nature, requiring him personally to appear in some way "before" the department or agency involved. The legislative history of 18 U.S.C. 203 and its predecessor statute, and judicial decisions under them, do not provide a clear answer to the issue. The Department of Justice has, however, followed the more restrictive interpretation that the services rendered for compensation by the public servant must be representational in nature and not merely in the form of advice or assistance in writing contracts and the like.

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[71] Section 205 is the oldest Federal conflict of interest statute, having been enacted in 1853. 10 Stat. 170. Section 203 dates from 1864, 13 Stat. 123.

[72] See *United States* v. *Johnson*. 215 F. Supp. 300. 315 (D. Md. 1963), and cases cited therein. A specific statute, 18 U.S.C. 204, prohibits Members of Congress from practicing in the Court of Claims. This provision will be moved to title 5 and graded as a misdemeanor.

[73] Working Papers, p. 717.

[74] *United States* v. *Johnson*, 419 F. 2d 56, 60 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); *United States* v. *Podell*, 519 F.2d 144 (2d Cir.), cert. denied, 423 U.S. 926 (1975); *United States* v. *Quinn*, 141 F. Supp. 622, 627 (S.D.N.Y. 1956).

Under 18 U.S.C. 203, as under 18 U.S.C. 201, it has been held that the agreement to receive, and the receipt of, the forbidden compensation state distinct offenses even when both are committed as part of the same transaction.[75]

In 18 U.S.C. 205, the phrase "acting as agent" has been interpreted broadly as not confined to the common law concept of a person having power to affect the legal relations of his principal.[76]

18 U.S.C. 209 punishes by up to one year in prison whoever receives any salary or any contribution to or supplementation of salary as compensation for his services as an officer or employee of the executive branch of government, of any independent agency of the United States, or of the District of Columbia, from any source other than the government of the United States (except as may be contributed out of the treasury of any State, county, or municipality). Section 209 also imposes a penalty of up to one year in prison on whoever, whether an individual, partnership, association, corporation, or other organization, pays, makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this section.

The section does not apply to a special government employee or to an officer or employee of the government serving without compensation. There is also an exception allowing an officer or employee of the executive branch to continue to participate in a bona fide pension, retirement, or similar plan maintained by a former employer.

Section 209 has been rarely utilized. Significantly, it proscribes payments for governmental services regardless of the intent of the payer: however, payments or gifts for non-governmental services are not covered.

In a major revision of the conflict of interest laws in 1962, the Congress, in Public Law 87-849, repealed a number of existing statutes in title 18 but limited its repeal of then 18 U.S.C. 281 and 283 by leaving those statutes in effect as to retired officers of the Armed Forces of the United States. Those statutes no longer appear in title 18 and appear only in section 2 of Public Law 87-849, 76 Stat. 1126. This was done because of the problems involved in defining the conflict of interest laws as to the peculiar status of retired officers of the Armed Forces while not on active duty. Substitution of the Criminal Code in this bill for current title 18 would not affect this partial repeal. However, in order to codify and thereby clarify these penal provisions, the Committee has moved them, with amendments, to a new title 18 Appendix.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if (1) he offers, gives, or agrees to give to a public servant, or, (2) as a public servant, he solicits,[77] demands, accepts, or agrees to accept from another person, anything of pecuniary value intended as consideration for advice or other assistance in preparing or promoting a bill, contract, claim, or other matter that is or may become subject to official action by such public servant.

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[75] See *Burton* v. *United States*, 202 U.S. 344, 377-378 (1906).

[76] See *United States* v. *Sweig*, 361 F. Supp. 1148, 1156-1157 (S.D.N.Y. 1970).

[77] See the discussion of this term in connection with section 1351.

The term "anything of pecuniary value" is defined in section 111 and, for this subchapter, in section 1359. It has been discussed in more detail in connection with section 1352, and that discussion should be incorporated here. The terms "official action" and "public servant" are also defined in section 111. Those provisions have been explained more fully in connection with section 1351, and that discussion should be consulted at this point.

The phrase "as compensation for advice or other assistance in preparing or promoting a bill,[78] contract, claim, or other matter" is derived from the suggestion of the National Commission.[79] Significantly, its scope is such that it covers substantially more than merely representational services and extends to all types of services rendered by a public servant. The Committee believes that a limitation to representational services in this section (such as is followed by the Department of Justice under 18 U.S.C. 203) would be inappropriate. The Federal government dispenses huge sums of money annually under a myriad of programs. It clearly has a strong interest in protecting those funds and, thus, should punish flagrant conflict of interest situations such as when a public servant is hired by a private person to assist him in preparing grant applications or in drafting contracts.

The Committee observes, however, that 18 U.S.C. 203 is not limited to cases in which the public servant is in a position to affect the matter by means of his official action. Thus, that statute, if interpreted to cover any sevices rendered and not just representational services, would arguably be too broad since no nexus would be required between the assistance furnished and any possible action the public servant could then take. This potential "overbreadth" is apparently the reason that the Department of Justice has supported a more limiting interpretation.

This section deals with the problem via the phrase of art "official action," which under its definition in section 111, narrows the scope of the prohibition to those activities where the public servant exercises discretionary authority or that "may become" subject to his discretion. So limited, there is no longer any reason for restricting the purview of the statute to representational activities. The National Commission reached a similar conclusion.[80] The exclusion of certain special government employees—in the main, part-time employees—from the coverage of 18 U.S.C. 205 is also implicitly carried forward by the limitation in this section to matters involving "official action" by the public servant, since present law specifically excepts from the exclusion matters with which these employees are concerned in their official capacity.

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[78] "Bill" is meant to refer to a commercial bill and not a legislative bill.

[79] See Final Report, § 1363(1).

[80] See Working Papers, pp. 702–703. It should be noted, however, that the Committee has slightly expanded this section as compared with that of the National Commission by substituting the phrase "matter that . . . may become subject to official action" for the National Commission's proposed phrase "matter which is . . . likely to be subject to his official action."

B. Culpability

The conduct in this section is, in paragraph (1), offering, giving, or agreeing to give, and, in paragraph (2), soliciting, demanding, accepting, and agreeing to accept. Since no culpability level is specially prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[81]

The elements that what is given is "anything of pecuniary value" and that it is offered, etc., to, or solicited, etc., by a "public servant" are existing circumstances. As no culpability standard is set forth in this section, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[82]

The common element that something of pecuniary value tendered or accepted is "intended as consideration for advice or other assistance in preparing or promoting a bill, contract, claim, or other matter that is or may become subject to official action by such public servant" states the particular purpose that the defendant must be shown to have had in offering or soliciting the thing of value.

The requirement of "knowing" conduct plus "recklessness" as to the nature of the payment is slightly less than existing law as to *scienter,* which requires no showing of evil motive but does require deliberate conduct coupled with an awareness, that is, knowledge, of the nature of the payment.[83]

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the public servant is a Federal public servant. This brings forward the present jurisdictional contours of 18 U.S.C. 203, 205, and 209, other than as to District of Columbia public servants who the Committee deems more suitable for coverage under the District of Columbia Code.

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This approximates the two-year maximum prison sentences that can be imposed under 18 U.S.C. 203 and 205.[84]

SECTION 1354. TRADING IN SPECIAL INFLUENCE

1. In General and Present Federal Law

This section is designed to be a companion provision to proposed section 1353 and is based in part on 18 U.S.C. 203 and 205. In other respects this section is new to Federal law. It closely resembles and is derived from the recommendations of the National Commission,[85] which in turn draw upon recent State code revisions and the Model Penal Code.

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[81] See sections 303(b)(1) and 302(b)(1).

[82] See sections 303(b)(2) and 302(c)(1).

[83] See *United States* v. *Johnson, supra* note 74 at 60. Compare Final Report, § 1363, which proposed to distinguish in degree of necessary *scienter* between the public servant who solicits a payment and the person who offers or gives a payment to such a public servant. Working Papers, p. 703.

[84] Compare Working Papers, p. 703.

18 U.S.C. 203 and 205 have been set forth and explained in detail in connection with the previous section. In essence, those statutes prohibit a public servant from receiving or being offered compensation for any services rendered or to be rendered by himself or another or from acting as agent or attorney for another, if in either case the United States has a direct and substantial interest in (or is a party to) the matter in question.

Section 1353 deals with the aspect of those statutes that punishes the offer or acceptance of compensation for advice or other assistance in preparing or promoting a matter over which the public servant has, or may acquire, discretion. This section, on the other hand, prohibits the purchase or sale of "special influence" (a defined term, including the exercise of influence by reason of kinship or position as a public servant) upon a public servant.[86] To permit persons to exert such special influence, as a potential consequence of which private interests may prevail over public interests, would be plainly detrimental to governmental operations, and to permit persons to derive some tangible or economic benefit through kinship or by reason of a position of influence as a public servant is likewise clearly unjustifiable.[87]

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he (1) offers, gives, or agrees to give to another person or (2) solicits,[88] demands, accepts, or agrees to accept from another person "anything of pecuniary value intended as consideration for exerting, or causing another person to exert, special influence upon a public servant with respect to his taking an official action or his performing a legal duty as a public servant."

This statute may be broader than current law in penalizing not only the direct offer or solicitation of anything of pecuniary value for personally exerting special influence but also "causing another to exert" special influence.

Thus, the offense goes beyond direct dealings or arrangements between persons and public servants and reaches cases where the recipient is not the one to exert the special influence but will be the one to arrange it. This will reach the case of a non-government fixer who, for payment, agrees to arrange for a public servant to exert his influence on another public servant. The rationale, as noted by the National Commission,[89] is that special influence is improper and should be punished regardless of the capacity of the recipient himself to exert the special influence. There would seem to be no reason to permit persons to indirectly trade in special influence with only public servants prohibited from directly engaging in the sale of such influence.[90]

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[85] See Final Report, § 1365.

[86] To some extent this kind of conduct falls within current law, for 18 U.S.C. 203 embraces more than a mere prohibition on the sale of services by public servants. As one court has observed: "It is the trading for pay of the prestige or power which comes with the defendant's position in the government that is dealt with by this section." *United States* v. *Reisley*, 35 F. Supp. 102, 104 (D.N.J. 1940). See also cases collected in Working Papers, pp. 708–709 n. 54, involving situations where a public servant has in effect sold his influence in the course of selling his services.

[87] See Working Papers, p. 707.

[88] See the footnote discussions of this term in relation to section 1351.

[89] See Working Papers, p. 708.

The term "anything of pecuniary value" is defined in section 111 and, specially for this subchapter, in section 1359. It has been fully discussed in connection with section 1352, and that discussion should be referred to here. Likewise the term "public servant" has both a general definition in section 111 and a special definition in section 1359. That term has been explained in relation to section 1351, and the discussion there should be consulted at this point.

The term "special influence" is defined in subsection (b) to mean "influence by reason of a relationship to the public servant by common ancestry or by marriage, or by reason of position as a public servant or as a political party official." The term "political party official" is defined in section 1359(a)(2) to mean a person who "holds a position or office in a political party, whether by election, appointment, or otherwise."

As previously indicated, the inclusion of power to influence by reason of position as a public servant generally accords with existing law; the inclusion of power to influence by reason of kinship[91] or position as a political party official is new. The prohibition against the sale of special influence over public servants by reason of kinship is derived from the Model Penal Code,[92] which gave no specific explanation for its inclusion. However, paying a relative of a public servant in order to reach the latter seems to be such a potentially frequent method of exerting improper influence that the Committee believes it should be covered.

The Model Penal Code also included "friendship or other relationship apart from the merit of the transaction" within the definition of the means by which special influence might be exerted. This was rejected by the Committee "to avoid casting the shadow of criminality over employment of professional representatives, who, because of their specialty or former official employment, are friends of the persons in government with whom they deal."[93] Applying the term "friendship" to special influence would make the statute too broad, especially in light of the many ex-public servants now dealing with the government as representatives of private industry. Control of their activities is best left to regulatory statutes outside the criminal code. It should be noted in this connection that "log-rolling" is exempted from the coverage of this section by virtue of the specific limitation on the definition of "anything of pecuniary value" in section 1359.[94]

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[90] *Ibid.* Note that the "causing" branch of this offense would not be encompassed within the general "causing" offense in section 401. That offense reaches persons who bring about the performance of conduct by parties that would be criminal if engaged in by the defendant or another. Since the mere exerting of special influence, without payment, does not constitute an offense under this section, the provisions of section 401 are inapplicable to the defendant's conduct under the "causing" branch of this statute as the defendant, by definition, performs the conduct of offering, etc., or soliciting, etc.

[91] The definition of kinship in the definition of "special influence" as "relationship to the public servant by common ancestry or by marriage" was suggested in the Working Papers (at 707 n. 50), although the Final Report merely used the word "kinship," without elaboration.

[92] Model Penal Code, § 240.7 (P.O.D. 1962).

[93] Final Report, § 1365. Comment, p. 138.

[94] See the discussion of this issue in relation to section 1351.

Political party officials are included because it is obvious that they can exert strong "special influence" on numerous public servants, and, when they are paid for doing so, such conduct should be criminal. It should, however, be emphasized that what is forbidden is not the exertion of influence itself but the acceptance or solicitation of pay for it. Lobbying is left to regulatory statutes outside the criminal code.[95] The definition of "political party official" in section 1359 is adapted from recent State codes that have enacted similar legislation.[96]

B. Culpability

The conduct in this section is, in paragraph (1), offering, giving, or agreeing to give something, and, in paragraph (2), soliciting, demanding, accepting, or agreeing to accept something. Since no culpability standard is specifically prescribed in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[97]

The elements that what is offered, etc., or solicited, etc., is "anything of pecuniary value" and that it is offered to or solicited from "another person" are existing circumstances. Since no culpability level is specifically prescribed, the applicable state of mind to be shown is at a minimum "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[98]

The element that something of pecuniary value given or accepted is "intended as consideration for exerting, or causing another person to exert, special influence upon a public servant with respect to his taking of an official action[99] or his performance of a legal duty as a public servant" states the particular purpose that the defendant must be shown to have had in offering or soliciting the thing of value.[100]

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the official action or legal duty involved is that of a Federal public servant. As under the previous section, this formulation preserves the current scope of Federal jurisdiction under 18 U.S.C. 203 and 205 except for the omission of District of Columbia public servants.[101]

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This maintains felony status for this offense (currently graded at a two-year level) in light of the Committee's determination that the sale of special influence, particularly when done by public servants who will exert such influence on other public servants, is gravely destructive of governmental integrity.[102]

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[95] See Working Papers, p. 707.

[96] See McKinney's N.Y. Rev. Pen. Law, § 200.40 (1967); Prop. Del. Crim. Code § 703(3) (Final Draft 1967).

[97] See sections 303(b)(1) and 302(b)(1).

[98] See sections 303(b)(2) and 302(c)(1).

[99] The term "official action" is defined in section 111 and is discussed in detail in connection with section 1351.

[100] See the discussion of the corresponding element in section 1353, *supra*.

[101] See the definition of "public servant" in section 111.

SECTION 1355. TRADING IN PUBLIC OFFICE

1. In General and Present Federal Law

This statute will replace 13 U.S.C. 211(1) and 18 U.S.C. 210 and 211. It is designed to prevent the substitution of purchased influence for considerations of ability and integrity in appointing, employing, advancing, and retaining employees in government service. The section is derived in large measure from the recommendations of the National Commission,[103] but, as will be discussed below, the Committee has rejected the Commission's proposal to create a new offense of trading in political endorsement.

13 U.S.C. 211(1) punishes by up to five years in prison whoever "receives or secures to himself any fee, reward, or compensation as a consideration for the appointment of any person as supervisor, enumerator, clerk, or other officer or employee" in the Department of Commerce. No reported prosecutions under this statute apparently exist.

18 U.S.C. 210 punishes by up to one year in prison whoever "pays or offers to pay any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person."

In *United States* v. *Shirey,*[104] the Court held that the statute reached an offer made to a Member of Congress of a yearly payment to a political party in return for the obtaining of a postmastership for the offeror.

The Court thus construed the word "person" broadly to include a political party and also found that the law extended to a situation where the payment was made to a person other than the one by whom the influence would be exerted.

18 U.S.C. 211 punishes by up to one year in prison whoever "solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States." It also punishes by an identical penalty whoever "solicits or receives any thing of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of the United States or by requiring the payment of a fee because such person has secured such employment."

The term "place" in this statute was inserted in 1948 to broaden the scope of coverage. It has been interpreted to mean "employment", the word used in the second paragraph of 18 U.S.C. 211.[105]

18 U.S.C. 210 and 211 are very broad and bar payment for the exertion of any influence, whether consequential or not, by anyone,

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[102] The National Commission, by contrast, proposed to downgrade this offense to a misdemeanor.

[103] See Final Report, § 1364.

[104] 359 U.S. 255 (1959).

[105] See Working Papers, p. 706 n. 47.

regardless of the actor's governmental connection or position of influence, for the purpose of obtaining for another an appointment or advancement in public service. Thus, existing law is broad enough to prohibit paid efforts to influence official action from sources that pose no realistic threat of causing mal-administration of the hiring and promotion practices of the Federal government. Prosecutions have, however, been limited in practice to persons, such as public servants or party officials, who are in fact in a position to exert such a harmful influence.[106]

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he (1) offers, gives, or agrees to give to another person or (2) solicits,[107] demands, accepts, or agrees to accept from another person "anything of pecuniary value intended as consideration for approval, disapproval, or assistance by a public servant or political party official in the appointment, employment, advancement, or retention of any person as a public servant."

In recognition of the prevailing practice under 18 U.S.C. 210 and 211 which has limited prosecutions to persons who, as public servants or party officials, are in a position to exert a harmful influence, this section has been drafted to contain the requirement that the thing of pecuniary value be offered or solicited as a consideration for "approval, disapproval, or assistance by a public servant or political party official." The Committee, however, does not intend that the phrase "intended as consideration for" be limited to mean only payments directed to public servants or party officials. For this reason, the section begins with a reference to an offer to or a solicitation from "another person." Thus, the statute is drafted broadly, as in current law, and would reach any person who solicits a thing of pecuniary value, including a third party influence peddler. It is only the ultimate result of the payment—not its recipient—that must be related to Federal employment. The statute will reach any person who solicits or offers a thing of pecuniary value in consideration for bringing influence to bear on public servants and party officials who are in a position to act.[108] This accords generally with the recommendation of the National Commission, although, unlike that body, the Committee has chosen not to define the terms "approval" and "disapproval," deeming their meaning to be evident.[109] The term "political party official" is defined in section 1359 to mean "a person who holds a position or office in a political party, whether by election, appointment, or otherwise." This class of persons was considered necessary for inclusion "to provide full coverage of those persons who are in a position of influence with regard to appointments, employment and advancements in government service."[110]

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[106] *Id.* at 704-705, and cases cited therein.

[107] See Working Papers, pp. 705-706.

[108] See Working Papers, pp. 705-706

[109] Compare Final Report, § 1364; Working Papers, p. 705.

[110] *Id* at 705.

The word "consideration" as used here is taken from existing law. It seems an appropriate term in view of the thrust of this statute to bar a salė of a public office or a promotion.

The phrases "appointment, employment, advancement, or retention" has been used by the Committee in lieu of the more archaic current law phrase "any appointive office or place." This will express the broad interpretation intended and applied under the existing statutes. The phrase is intended to embrace the situation in *United States* v. *Hood,*[111] where contributions were made in return for promises of influence in obtaining positions not then in existence but already authorized by Congress.

As is apparent, there is an overlap between this offense and the bribery and graft statutes when the recipient of the payment is a public servant.[112] In such a case his action in hiring or promoting an individual will often amount to taking payment "for or because" of his official action, or perhaps even as a *quid pro quo* for his official action. Nonetheless, the Committee urges retention of this specific statute for several reasons. First, it covers party officials who are not covered either by the bribery or graft statutes. Second, separate coverage for sale of public office historically has been part of the criminal code. The present offense of simply referring a person's name to an executive agency for pay, and the like, contained in the second paragraph of 18 U.S.C. 211 has been transferred to title 18 Appendix, United States Code.

The National Commission proposed to include in its corresponding provision a new offense of trading in political endorsement.[113] The nearest current offenses to the suggested Commission statute are contained in 18 U.S.C. 599 and 600, barring promises of employment, compensation, or other benefit "provided for or made possible in whole or in part by an Act of Congress" as consideration for the support or opposition to any candidate. The Commission proposal went much further and would have made it an offense for any person to give anything of pecuniary value (not just a benefit provided for by law) to another person as consideration for approval or disapproval by a public servant or party official of a person for "designation or nomination as a candidate for elective office."

There is, to be sure, a Federal interest in preventing the sale of public elective office just as there is in preventing the sale of public appointive office. At the same time, the drafting of this type of statute introduces the criminal law into the area of choosing political candidates, with possible unforseen difficulties. In the absence of a showing of past problems an current existing abuses in this area, and therefore the need for remedial legislation, the Committee sees no necessity to include this expansion of present law in the code bill.

B. Culpability

The conduct in this offense is offering, giving, or agreeing to give something (paragraph (1)) and soliciting, demanding, accepting, or agreeing to accept something (paragraph (2)). Since no culpability level is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[114]

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[111] 343 U.S. 148 (1952).

[112] The term "public servant" is defined generally in section 111 and specially in section 1359. It has been discussed at length in connection with section 1351 and that discussion should be consulted here.

[113] See Final Report, § 1364(1)(b).

The elements of "another person" and that what is offered, etc., or solicited, etc., is "anything of pecuniary value" are existing circumstances. Since no culpability standard is specifically provided, the applicable state mine that must be shown is at a minimum "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstances existed.[115]

The element that the payment was "intended as consideration for approval," etc., states the particular purpose the defendant must be shown to have had for offering or soliciting the thing of value.

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the appointment, employment, advancement, or retention involved is that of a Federal public servant. This carries forward the essential scope of 18 U.S.C. 210 and 211.[116]

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This represents a compromise between the present grading level of 18 U.S.C. 210 and 211 and that of 13 U.S.C. 211.

SECTION 1356. SPECULATING ON OFFICIAL ACTION OR INFORMATION

1. In General and Present Federal Law

This section has no precise counterpart in existing law. Its purpose is to deter and punish the use of inside information acquired while in government service for pecuniary gain. The section generalizes from a half dozen existing enactments dealing with specific employees and limited situations. It is drawn closely from the recommendations of the National Commission, which in turn were derived from the Model Penal Code.[117]

The six similar statutes in current law are as follows:[118]

(i) *18 U.S.C. 1901.* This enactment (which dates from 1789) punishes by up to one year in prison whoever, being an officer of the United States concerned in the collection or disbursement of the revenues thereof, carries on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either. Strictly speaking, the use of inside information is not an element of this offense, although it probably would be present in any violation that would be prosecuted.

(ii) *18 U.S.C. 1902.* This enactment punished by up to ten years in prison whoever, *inter alia,* being an officer, employee, or person acting for or on behalf of the United States or any department or agency thereof and having by virtue of his office, employment, or position, become possessed of information which might affect or influence the market value of any product of the soil grown within the United States, which information is by law or by the rules of such department or agency required to be withheld from publication until a fixed time, before such information is made public through regular channels directly or indirectly speculates in any such product by selling or buying the same in any quantity.[119]

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[114] See sections 303(b)(1) and 302(b)(1).

[115] See sections 303(b)(2) and 302(c)(1).

[116] See the definition of "public servant" in section 111.

[117] See Final Report § 1372; Model Penal Code, § 243.2.

[118] No reported prosecution under any of these statutes exists.

(iii) *18 U.S.C. 1903.* This statute punishes by up to two years in prison whoever, while acting in any official capacity in the administration of any Act of Congress relating to crop insurance or to the Federal Crop Insurance Corporation, speculates in any agricultural commodity or product thereof, to which such enactments apply, or in contracts relating thereto, or in the stock membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product.

(iv) *7 U.S.C. 1157.* This statute punishes by up to two years in prison any person who, while acting in any official capacity in the administration of the Sugar Act of 1948, invests or speculates in sugar or liquid sugar, contracts relating thereto, or the stock or membership interests of any association or corporation engaged in the production or manufacture of sugar or liquid sugar.

(v) *15 U.S.C. 645(B)(4).* This enactment punishes by up to five years in prison whoever, *inter alia,* being connected in any capacity with the Small Business Administration, having information concerning any future action or plan of the Administration, invests or speculates, directly or indirectly, in the securities or property of any company or corporation receiving loans or other assistance from the Administration.

(vi) *26 U.S.C. 7240.* This section, a companion to 7 U.S.C. 1157, punishes by up to two years in prison whoever, while acting in an official capacity in the administration of the laws dealing with taxes on sugar, invests or speculates in sugar or liquid sugar, contracts relating thereto, or the stock or membership interests of any association or corporation engaged in the production or manufacture of sugar or liquid sugar.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if "while a public servant, or within one year after his service as a public servant terminates, and in contemplation of his taking of an official action as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he: (1) acquires or disposes of a pecuniary interest in any property, transaction, or enterprise that may be affected by such official action or information, or (2) provides information with intent to aid another person in acquiring or disposing of such an interest."

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[119] This section also punishes the willful imparting of any such information required to be withheld from publication to any person not entitled to receive it.

The basic thrust of this statute is to prevent self-dealing by a public servant designed to enable him or another to profit financially. Such conduct is deemed appropriate for penal sanctions "since it constitutes taking undue and partisan advantage of a public position and is, therefore, a serious breach of the integrity of government operations."[120]

Following the suggestion of the National Commission, the prohibition on self-dealing herein is extended to actions by public servants not only while they are actively employed by the government but for a period of one year thereafter. This is designed to prevent a public servant from simply quitting his job in order to make a financial investment on the basis of information he has obtained because of his public service. However, the statute recognizes that, after a while, the opportunity to benefit from a speculation founded on inside government information becomes attenuated. The one-year period, while necessarily somewhat arbitrary, is intended reasonably to balance these competing considerations.[121] Significantly, the same period is contained in one of the current conflict of interest statutes.[122]

Although this section resembles regulatory offenses of the type found in chapter 11 of title 18, the basis of many of those statutes is that they bar acts that are *malum prohibitum,* bad in appearance, and have a potential for temptation and corruption. The gravamen of this offense, however, is something more than an ordinary conflict of interest. It requires, as an element of the offense, that the acquisition of a pecuniary interest or the passing of information to another by a current or recent public servant be "in contemplation of his taking an official action as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant . . ." This element takes the offense out of a general conflict of interest situation and makes it, instead, a genuine case of overt self-dealing and betrayal of public trust. It should be noted that the person's actions violate the statute not only if they are based on some official action he will take or has taken but also if it is based on information that came to him in the course of his employment. This is intended to include information that he has access to in the normal course of his duties as well as information he has access to merely by reason of his presence in any agency, even if the specific information involved is outside of the scope of his normal duties and activities.

The prohibited acts themselves are set forth in two separate paragraphs. Paragraph (1) forbids a current or recent public servant from acquiring or disposing of a "pecuniary interest in any property, transaction, or enterprise which may be affected" by the official action contemplated or the information obtained. The terms "speculates" and "wagers"—used in addition by the National Commission—were thought to be unnecessary as encompassed within the meaning of "acquires or disposes of a pecuniary interest in", especially in light of the broad definition of the word "property" in section 111.[123]

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[120] Working Papers, p. 725.

[121] See *ibid.*

[122] 18 U.S.C. 207(b).

It should be emphasized that, unlike the National Commission's formulation, this proposed statute bars not only acquiring an interest in property, but also disposing of property already in a public servant's possession, when the disposition is as a result of inside information. Because the latter conduct is equally reprehensible, the Committee does not agree that it is "difficult to brand a person's normal impulse to cut losses, even if his information is derived from his public employment, as criminal behavior."[124]

Paragraph (2) forbids the providing of information with intent to aid another person to acquire or dispose of a pecuniary interest in any property, transaction, or enterprise, etc. The language used in this branch is that of "aiding," which suggests the complicity provision, section 401. However, that provision will not apply, as the receipt of the information is not an independent crime. Thus the public servant is not an accomplice but a principal when he delivers the information with the requisite intent.[125]

B. Culpability

The conduct in this offense is acquiring or disposing of a pecuniary interest (paragraph (1)) and providing information (paragraph (2)). Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[126]

The common elements that the conduct is done "while a public servant" or "within one year after [the actor's] service as a public servant terminates" are existing circumstances. Since no culpability level is specifically set forth, the applicable state of mind that must be shown is "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[127]

The element that the conduct is done "in contemplation of his taking an official action . . . or in reliance on information" describes the particular mental state that the defendant must be shown to have had in acquiring or disposing of the pecuniary interest or providing the prohibited information.

The element in pargraph (1) that the interest acquired was in any "property, transaction, or enterprise that may be affected by such official action or information" is also an existing circumstance as to which, by the same analysis as just discussed, the applicable mental state is "reckless."

The element in paragraph (2) that the providing of information was done "with intent to aid another person in acquiring or disposing of" an interest of the type described in paragraph (1) states the particular purpose for which it must be proved that the conduct was performed. Thus the indiscreet public servant who merely

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[123] The terms "enterprise" and "official action" are also defined in section 111. The latter has been explained in connection with section 1351.

[124] Working Papers, p. 725.

[125] On the other hand, the recipient could be prosecuted as an accomplice of the publc servant who imparts the information.

[126] See sections 303(b)(1) and 302(b)(1).

[127] See sections 303(b)(2) and 302(b)(1).

"talks too much" and thereby discloses inside information prompting another to acquire a pecuniary interest will not be liable under this provision.

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the public servant is or was a Federal public servant or if the agency is a Federal government agency.[128]

4. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This adopts the penalty level recommended by the National Commission and seems adequate to deter and punish the kind of conduct proscribed.

SECTION 1357. TAMPERING WITH A PUBLIC SERVANT

1. In General

This section contains both a broad and a relatively narrow offense. The broad offense in paragraph (1) deals with threatening public servants in order to influence their official action or the performance of their duty. It is patterned after section 1323 (Tampering with a Witness, Victim, or an Informant) but covers public servants in general rather than only witnesses, victims, and informants. The offense here differs from that in section 1302 (Obstructing a Government Function by Physical Interference) in that a violation of this section does not require an actual obstruction or impairment of a government function. Moreover, the prohibited means in this section include threat, intimidation, and deception, while those in section 1302 are limited to physical interference or obstacle.

The narrow offense (paragraph (2)) is directed only at a particular class of public servants—the President, a potential successor to the President, or another person under the protection of the United States Secret Service. It punishes the communication of a threat to commit a crime of violence against such person and the communication of false information that such a crime is imminent or in progress. The offense carries forward, in somewhat modified form, 18 U.S.C. 871.

2. Present Federal Law

A. In relation to the offense in paragraph (1)

Under current law there are a number of statutes directed at the substantive offense of threatening public servants, but such statutes generally do not focus upon a purpose to influence official action or the performance of a legal duty.

18 U.S.C. 111 punishes by up to three years in prison whoever, *inter alia*, "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" those public servants listed in 18 U.S.C. 1114 (including law enforcement agents, employees of correctional insti-

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[128] The term "public servant" is defined in section 111 generally and is given a special definition in section 1359. The term "government agency" is defined in section 111.

tutions, and judges) "while engaged in" the performance of their official duties.[129] The term "forcibly" has been held to modify the entire string of verbs that follow it so that the provision reaches only those acts of intimidation that involve force or a present threat to inflict bodily harm.[130] This statute is commonly used to punish assaults upon the enumerated public servants or such acts as opposing, resisting, or interfering with them in the exercise of their duties. There are few reported cases involving threats or intimidation under 18 U.S.C. 111, although the law clearly bars such conduct.

18 U.S.C. 372 punishes by up to six years in prison whoever conspires *inter alia,* prevent "by force, intimidation, or threat," any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce "by like means" any officer of the United States to leave the place where his duties as an officer are required to be performed, or while engaged in the lawful discharge of his duties to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties. This statute is drafted broadly to embrace conspiracies affecting all Federal public servants.[131] However, no substantive statute of similar reach exists.

18 U.S.C. 1503 punishes by up to five years in prison whoever, *inter alia,* corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witnesses,[132] or any grand or petit juror, or officer of any court of the United States, in the discharge of his duty.[133]

B. In relation to the offense in paragraph (2)

18 U.S.C. 871 punishes by up to five years in prison whoever knowingly and willfully deposits for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any "threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice president or other office next in order of succession to the Office of the President, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against" one of such enumerated persons. The phrase "other officer next in the order of succession to the office of President" is defined to mean the person next in the order of succession to act as President in accordance with 3 U.S.C. 19 and 20.

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[129] 18 U.S.C. 2231 is a parallel enactment specifically aimed at protecting persons authorized to serve or execute search warrants or to make searches and seizures.

[130] See *United States* v. *Bamberger,* 452 F.2d 696 (2d Cir. 1971), cert. denied, 405 U.S. 1043 (1972); *United States* v. *Johnson,* 462 F.2d 423 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973); *Long* v. *United States,* 199 F.2d 717 (4th Cir. 1952).

[131] Relatively few reported prosecutions under 18 U.S.C. 372 exist. See e.g., *Finn* v. *United States,* 219 F.2d 894 (9th Cir.), cert. denied, 349 U.S. 906 (1955); *United States* v. *Hall,* 342 F.2d 849 (4th Cir.), cert. denied, 382 U.S. 812 (1965); *United States* v. *Barber,* 442 F.2d 517 (3rd Cir.), cert. denied, 404 U.S. 846 (1971).

[132] The coverage of this statute in respect to witnesses is carried forward in proposed section 1323.

[133] There are also at least two statutes outside of title 18 on intimidation of specified public servants, one barring intimidation of inspectors under the Grain Standards Act (7 U.S. 87c), and the other barring threats or intimidation to obstruct the due administration of the internal revenue laws (26 U.S.C. 7212).

It has been held that this statute reaches only true threats as distinct from utterances that would lead a reasonable person to interpret them as a joke or as mere political hyperbole.[134] Given a true threat,[135] nearly all courts that have considered the issue, notwithstanding the expression by the Supreme Court of "grave doubts" as to the correctness of the interpretation,[136] have determined that the requisite scienter (i.e., "knowingly and willfully") is established by proof that the maker of the threat comprehended its meaning and voluntarily and intentionally uttered the words as a declaration of determination to carry out the threat; proof of an actual intent to carry the threat into execution is not ordinarily required.[137] The Fourth Circuit, however, in *United States* v. *Patillo,*[138] by a divided court, held that, if the threat is uttered with no communication to the President intended, proof of actual intent to carry out the threat is necessary to establish the requisite willfulness.[139]

3. The Offense

Subsection (a) provides that a person is guilty of an offense if he (1) uses force, threat, intimidation, or deception with intent to influence a public servant with respect to his taking an official action or performing a legal duty as a public servant, or (2) communicates (A) a threat to commit a crime of violence upon the person of the President, a potential successor to the Presidency, or other person under the protection of the United States Secret Service pursuant to the provisions of section 3021, or (B) information, that he knows to be false, that such a crime is imminent or in progress, and, in either case, the communication is under circumstances in which the threat or information may reasonably be understood as an expression or reflection of serious purpose.

Paragraph (1) deals with the protection of public servants from unfair and dangerous pressures exercised against them before they engage in official action or perform a legal duty.[140] The offense thus complements the bribery series of offenses set forth earlier in this subchapter, which likewise deals with improper external pressures (albeit of a different kine) on public servants.

The prohibited means—i.e., force, threat, intimidation, and deception—parallel those in section 1323 and the discussion of those terms under that section should be consulted.[141] The terms are meant to be read independently of one another. Hence, unlike under current 18 U.S.C. 111, the work "force" is not to be construed as affecting the interpretation of the other words such as "threat," and the latter is intended to have a broad reach including threats of future (nonimminent) force[142] as well as threats of non-violent action (e.g., to injure a public servant in his business).

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[134] See, e.g., *Watts* v. *United States,* 394 U.S. 705 (1969); *Alexander* v. *United States,* 418 F.2d 1203 (D.C. Cir. 1969).

[135] Such a threat may be conditional. See *United States* v. *Moncrief,* 462 F.2d 762 (9th Cir. 1972).

[136] See *Watts* v. *United States, supra* note 136 at 707. Justices Marshall and Douglas, concurring in *Rogers* v. *United States,* 422 U.S. 35, 41–48 (1975), indicated their belief that the dictum in *Watts* is sound.

[137] E.g., *United States* v. *Compton,* 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971); *Roy* v. *United States,* 416 F.2d 874 (9th Cir. 1969); *United States* v. *Hart,* 457 F.2d 1087 (10th Cir.), cert denied, 409 U.S. 861 (1972); *United States* v. *Rogers,* 488 F.2d 512 (5th Cir. 1974), reversed on other grounds, 422 U.S. 35 (1976); *United States* v. *Lincoln,* 462 F.2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972).

[138] 438 F.2d 13 (4th Cir. 1971) (*en banc*).

[139] The Supreme Court granted certiorari in *United States* v. *Rogers, supra* note 137, to resolve the conflict with *Patillo* with respect to *scienter,* but the case was decided on other grounds.

[140] Section 1358 has a similar thrust, but is directed at activities occurring after the official action has been taken or the legal duty performed.

[141] The same combination of terms is used in section 1116 and in the kidnapping series of crimes (see section 1624(a)(2)).

In sum, all types of forces, threats, and intimidations are included (limited only by the affirmative defense set forth in subsection (b) which will be discussed below). The far-reaching nature of this offense is illustrated by the use of both "threat" and "intimidation." Although they clearly overlap, each is included because it is believed that the term "intimidation" more clearly covers the nonverbal conduct involved in such acts as following or "shadowing" a person or breathing over the telephone than does the term "threat." All such acts are intended to be included in the prohibitions of this section.

The inclusion of all forms of force, threat, and intimidation is intended to foster the basic purpose of the statute—to protect the government's right to function freely be eliminating improper pressures on its employees. For this purpose, the statute draws no distinction between acts of discretion (official acts) or the performance of ministerial functions or acts outside the scope of the public servant's official duties (performance of a legal duty). All are fully protected from improper tampering by means of force, threat, intimidation, or deception.[143] In this regard, this offense parallels the related sections on bribery (section 1351) and graft (section 1352).

Similarly, as a consequence of the definitions of "public servant" in sections 111 and 1359, this section applies to persons not yet holding public office but who have been elected, nominated, or appointed to be public servants (or officially informed that they will be nominated or appointed). This is intended to take the issue of when, in point of time, a person in fact becomes a public servant out of controversy in a case. As long as entrance upon public service is expected, contemplated, or sought at the time of the act, then tampering in the form of force, threat, or intimidation with the requisite intent violates the statute.[144]

The is no requirement that the force, threat, or intimidation be directed at the public servant who is to be influenced thereby. What is prohibited is the "use" of force, threat, or intimidation. Thus, the barred conduct may be directed not only at the public servant but at his family, friends, or associates as well, or, for that matter, at anyone, if the requisite intent is present. It is also intended to cover threats not only against the person but against any property interest as well.

The conduct in this offense is using force, threat, intimidation, or deception. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[145]

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[142] Contrast *United States* v. *Glover*, 321 F. Supp. 591 (E.D. Ark. 1970), holding that a threat of future force was insufficient to violate 18 U.S.C. 111.

[143] The Committee has rejected the complex formulation of the National Commission for this offense, which distinguished between threats of harm with intent to influence for this offense, which distinguished between threats of harm with intent to influence official action in a judicial or administrative proceeding and threats of specific types directed at other discretionary acts by a public servant. See Final Report, § 1366.

[144] See Working Papers, p. 590.

The element that the above means were employed "with intent to influence a public servant with respect to his taking an official action or performing a legal duty as a public servant" states the particular purpose for which it must be shown that the conduct in question was performed. It should be noted that "conduct" may include an omission to act where there is a legal duty to act. (See section 111).

The offense in paragraph (2) generally parallels section 1616 (Communicating a Threat), except that no specific intent (as required in that section) to alarm or harass another person is present; at the same time, this section contains a requirement (not in section 1616) that the threat or information be capable of being reasonably understood as an expression or reflection of serious purpose.

The reason for separate (and more severe) treatment of the present offense apart from section 1616 is that threats against the President are likely to occasion a disruption of governmental processes, even if the threat is not carried out or even seriously intended. For whenever an apparently genuine or serious threat is uttered, there exists the potential for cancellation of a Presidential appearance or activity and the expenditure of considerable governmental resources through the initiation of an investigation by the Secret Service.[146] In this respect, threats against the President bear a strong similarity to bomb hoaxes directed at aircraft,[147] which likewise have a strong tendency to create substantial disruption. In view of this similarity, subparagraph (B) extends the offense in 18 U.S.C. 871 to reach the hoax concept, which is also embodied in section 1616(a)(2).

The common element that the threat or false information is communicated under circumstances under which it may reasonably be understood as an expression or reflection of serious purpose is designed to carry forward the case law interpretations under 18 U.S.C. 871 dealing with the kind of threat required to establish a violation of that statute. Thus, a jocular utterance in the form of a threat or a threat communicated as political hyperbole in the course of a speech, not reasonably susceptible to construction as an expression or reflection of serious purpose, is not within the scope of this section. The Committee specifically endorses the holding in *Watts* v. *United States, supra,* that a "true" threat is required, and the formulation here is intended to perpetuate that construction.

The term "crime of violence" is defined in section 111 to mean, in this context, an offense that has as an element the use, attempted use, or threatened use of physical force against the person or another or any other offense that is punishable by more than one year in prison and that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. Thus, the phrase "threat to commit a crime of violence upon the person of the President" includes, and probably is broader than, the present scope of 18 U.S.C. 871, which covers only threats "to take the life of or to inflict bodily harm upon" the President.

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[145] See sections 303(b)(1) and 302(b)(1).

[146] For the same reasons, the Committee does not intend the term "communicates", a variant of which is defined in section 111, to require proof that the person threatened actually hear or become aware of the threat. It is enough that the threat is communicated to anyone. The heart of the offense under this paragraph is the disruption it causes to governmental processes.

[147] See 18 U.S.C. 35.

The phrase "potential successor to the Presidency" is defined in section 1359(a)(1)(C) to mean the President-elect; the Vice President; if there is no Vice President, the person next in order of succession to the office of President; or the Vice President-elect.[148] This precisely reflects the existing purview of 18 U.S.C. 871.

Section 1359(a)(2) also prohibits the communication of a threat to commit a crime of violence upon a "person under the protection of the United States Secret Service pursuant to the provisions of section 3021." This coverage has been included to clarify the authority of the Secret Service to investigate threats of violence directed not only against the Preisent or a potential successor to the Presidency, but also against other persons who are entitled to Secret Service protection by law, e.g., members of a President's family and former Presidents and their spouses.

The conduct in this offense is communicating a threat (subparagraph (A)) and communicating information (subparagraph (B)). Since no culpability standard is specifically set forth in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[149]

The remaining elements in these offenses are all existing circumstances. As no culpability level (with one exception) is specifically prescribed, the applicable state of mind to be shown is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[150] The single exception is the circumstance that the information communicated be false. As to this fact, the culpability level is set at "knowing," thus requiring proof of an awareness of the falsity of the information.[151]

4. Affirmative Defense

Subsection (b) contains an affirmative defense to a prosecution under subsection (a)(1) that the conduct used to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the public servant to exercise his official action properly or to perform his legal duty properly.

This defense is designed to mitigate the effect of paragraph (1) which, as drafted, makes every threat whatsoever with intent to influence a public servant's performance of his duties a criminal offense. Some threats are proper and may even involve questions of free speech. This provision recognizes that possibility and affords a defense, under strictly confined circumstances, for such threats. A similar defense exists in the parallel section dealing with tampering with a witness, victim, or an informant.[152]

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[148] These terms are all defined in section 111.

[149] See sections 303(b)(1) and 302(b)(1). The term "communicate" is defined in section 111.

[150] See sections 302(b)(2) and 302(b)(1). The committee therefore rejects the holding in *United States* v. *Patillo, supra* note 138, that drew a distinction in terms of *scienter* between threats made without the purpose of being communicated to the President and those made with such purpose. Under this section, regardless of the actor's intent in regard to whether his threat reaches the President or other protected person, the actor will only need to be reckless as to the circumstance that his threat could reasonably be understood as an expression or reflection of serious purpose, and no additional element of an intent to carry out the threat need be shown.

[151] See section 302(b)(2).

The key element in the defense is that the threats be of "lawful" conduct. This is intended to include the concept of "lawful" not only in the criminal sense but in the civil sense of a tort as well. Thus not only will a threat to commit an assault fall outside of the defense, but a threat to commit a libel will also. Among the acts to which the defense will apply are: a cleric influencing an elected public servant to vote in Congress by threat of excommunication; a threat by a supervisor to discharge a subordinate if he pursues a particular course of official behavior unless the threatened discharge violates the applicable civil service law; and a threat of political opposition if the public servant should exercise his discretion in a certain manner.

The threat, of course, must be solely to influence the public servant to perform his duties properly. If the threat is intended to influence official action or the performance of a legal duty to benefit the actor instead of "solely" to have the duties performed properly—an admittedly difficult line to draw—then the defense will not apply.

As drafted, this provision affords a defense only for threats that fit its requirements. Force is not included because the use of force to influence a public servant, even to act lawfully, cannot be tolerated.

The defense is denominated as "affirmative," thus requiring that the defendant bear the burden of proving each of the elements thereof by a preponderance of the evidence.[153]

5. Jurisdiction

There is Federal jurisdiction over an offense in paragraph (1) if the public servant is a Federal public servant. In addition, extraterritorial jurisdiction exists over this offense under section 204(a)(1). This broadens somewhat the jurisdictional extent of current law.[154] The Committee considered further enlarging Federal jurisdiction to reach local public servants where interstate travel or the mail is utilized, as does current 18 U.S.C. 1952 in the case of bribery. Such an extension was made in the obstruction of justice statutes.[155] However, this option was rejected as not justified by experience or necessity for the offenses defined here.

With respect to the offense in paragraph (2), there is Federal jurisdiction if the offense is committed within the general or special jurisdiction of the United States as set forth in sections 202 and 203. In addition, extraterritorial jurisdiction exists over this offense under section 204.

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[152] Section 1323(b).

[153] See the definition of "affirmative defense" in section 111.

[154] Moreover, the definition of "public servant" in section 111 is more encompassing than the specific classes of public servants covered in 18 U.S.C. 1114.

[155] Section 1323(e) (4) and (5).

6. Grading

An offense in this section is graded as a Class E felony (up to three years in prison). As to paragraph (1), the seriousness of force and threats and their relationship to the conduct of the government argue in favor of felony grading. An offense under section 1323, covering tampering with witnesses, victims, and informants, is also graded as a felony, albeit one grade higher because of the particular gravity of the evils involved in tampering with official proceedings and obstructing justice. As to paragraph (2), the Class E felony classification is a reduction from the penalty level in 18 U.S.C. 871.

SECTION 1358. RETALIATING AGAINST A PUBLIC SERVANT

1. In General and Present Federal Law

This section complements section 1324 (Retaliating against a Witness or an Informant). It is designed to protect public servants against undue pressures due to acts of retaliation because of a past official action or their status as public servants.

This section carries forward different aspects of the same statutes covered by paragraph (1) of the prior section. Thus, this section covers that portion of 18 U.S.C. 111 that punishes whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in 18 U.S.C. 1114 "on account of" the performance of his official duties. It also reflects that portion of 18 U.S.C. 372 that penalizes a conspiracy to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place where his duties as an officer are required to be performed, or to injure him in his person or property "on account of his lawful discharge of the duties of his office." Similarly, this section brings forward the "on account of" branches of 18 U.S.C. 1503.[156]

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he engages in conduct by which he causes bodily injury to another person or damages the property of another of another person "because of an official action taken or a legal duty performed by a public servant, or because of the status of a person as a public servant."

The statute adopts the approach of limiting the types of injuries that are proscribed to those involving bodily injury or damage to property. The Committee has rejected the approach of the National Commission, which proposed to penalize whoever "harms another by an unlawful act in retaliation."[157] The theory behind restricting the sweep of this offense is that the potential for injury to the government is greatly lessened because the official action has already been taken or the legal duty has already been performed. The Federal interest should thus be directed more towards protection of its public servants from physical harm. Other kinds of conduct (including tortious conduct covered by the National Commission proposal) directed at them as retaliation for official actions can be resolved in the local courts. Note, however, that a public servant is protected against economic retaliation under section 1324(a)(2) if the retaliation is on account of testimony or information as to a possible offense given by him. The Committee deems these activities by any person of such overriding importance as to justify protection through criminal sanctions against economic as well as physically injurious retaliatory acts.

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[156] For a more detailed discussion of these statutes, as well as others brought forward herein, see the report accompanying the previous section and sections 1323 and 1324.

[157] See Final Report, § 1367.

Only serious acts of retaliation are included. These are delineated as those that cause bodily injury or damage the property of another person. The term "bodily injury" is defined in section 111 and is the kind of injury punished as battery in section 1613. The concept of "damages the property of another" is intended to mean physical damage to property of the sort covered in the arson and property destruction offenses (sections 1701-1703).

This section speaks of retaliation because of the taking of an official action or the performance of a legal duty. The term "official action" is defined in section 111 to mean only those actions involving an exercise of discretion. However, public servants ought clearly to be protected against retaliation on account of their performance of mandatory or ministerial acts. Such coverage is afforded by the phrase "legal duty."

The retaliatory act must be "because of" the official action or performance of a legal duty or the status of a person as a public servant.[158] The phrase "because of" should be read as synonymous with the term used in current law, "on account of."

As under the prior section, the conduct can be directed against any person, not just the public servant because of whose official action, performance of duty, or status the conduct is performed. Although current law is limited to injuries to the person or property of the public servant himself.[159] The Committee believes that it is important to protect family, friends, associates, etc. from acts of retaliation. Note also that, unlike in 18 U.S.C. 372, it is not an element of the offense that the official action or performance of a legal duty was "lawful." The Committee considers that physical retaliation is unjustified against a public servant irrespective of the legality of the public servant's acts that may have prompted the retaliation.[160]

B. Culpability

The conduct in this offense consists of engaging in any conduct. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[161]

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[158] The latter branch would reach, for example, the case of an employee of the Civil Rights Division of the Department of Justice who is attacked because of his employment in such agency.

[159] See 18 U.S.C. 1503

[160] See Working Papers, p. 597.

[161] See sections 303(b)(1) and 302(b)(1).

The elements that the conduct "causes bodily injury to another person," etc., is a result of conduct. Since no culpability level is specifically set forth in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the result would occur.[162]

The element beginning with the words "because of" states the particular purpose for which it must be proved that the conduct was performed.

3. Jurisdiction

There is Federal jurisdiction over an offense described in this section if the public servant is a Federal public servant. This somewhat expands the scope of current law,[163] but is in accord with the recommendation of the National Commission that all Federal public servants should be protected against retaliation for their official actions.

4. Grading

This section is graded as a Class E felony (up to three years in prison). Of course, if more serious harm is caused, e.g., maiming or death, or destruction of a dwelling, other sections of the proposed Code may also be utilized to punish the conduct.

SECTION 1359. GENERAL PROVISIONS FOR SUBCHAPTER F

This section contains various special definitions applicable to the offenses in this subchapter, as well as two defense precluded provisions. The definitions have been discussed in connection with the sections to which they apply.

Subsection (b)(1) provides that it is not a defense to a prosecution under sections 1351, 1352, 1354, or 1356 that the recipient was not qualified to act, whether because he had not yet assumed office, because he lacked authority or jurisdiction, or because of any other reason.

The offenses to which this defense precluded provision applies are bribery, graft, trading in special influence, and speculating an official action or information. The provision is derived from the recommendation of the National Commission.[164] It is designed to obviate problems relating to whether or not the person receiving, e.g., the bribe, was qualified to act. The Committee takes the view that a person who offers a bribe in return for an agreement that the public servant's official action will be influenced is guilty, even if the public servant had no power to bring about the result desired or was not qualified to act. This result is consistent with existing law. It further elaborates on the concept in the definition of "public servant" in sections 111 and 1359 as including persons nominated, appointed, or elected (or officially informed that they will be nominated or appointed) to be public servants, thus enabling these sections to reach corrupt endeavors to influence public servants before they assume office.[165]

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[162] See sections 303(b)(3) and 302(c)(2).

[163] The definition of "public servant" in section 111 is broader than the list of Federal officials and employees in 18 U.S.C. 1114, which covers only about thirty percent of all Federal public servants.

[164] See Final Report, § 1361(2).

Subsection (b)(2) provides that it is not a defense to a prosecution under sections 1351 through 1355 that the defendant, or the recipient of the thing of value when a party other than the defendant, by the same conduct, also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft). This provision is designed to obviate a technical defense, thus far largely rejected by the cases, based upon the thesis that bribery and extortion (or bribery and theft) are mutually exclusive crimes.[166] A corresponding provision is contained in section 1321 (Witness Bribery) and the discussion there should be consulted here.

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[165] Working Papers, p. 689.

[166] See, e.g., *United States* v. *Addonizio*, 451 F.2d 49, 72-73, 77-78 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972).

CHAPTER 14.—OFFENSES INVOLVING TAXATION

This chapter deals with offenses involving taxation and includes two subchapters. Subchapter A deals with internal revenue offenses, such as tax evasion, and subchapter B concerns customs offenses, such as smuggling. Jurisdiction over the offenses is plenary, as under current law.

SUBCHAPTER A.—INTERNAL REVENUE OFFENSES

(Sections 1401–1404)

Sections 1401 and 1402 of the bill, as reported, set forth the offenses of tax evasion and the disregard of tax obligations or the false claiming of an exemption. Section 1403 carries forward a number of specific tax offenses relating to alcohol and tobacco. Section 1404 contains the definitions applicable to the foregoing sections. Sections 1401 and 1402 are comprised of criminal offenses currently appearing in eight sections of the Internal Revenue Code, 23 U.S.C. 7201–7206, 7212 and 7215.

The formulations of the National Commission,[1] S. 1, as introduced in the 93d Congress,[2] S. 1 and S. 1400[3] in the 94th Congress, S. 1437 of the 95th Congress, and S. 1722 of the 96th Congress were noteworthy for their similarities.[4] The Committee, therefore, has embodied in the reported bill the features common to all these drafts. In keeping with the consensus objectives of the Committee, the National Commission, the Department of Justice, and the Internal Revenue Service, offenses in this subchapter are written so as to retain, when coupled with other generally applicable offenses, the breadth and effectiveness of sanctions currently found in the Internal Revenue Code of 1954 (title 26, United States Code) and provisions such as 18 U.S.C. 287, 371 and 1001.

The definitions of punishable conduct are systematized and simplified; they are placed here to achieve the goal of having all principal criminal laws in a single code to be considered and construed as one instrument.

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[1] See Final Report, §§ 1401–1403.
[2] See sections 26G1–26G3.
[3] See sections 1401–1403.
[4] See Hearings, p. 6326.

Under the present criminal provisions of 26 U.S.C. 7201, tax evasion is defined as an attempt offense, the attempt being "in any manner to evade or defeat" any tax or payment thereof. The penalty is imprisonment up to five years, or a maximum fine of $10,000, or both. The elements explicit in the statute and imposed by the gloss of judicial interpretation require: (1) a willful[5] (2) attempt to evade or defeat[6] (3) an additional tax due and owing.[7]

The overwhelming majority of current criminal tax evasion prosecutions under 26 U.S.C. 7201 involve the filing of fraudulent income tax returns. Such a filing satisfies the "attempt" element of the statute.[8] In the absence of a fraudulent filing, the government may also rely on other affirmative acts to prove an attempt to evade or defeat, such as:[9]

> . . . keeping a double set of books, making false entries or alterations or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to conceal. If the tax evasion plays any part in such conduct, the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

The necessity to show a net tax deficiency which is due and owing as an element of proof under the existing evasion statute is one imposed by judicial opinion.[10]

Section 7202 of title 26 involves willful failure to collect or truthfully account for and pay over any tax, the obvious thrust being to enforce the performance by third persons of obligations imposed by law to collect taxes. These are generally referred to as "trust fund" taxes, e.g., withheld social security and income taxes. Nonperformance of the collection duty, or dishonest reporting or non-reporting of collections, and failure to pay over the amount due coupled with willfulness made out the particular felonies defined. The penalties are the same as for attempted evasion.

Section 7203 of title 26 proscribes failure to file tax returns, pay any tax, keep records or supply information. The elements of the offense are nonperformance coupled with willfulness.[11] Violations of section 7203 are misdemeanors carrying a maximum sentence of one year in prison, $10,000 fine, or both.

Sections 7204 and 7205 of title 26 deal, respectively, with willful failures to give true withholding statements by employers to employees and willful failure to give true withholding information by employees to employers. Each of these offenses is a misdemeanor carrying a possible prison sentence of up to one year.

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[5] See *United States* v. *Pomponio*, 429 U.S. 10 (1976); *United States* v. *Bishop*, 412 U.S. 346 (1973); *Spies* v. *United States*, 317 U.S. 492 (1943); *Holland* v. *United States*, 348 U.S. 121 (1954); *Sansone* v. *United States*, 380 U.S. 343 (1965).

[6] *Spies* v. *United States*, *supra* note 5; *Sansome* v. *United States*, *supra* note 5.

[7] *Lawn* v. *United States*, 355 U.S. 339 (1958); *Sansone* v. *United States*, *supra* note 5.

[8] *United States* v. *Stone*, 431 F.2d 1286 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); *United States* v. *Coppola*, 425 F.2d 660 (2d Cir. 1969).

[9] *Spies United States*, *supra* note 5.

[10] E g., *Lawn* v. *United States*, *supra* note 7 at 361; *Sansone* v. *United States*, *supra* note 5 at 351.

[11] See *United States* v. *Porth*, 426, F.2d 519 (10th Cir.), cert. denied, 400 U.S. 824 (1970). The degree of willfulness under this section has been held to be the same as that required by section 7201. *United States* v. *Bishop*, *supra* note 5. Any of these nonperformances, willfully done and coupled with proof of an affirmative act demonstrating intent to evade taxes, can become a violation of the evasion statute, 26 U.S.C. 7201. See *Spies* v. *United States*, *supra* note 5.

Section 7206 of title 26 contains numerous separate offenses in its five subdivisions: (1) willfully making and subscribing an Internal Revenue Service document which is verified by a declaration that it is made under the penalties of perjury without believing it to be true in all material matters; (2) willfully aiding, procuring or advising the preparation or presentation of a materially false document or return under the revenue laws (whether or not such falsity is known to the person authorized or required to present the document); (3) falsely simulating or executing a required bond, permit entry or document called for by the revenue laws; (4) removing or concealing goods or any property on which a tax is imposed or levy authorized by 26 U.S.C. 6331, with intent to defeat the assessment or collection of any tax; or (5) in connection with a compromise (under 26 U.S.C. 7121), concealing property of the person liable, or withholding, destroying or falsifying any records relating to the financial condition of the person liable. All of these crimes are punishable as felonies by prison sentences up to three years, or fines of not more than $5,000, or both.

In addition to the above provisions, a special collection measure was enacted in 1958 for dealing with persistently delinquent employers and other withholding agents who do not perform their tax withholding obligations.[12] It calls for the establishment, on notice, of a special trust fund bank account and the depositing thereafter of collected withholding taxes within two banking days after collection. A special misdemeanor sanction is provided in 26 U.S.C. 7215 with respect to the failure to establish the trust fund account or to make the required deposits.[13] Willfulness is not an element of the offense. Inability to pay is not a defense.[14]

All of the above criminal statutes provide for the inclusion of the costs of prosecution in sentences that may be imposed, except 26 U.S.C. 7204 and 7205.

SECTION 1401. TAX EVASION

1. The Offense

A. Elements

Section 1401 of the bill, as reported, redefines tax evasion as performing any of five categories of acts "with intent to evade" a tax or the payment thereof.

The first category is the traditional filing of a tax return which understates the tax.[15] This preserves the basic thrust of the existing evasion statute, 26 U.S.C. 7201, and retains the element imposed by judicial decision requiring proof of a net deficiency in tax.

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[12] Act of February 11, 1958, 72 Stat. 6.

[13] The constitutionality of this statute has been sustained against a claim that it violates due process by permitting the government to place a person in a trust account category without a hearing, *United States* v. *Patterson,* 465 F.2d 360 (9th Cir.), cert. denied, 409 U.S. 1038 (1972).

[14] See 26 U.S.C. 7215(b); *United States* v. *Derske,* 536 F.2d 188 (7th Cir. 1976).

[15] Causing the filing of such a return would, of course, be covered through the complicity provisions of section 401.

The second evasion violation is the removal or concealment of an asset, knowing that a tax is due or may become due. Given the intent to evade the tax or its payment, this subsection appropriately places this behavior under the evasion umbrella where the uniform evasion penalty would apply.

The third category is the failure to account for or pay over a collected and withheld tax when due, or payments received from or on behalf of another with the understanding that they would be turned over to the United States for tax purposes. This embodies the felony now found in 26 U.S.C. 7202 although limited to evasion-motivated derelictions, and also could cover the embezzlement of tax monies entrusted to others such as tax return preparers, accountants, and attorneys in those instances where the requisite intent is found to exist. The lower Federal courts have been divided as to whether the current evasion statute reaches embezzlement situations.[16] The second clause of section 1401(a)(3) resolves this uncertainty and clearly includes embezzlement of tax money in the crimes of tax evasion.[17]

The fourth category of evasion-motivated behavior covered is alteration, destruction, mutilation, concealment or removal of any property in the care, custody, or control of the United States. This provision can be applied to the not uncommon case where a taxpayer retakes property which has been seized or levied upon for delinquent taxes.[18]

The fifth and final category provides that a person who "otherwise acts in any manner to evade the tax or the payment thereof" with the intent to evade is guilty of an offense. This provision is designed to preserve the encompassing breadth of the "attempts in any manner" language of the present evasion statute. The substitution in section 1401 of the word "acts" (when coupled with the intent to evade preamble) for the word "attempts" in 26 U.S.C. 7201 is, in fact, the substitution of the synonym used by the Supreme Court to define "attempts."[19]

The Committee rejected the requirement in S. 1, as introduced in the 93d Congress, that the tax due be "substantial." The word "substantial" is not contained in present law. It has been evolved by judicial opinion, however, as a means of explaining to a jury that it should find an understatement sufficient to insure that something more is involved than a mere mistake or insignificant oversight. The Committee endorses such explanations but has decided not to write a requirement that the tax due be "substantial" because such a requirement would undermine the concept of the evasion statute—namely, that there must be proof of a clear amount intended to be evaded. Thus, analytically, the amount due is not relevant.[20]

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[16] Compare *United States* v. *Mesheski,* 286 F.2d 345 (7th Cir. 1961), with *United States* v. *Whiteside,* 404 F. Supp. 261, 264–265 and cases cited therein (D. Del. 1975). Cf. *United States* v. *Marquez,* 332 F.2d 162 (2d Cir.), cert. denied, 379 U.S. 890 (1964).

[17] Recommendation of the Department of Justice. See testimony of Scott P. Crampton, Assistant Attorney General, Tax Division, Hearings, pp. 6342–43.

[18] Compare 26 U.S.C. 7212(b) requiring a "forcible rescue" of such property, but not requiring an intent to evade.

[19] *Spies* v. *United States, supra* note 5; see testimony of Donald McDonald, Chairman. Section of Taxation, American Bar Association, Hearings, p. 5633.

[20] The manner in which the courts have interpreted the "substantial" deficiency requirement allows flexibility in prosecution, and has resulted in convictions where the deficiency amounts

The Committee also rejected exempting an attempt to evade taxes from the general attempt provision of the Code.[21] In certain cases it is clear that a taxpayer intends to evade a tax but the government may be unable to prove any ultimate tax deficiency. For example, a defendant may intentionally understate his gross income but subsequently realize that the has legitimate deductions or loss carryovers not claimed on the return which will offset unreported income. Where there is proof of an intent by evidence of affirmative activities to evade taxes, but no proof of an actual tax deficiency the Committee believes that section 1001 should be available for prosecution for an attempted violation of this section.[22] Conceptually, a defense to such an attempt prosecution that no tax deficiency is in fact due is an embodiment of the factual impossibility concept. That concept is specifically rejected as a defense to an attempt in section 1001 of the bill, as reported, and is rejected here for the very same reasons.

S. 1, as introduced in the 93d Congress, S. 1400, and the National Commission's Final Report all proposed making failure to file tax returns a felony upon proof of an intent to evade. Where there is proof of affirmative acts demonstrating an intent to evade,[23] a failure to file would be encompassed within the "acts in any manner" language of this section. However, a failure to file evidenced by totally passive conduct would be covered in section 1402 as a Class A misdemeanor upon proof that such failure was "knowing."

Finally, as earlier noted, 26 U.S.C. 7206(2) makes it a three-year felony to aid or assist in the preparation or presentation of a return which is false as to any material matter, "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return." Being an accomplice liability provision, this subsection covers the tax return refund mill operator who specializes in illegal deductions. As one court has noted, the purpose of this section "was very plainly to reach the advisers of taxpayers who to up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent."[24] Under the proposed Code, the return preparer's fraud is covered under section 401 concerning accomplice liability. The committee intends that section 401 encompass the same types of con-

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seem minor when considered *in vacuo*, but "substantial" when considered as a percentage of the tax reported on the returns. See, e.g., *Janko* v. *United States*, 281 F.2d 156 (8th Cir. 1960), rev'd on other grounds, 366 U.S. 716 (1961) (tax evaded was $134 in 1954 and $264 in each of the following two years); *United States* v. *Marks*, 282 F. Supp. 546 (D. Ore. 1966), aff'd, 391 F.2d 210 (9th Cir., 1968) (tax evaded was $375.49 in 1961). See also *United States* v. *Cindrich*, 140 F. Supp. 356 (W.D. Pa. 1956), aff'd. 241 F.2d 54, 57 (3d Cir. 1957) (court concluded deficiency was substantial where the defendant reported gross receipts of $133,111.77, but did not include ten checks totaling $4,680.60); *United States* v. *Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957), where the court noted that: "All the attendant circumstances must be taken into consideration" in determining whether the deficiency was substantial, and that "a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax law with impunity."

[21] Section 1001.

[22] See Connelly, *The Proposed Federal Criminal Codes: A Prosecutor's Point of View*, 68 Nw. U. L. Rev. 825, 832 (1973); see testimony of Messrs. Folsom and Sepenuk. Hearings, pp. 6345-6348. Conduct of this nature may also constitute a violation of section 1343.

[23] See *Spies* v. *United States*, *supra* note 5; see also testimony of Scott P. Crampton, Assistant Attorney General, Tax Division. Department of Justice, Hearings, p. 6335.

[24] *United States* v. *Kelley*, 105 F.2d 912, 917 (2d Cir. 1939).

duct which are presently violative of 26 U.S.C. 7206(2). Pursuant to section 401, a violation of section 1401 (or section 1343) may occur even where the return was filed on behalf of the taxpayer by the return preparer.

B. Culpability

As previously noted, the element of purpose is stated in terms of specific intent, i.e., intent to evade any tax or the payment of any tax. This element applies to each of the five evasion offenses in this section. The phrase "with intent to evade" is a substitute for the expression "willfully"—the term which presently appears in 26 U.S.C. 7201—and has been defined to mean an intentional violation of a known legal duty. *United States* v. *Pomponio,* 429 U.S. 10 (1976). The phrase has essentially the same meaning as the *Pomponio* test and requires proof that the defendant had the conscious objective of or desire to evade a tax or payment of a tax.[25]

The culpability is not specified with respect to conduct in any of the paragraphs in this section. Therefore, under the general principles of section 303(b)(1), the state of mind applicable in each instance is "knowing," i.e., the offender must be aware that he "filed" a tax return; in paragraph (2), that he "removed or concealed assets"; in paragraph (3), that he "failed to account for, or to pay over" taxes; in paragraph (4), that he "altered, destroyed, mutilated, concealed, or removed" property; and in paragraph (5), that he otherwise "acted" in any manner to evade a tax.

In paragraph (1), the element that the tax return understated the tax is a result of conduct. Accordingly, under the general principles of section 303(b)(3), the applicable state of mind is "reckless," i.e., the offender must be shown to have been aware of, but to have disregarded, the substantial risk that the return would understate the tax.[26]

In paragraph (2), the elements that the tax is due or may become due are existing circumstances. The state of mind is specifically designated as "knowing," thus requiring proof that the offender was aware that a tax was due or might become due.

In paragraph (3), the elements of "when due," "previously collected or withheld," and "received from another person with the understanding that they will be paid over to the United States" are all existing circumstances. Since no state of mind is specified, under the general principles of section 303(b)(2), the applicable state of mind is "reckless," i.e., the offender must have been aware of, but have disregarded, the substantial risks that the taxes were due, and that they either had been previously collected or withheld, or had been received from another person with the understanding that they would be paid to the United States.

In paragraph (4), the element that the property was in the care, custody, or control of the United States is an existing circumstance. Therefore, under the principles discussed above, the state of mind that must be proved is "reckless," i.e., an awareness, but disregard, of the substantial risk that the property was in the care, custody, or control of the United States.

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[25] See, e.g., *United States* v. *Bishop, supra* note 5, and cases cited therein. See also testimony of Scott P. Crampton, Assistant Attorney General, Tax Division, Department of Justice. Hearings, p. 6334. The Supreme Court appears to have resolved one nettlesome question, holding that "willfully" does not require proof of an evil motive, but rather merely an intentional, voluntary violation of a known legal duty. *United States* v. *Pomponio, supra* note 5.

[26] Section 302(c)(2).

In paragraph (5), the element "to evade the tax or the payment thereof" states the particular purpose the defendant must be shown to have had.[27]

Normally, in view of the general requirement to prove a purpose to evade any tax or payment of a tax, the government's proof will show that the offender also knew of any existing circumstances or knew of or intended the results of his conduct. However, the culpability is placed at the "reckless" level in the bill as reported in order to reach those instances where a person, in carrying out his intention to evade a tax and being fully aware of the nature of his conduct, nevertheless is only recklessly indifferent as to a particular existing circumstance or result.

2. Jurisdiction

The jurisdiction for this section is largely circumscribed by the definition of its terms, thus making a limiting statement of jurisdiction unnecessary. For example, the crucial term "tax" is defined in section 1404 to mean all or any part of a tax or exaction denominated as a tax imposed by "a federal statute." The term "federal statute" includes all Acts of Congress, with the exceptions of Acts of Congress applicable exclusively to the District of Columbia, and the Uniform Code of Military Justice.[28] Since no jurisdictional base is designated with this section, Federal jurisdiction is governed by the provisions of section 201.[29]

3. Grading

Offenses under this section are Class D felonies (up to six years in prison) unless the tax or the tax payment involved is in excess of $100,000, in which event the crime is a Class C felony (up to twelve years in prison). An offense is a Class E felony (up to three years in prison) under this section if "no tax or tax payment is involved".[30] Although these penalty levels are higher than at current law, they are consistent with the recommendations of the National Commission, S. 1400, S. 1 as originally introduced in the 93d Congress, S. 1437 of the 95th Congress, and S. 1722 of the 96th Congress, and are deemed appropriate in view of the conscious purpose to evade required for conviction.

The Committee determined to adopt a distinction in level of grading based on the amount of evaded tax liability in order to provide a greater deterrent for the very affluent tax evader. This will, to be sure, require a special finding by a jury in addition to a general determination that the defendant is guilty of tax evasion. However, it is not thought that the special finding will unduly burden the jury by requiring it to ascertain the precise amount of tax or payment evaded, but rather will only require that the jury generally determine whether the amount was "in excess of $100,000."[31]

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[27] This requirement is present in the general intent to evade preamble and is merely restated in this residual paragraph.

[28] See section 103.

[29] See specifically section 201(b)(2).

[30] This provision is designed to cover offenses in which (1) liability is not in issue and only evasion of payments is involved, or (2) an attempt to evade is done but no tax deficiency in fact exists.

As used in this grading subsection, the term "tax or tax payment involved"refers to the taxpayer's deficiency attributable to the offense and not his entire tax owned where some of the tax owned has been paid.

SECTION 1402. DISREGARDING A TAX OBLIGATION

1. The Offense

Five misdemeanor tax offenses are consolidated in this section. In each instance, since no specific mental state is set forth as to the conduct element, the behavior is culpable if it is an act or omission done "knowingly," i.e., when the defendant is aware of the nature of his conduct.[32]

Section 1402(a)(1) punishes the knowing failure to file when due a tax return or an information return that is required to be filed under the Internal Revenue Code of 1954, as amended.[33] This formulation is a restatement of the existing failure to file statute (26 U.S.C. 7203) limited, however, to tax returns or information returns, but not including failure to pay, keep records, or supply information. These latter offenses are retained in title 26. If, moreover, the taxpayer fails to file a return with intent to evade payment his wrongdoing is amply covered by the felony provisions of section 1401(a)(5).[34]

Section 1402(a)(2) describes the offense of knowing failure to withhold or collect taxes required to be withheld or collected under the Internal Revenue Code of 1954.[35] Under present law such conduct, if engaged in "willfully," is a felony punishable by imprisonment for five years.[36] Under the Committee's reported bill, felony treatment would be available under section 1401(a)(2) only the failure to withhold or collect taxes were accompanied by an intent to evade. Where no such intent is present, felony treatment seems manifestly inappropriate.

Section 1402(a)(3) makes it an offense for an employer to fail to furnish an employee with a statement of tax withheld or to furnish him with a false withholding statement.[37] This provision is intended basically to preserve the offense in 26 U.S.C. 7204.

Section 1402(a)(4) penalizes the making of a claim to which the claimant knows he is not entitled, for a personal exemption, in an income tax return.[38] The provision has no counterpart in existing law. However, enactment of such a provision has been urged repeatedly by the Internal Revenue Service[39] and is expected by the Committee to provide needed prosecutorial flexibility in this area.

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[31] See Hearings, pp. 6327-6331.

[32] Sections 303(b)(1) and 302(b)(1).

[33] The fact that the return is "due" is an existing circumstances as to which the state of mind that must be proved is "reckless." See sections 303(b)(2) and 302(c)(1). The fact that one is "required to file" the return is a matter concerning which no culpability need be proved. See section 303(d)(1)(A). However, it is implicit in the conduct element of a "knowing" failure to file that there be an awarness at least of the risk that there exists a legal obligation to do so. Compare *United States* v. *Bishop, supra* note 5.

[34] See testimony of Scott P. Crampton, Assistant Attorney General, Tax Division, Department of Justice, Hearings, p. 6335.

[35] The fact that the tax was "required" by the Internal Revenue Code to be withheld or collected is an existing circumstance as to which no state of mind is applicable.

[36] 26 U.S.C. 7202.

[37] The fact that the true statement was "required" to be furnished under 26 U.S.C. 6051 does not necessitate proof of any state of mind.

Section 7205 of title 26 currently punishes at a one-year misdemeanor level the willful furnishing of false information to an employer in a withholding exemption certificate, or the willful failure to supply information which would require an increase in the tax to be withheld. This section will be retained in the Internal Revenue Code in order to afford a just and practical vehicle for prosecution for such false statements.[40]

Section 1402(a)(5) prohibits the knowing failure to safeguard collected taxes (by depositing them in a special bank account) or paying them over to anyne other than the United States.[41] This carries forward the provisions of 26 U.S.C. 7215 and 7512.

2. Jurisdiction

As under section 1401, the jurisdictional contours of section 1402 are principally determined by the definition of such terms as "tax" and "tax return" in section 1403. Since no jurisdictional base is specified in this section, there is Federal jurisdiction to the extent designated by section 201(b)(2).

3. Grading

The offenses described in paragraphs (a)(1) through (a)(3) of this section are Class A misdemeanors (up to one year in prison). The offenses set forth in paragraphs (a)(4) and (a)(5) are deemed less serious and are graded as Class B misdemeanors (up to six months in prison).

SECTION 1403. ALCOHOL AND TOBACCO TAX OFFENSES

1. In General

This section incorporates into the proposed new Federal Criminal Code a number of offenses in the Internal Revenue Code of 1954, as amended, relating to alcohol and tobacco taxes. The reason for such incorporation is to implement the Committee's decision to consolidate all felonies, currently scattered throughout several titles of the United States Code, into a new title 18. The technique utilized in this section is to list specifically the provisions to be encompassed within the proposed section and to provide that whoever "violates" any of such provisions commits an offense. The term "violates" incorporates all the elements and culpability aspects of the enumerated offenses so that no change in substantive law is effected. Each section enumerated is followed by a brief description of its contents, contained in a parenthetical expression introduced by the words "relating to." Those words, and the brief descriptions that follow, are not to be construed as limiting in any way the full scope of the sections to which they refer.[42]

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[38] The elements of entitlement to the personal exemption and "in an income tax return" are existing circumstances. The state of mind is designated for the former element at a level of "knowing" (i.e. "he knows he is not entitled"), so that the offender must be shown to have been aware of his lack of entitlement to the exemption. The applicable state of mind for the fact that the document submitted was an income tax return is "reckless" (see section 303(b)(2), although as a practical matter, the evidence will almost always demonstrate knowledge of the nature of the return.

[39] See Working Papers, p. 766.

[40] The alternative of prosecuting under section 1343 (Making a False statement) at a felony level would almost never be justified for this kind of offense.

[41] The elements that the collected taxes were deposited "in a special bank account" as provided under 26 U.S.C. 7512(b) and that funds in such an account were paid "to any person other than an authorized agent of the United States" are existing circumstances, as to which the culpability level is "reckless." See sections 303(b)(2) and 302(c)(1).

In many cases, the sections listed embrace a number of offenses dealing not only with tax offenses per se, but also with counterfeiting or uttering offenses, or offenses involving obstruction of a government function by fraud.[43] Such offenses are also covered generally at the same penalty level, in subchapter E of chapter 17 (Counterfeiting, Forgery, and Related Offenses) and in section 1301 (Obstructing a Government Function by Fraud). Thus, in those instances, the prosecution is afforded alternative methods of punishing the defendant's conduct.

2. The Offense

Paragraph (1) of subsection (a) of section 1403 provides that a person commits an offense if he violates 26 U.S.C. 5601(a). That statute punishes by up to five years in prison whoever commits any of fourteen listed offenses. The principal of these include possessing an unregistered still and engaging in the business of a distiller without giving the required bond. Also covered are unlawful production, use, purchase, receipt, or concealment of distilled spirits. The evidentiary provisions of 26 U.S.C. 5601(b), creating a presumption applicable to one of the offenses, is not referred to in paragraph (1). However, this presumption is deemed part of the definition of the offense incorporated herein and thus will be retained.[44]

Paragraph (2) makes it an offense to violate 26 U.S.C. 5602. That statute punishes by up to five years in prison any person who engages in the business of a distiller, with intent to defraud the United States of any tax on the spirits he distills, or who does so to defraud the United States.

Paragraph (3) makes it an offense to violate 26 U.S.C. 5603(a). That statute punishes by up to five years in prison whoever fails to keep or falsifies required records relating to distilled spirits, with intent to defraud the United States.

Paragraph (4) makes it an offense to violate 26 U.S.C. 5607, which provides up to a five-year prison term for whoever uses, or sells, any denatured distilled spirits withdrawn free of tax, or withdraws denatured spirits free of tax.

Paragraph (5) makes it an offense to violate 26 U.S.C. 5661(a), which punishes by up to five years in prison whoever fails to pay any tax imposed on wine, or recovers any spirits from wine, with intent to defraud the United States.

Paragraph (6) makes it an offense to violate 26 U.S.C. 5671, which penalizes by up to five years in prison whoever evades a tax on beer under 26 U.S.C. 5051 or 5091, or who, with intent to defraud the United States, fails to keep accurate records required by law.

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[42] See section 112(b).

[43] See, e.g., 26 U.S.C. 5604(a)(4) and 5762(a)(6).

[44] In *United States* v. *Gainey*, 380 U.S. 63 (1965), the Supreme Court sustained the provision of 26 U.S.C. 5601(b), declaring presence at a still to be sufficient evidence to authorize conviction under 26 U.S.C. 5601(a)(4) for carrying on the business of a distiller without giving the necessary bond.

Paragraph (7) makes it an offense to violate 26 U.S.C. 5604(a). That statute punishes by up to five years in prison whoever commits any of nineteen enumerated crimes, including the transportation or possession of liquor not bearing the required stamps, emptying of containers without destroying the stamps, and reuse, alteration, or forgery of stamps or labels. Some of this conduct is a felony if done with "intent to defraud the United States;" some is proscribed irrespective of intent.

Paragraph (8) makes it an offense to violate 26 U.S.C. 5605 which punishes by up to two years in prison whoever willfully violates 26 U.S.C. 5291, relating to the requirement to furnish a correct return showing the disposition of any distilled spirits or substance used in their manufacture.

Paragraph (9) makes it an offense to violate 26 U.S.C. 5608, which punishes by up to five years in prison whoever makes a fraudulent claim for or obtains an allowance of drawback on distilled spirits, or, with intent to defraud the United States, relands any distilled spirits that have been shipped for export.

Paragraph (10) makes it an offense to violate 26 U.S.C. 5682, which provides a maximum three-year prison term for whoever breaks, destroys, or tampers with any lock or seal, which may be placed on any building, tank, vessel, or apparatus by any authorized internal revenue agent.

Paragraph (11) makes it an offense to violate 26 U.S.C. 5697(a), which punishes by up to two years in prison any person who carries on the business, *inter alia,* of a brewer, wholesale or retail dealer in liquor, or wholesale or retail dealer in beer, and willfully fails to pay the special tax required by law. As under paragraph (1), the evidentiary provision in subsection (b) of 26 U.S.C. 5691, although not referred to in this paragraph, is deemed to be part of the definition of the offense and, to the extent it is valid, is retained.[45]

Paragraph (12) makes it an offense to violate 26 U.S.C. 5762(a), which punishes by up to five years in prison eleven crimes involving tobacco products committed with intent to defraud the United States (e.g., refusing to pay or attempting to evade any tax, affixing improper stamps, engaging in the business of manufacturing without filing the required bond, and refilling packages that previously contained tobacco products).

3. Jurisdiction

This section contains no subsection setting forth jurisdictional bases. Therefore, Federal jurisdiction over an offense described herein is governed by the provisions of section 201(b)(2).

4. Grading

An offense under paragraphs (a)(1) through (a)(6) of this section is graded as a Class D felony (up to six years in prison); an offense under paragraphs (a)(7) through (a)(12) is graded as a Class E felony

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[45] Subsection (b) states that a sale of twenty or more gallons creates a presumption that the seller is in the business of a wholesale dealer in liquor or beer.

(up to three years in prison). This generally accords with current law. The Committee rejected the grading scheme suggested by the National Commission, which would have downgraded many of these offenses to misdemeanors.[46]

Felony grading is considered advisable in view of the need to deter, in particular, violations involving illicit distilleries since the gallonage taxes (26 U.S.C. 5001) are high enough to make moonshining a profitable business.[47]

SECTION 1404. DEFINITIONS FOR SUBCHAPTER A

This section supplies certain definitions for Sections 1401–1403.

"Payment" is defined so as to include collection as well as voluntary payment.

The term "tax" is defined to mean all or any part of a tax imposed by Federal statute,[48] or exaction so denominated, and also broadly encompasses all or any part of any penalty, addition to a tax, additional amount, or interest thereon. Tariffs, customs duties, tolls, levies or other charges not called a "tax" by a Federal statute are not included.

A "tax return" is defined as a written report of a taxpayer's tax obligation required to be filed by Federal statute, or a regulation, rule or order issued pursuant to such a statute. Specifically listed are reports of withheld or collected taxes, income, estate, gift or excise tax returns and any other tax return of an individual, corporation or entity required to file a return and pay a tax in conjunction with a tax return. Excluded are interim reports, information returns or estimated tax returns.[49] Despite the exclusion of information returns in the present definition, they are nonetheless expressly included in the offense in section 1402(a)(1). Moreover the exclusionary definitions were not intended to limit the scope of section 1401(a)(5), if an information return constituted the effective manner of evasion.

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[46] See Final Report, §§ 1403–1404; Working Papers, pp. 759–761.

[47] Prosecutions for illicit liquor violations under 26 U.S.C. 5601 rank high in order of frequency of all Federal criminal prosecutions, as do prosecutions for possession of distilled spirits in unstamped containers under 26 U.S.C. 5604(a). See the Report of the Director of the Administrative Office of United States Courts, 1968–1970. The Bureau of Alcohol, Tobacco, and Firearms of the Department of the Treasury advised the Committee that more than 3,300 illicit distilleries were erected during fiscal year 1971, in the face of supposedly harsh penalties. A reduction in grading could thus be expected to result in even more violations of the liquor laws.

[48] The term "federal statute" is not defined but is intended to extend to all Acts of Congress except those enumerated in section 103.

[49] This follows the recommendation of the New York City Bar Association's Special Committee. Hearings, p. 7738. Contrast the broader definition of "return" in 26 U.S.C. 6103(b)(1), to which the disclosure offense in 26 U.S.C. 7213 is applicable.

SUBCHAPTER B.—CUSTOMS OFFENSES

(Sections 1411–1414)

This subchapter contains three offenses. The first (section 1411) deals with conduct involving the introduction of prohibited objects into the country, or the evasion of customs duties, grouped generically under the heading of "smuggling." It is largely drawn from the recommendations of the National Commission.[1] In addition, the subchapter prohibits the receiving or disposing of smuggled property. Section 1412 covers such conduct in terms designed to reach the professional "fence;" section 1413 covers the offense when committed by a person who buys or receives smuggled property for his own use rather than to sell or dispose of it to another. Completing the subchapter is a section of general provisions relating to definitions and procedural matters.

SECTION 1411. SMUGGLING

1. In General

This section prohibits the unlawful introduction of objects into the United States and the evasion of government inspection of, or payment of customs duties on, such objects. The purpose of the section is threefold: (1) to protect the commerce and citizens of the United States against the introduction of harmful objects (contraband), (2) to protect the revenue raising capability of the United States, and, (3) since the term "customs duties" includes "tariffs," to protect designated commercial enterprises within the United States from foreign competition where Congress has thought this appropriate. In keeping with the effort of the proposed Code to simplify and clarify Federal criminal law, section 1411 is a consolidation of a number of provisions of the United States Code.

2. Present Federal Law

A number of sections currently found in titles 18 and 19 of the United States Code prohibit smuggling in one form or another.[2]

For example, 18 U.S.C. 541 provides that anyone who "knowingly effects any entry of goods, wares, or merchandise . . . by the payment of less than the amount of duty legally due" is guilty of an offense.

18 U.S.C. 543 provides that it is an offense for an officer of the revenue knowingly to admit to entry any goods, wares, or merchandise, upon payment of less than the amount of duty legally due.

18 U.S.C. 544 provides that where merchandise is entered or withdrawn for exportation without payment of the proper duties and is relanded anywhere in the United States without proper entry having been made, "such merchandise shall be considered as

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[1] See Final Report § 1411.

[2] Current law also contains a number of customs-related offenses that will be dealt with under other provisions of the proposed Code: 18 U.S.C. 541, 542, and 550, dealing with false statements or claims, and 18 U.S.C. 548, 549, and 551, dealing with interference with customs, will be covered by such proposed Code sections as 1325 (Tampering with Physical Evidence), 1343 (False Statements), 1703 (Property Destruction), and 1731 (Theft). Title 19 of the United States Code (Customs Duties) presently contains numerous regulatory requirements, violations of which will often be dealt with by proposed Section 1411.

having been imported into the United States contrary to law, and each person concerned" shall be guilty of an offense. Sections 541, 543, and 544 all carry a penalty of up to two years' imprisonment.[3]

18 U.S.C. 545 is the basic prohibition against smuggling contained in current law. It provides that anyone who "knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced," or passes or attempts to pass through the customhouse any false or forged document, is guilty of an offense. Section 545 also makes it criminal to "fraudulently or knowingly" bring into the United States any merchanise "contrary to law," or to receive, conceal, buy, sell, or in any way facilitate "the transportation, concealment, or sale of such merchandise after importation knowing the same to have been imported or brought into the United States contrary to law." The penalty for a violation of section 545 is a fine of not more than $10,000, imprisonment for five years, or both. The section also provides for forfeiture of the merchandise[4] and states that "[p]roof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."

The various provisions of this section have often been subjected to court interpretation. The term "clandestinely introduces" has been held to refer to any method of introducing goods surreptitiously by concealment or fraud.[5]

The term "merchandise which should have been invoiced" has been interpreted to mean goods which had to be lawfully entered and declared.[6] The inference of guilt from proof of the defendant's possession has been sustained against a claim that it infringes the privilege against self-incrimination by compelling the defendant to testify.[7] It would also seem to fall well within the Supreme Court's opinions sustaining similar inferences as sufficiently "rational" to meet due process objections.[8] The section has of course been held to have extraterritorial application to acts committed outside the United States.[9]

18 U.S.C. 546 provides that any person who owns, controls, or is on board a vessel of the United States and who allows the vessel to be used for, or participates in, the smuggling of merchandise into a foreign country, where such foreign country punishes violations of the customs laws of the United States, is guilty of a two-year felony.[10]

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[3] In addition section 543 provides for the offender's removal from office and section 544 provides for forfeiture of the merchandise. These provisions (which are also contained in other current customs and smuggling statutes) will be retained and dealt with in title 18 Appendix, United States Code.

[4] In *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), the Court, although construing another customs forfeiture provision, seemed to indicate that the forfeiture provision under this section was civil and remedial rather than punitive, so that a forfeiture proceeding would not be barred by an acquittal on a charge of smuggling under this section.

[5] See *United States* v. *Kurfess*, 426 F. 2d 1017, 1019 (7th Cir.), cert. denied, 400 U.S. 830 (1970).

[6] See *United States* v. *Boggus*, 411 F. 2d 110, 112 (9th Cir.), cert. denied, 396 U.S. 919 (1969).

[7] E.g., *id.* at 113; *United States* v. *Perez*, 426 F. 2d 799 (9th Cir.), cert. denied, 400 U.S. 841 (1970).

[8] See *Turner* v. *United States*, 398 (1970); *Barnes* v. *United States*, 412 U.S. 837 (1973).

[9] See *Brulay* v. *United States*, 383 F. 2d 345 (9th Cir.), cert. denied, 389 U.S. 986 (1967).

[10] This provision has been relocated in title 18 Appendix of the United States Code, and the grading reduced to a misdemeanor.

18 U.S.C. 547 provides that whoever "receives or deposits any merchandise in any building upon the boundary line between the United States and any foreign country, or carries any merchandise through the same, in violation of law" is guilty of a felony.

18 U.S.C. 552 provides that whoever "being an officer, agent, or employee of the United States, knowingly aids or abets any person engaged in any violation of any of the provisions of law prohibiting," *inter alia,* the importing of obscene matter is guilty of a felony punishable by up to ten years in prison.

18 U.S.C. 1462 makes it a five-year felony, *inter alia,* to bring into the United States, or any place subject to the jurisdiction thereof, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, or writing, or any phonograph recording, electrical transcription, or other article or thing capable of producing sound, as well as any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use.[11]

18 U.S.C. 1915 provides that whoever "being an officer of the United States, without lawful authority compromises of abates or attempts to compromise or abate any claim of the United States arising under the customs laws for any fine, penalty or forfeiture, or in any manner relieves or attempts to relieve any person, vessel, vehicle, merchandise or baggage" therefrom, is guilty of a two-year felony.[12]

19 U.S.C. 283 provides that "saloon stores or supplies" purchased for use or sale on vessels specified in 19 U.S.C. 282 "shall be deemed merchandise" and are liable "to entry and the payment of the duties found to be due thereon, at the first port of arrival of such vessel in the United States." A failure on the part of the "saloon keeper or other person so purchasing and owning" such stores to make entry and pay duty is punishable by imprisonment for not less than three months and not more than two years."[13]

19 U.S.C. 1436 provides, in its first paragraph, that if an American or foreign vessel arriving in the United States is found to have on board "any merchandise (sea stores excepted), the importation of which into the United States is prohibited, or any spirits, wines, or other alcoholic liquors," and the master of the vessel has failed to make the required report or entry upon its arrival, then the master shall be subject to imprisonment for not more than one year.[14]

19 U.S.C. 1464 provides that if the master or person in charge of a "sealed vessel" (as described in 19 U.S.C. 1463) "unlades" merchandise at other than a port of destination, or disposes of any merchandise by sale or otherwise, he shall be guilty of a felony punishable by imprisonment for not more than five years and any

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[11] The proscription on importation of obscene articles is carried forward in part by section 1842 (Disseminating Obscene Material). 18 U.S.C. 1462 is reflected in this section by the interaction of its provisions with 19 U.S.C. 1305, which contains a prohibition, among other things, of obscene articles, books, and writings.

[12] This section has been relocated in title 18 Appendix in the Code.

[13] This provision will be enforced through the general operation of section 1411.

[14] Through the operation of section 2009 of title 18 this provision is designated a Class A misdemeanor.

such vessel or vehicle, with its contents, shall be subject to forfeiture."[15]

19 U.S.C. 1465 requires the master of specified United States vessels to file reports of all "supplies or other merchandise purchased in a foreign country for use of sale on such vessel" upon arrival from a "foreign contiguous territory." Likewise, the "conductor or person in charge of any railway car arriving from a contiguous country" must file a similar report of supplies or merchandise "purchased in such foreign country for use in the United States." Failure to comply with these requirements subjects the offender to imprisonment for not more than two years.[16]

19 U.S.C. 1586(e) provides that:

> [W]hoever, at any place, if a citizen of the United States, or at any place in the United States or within one league of the coast of the United States, if a foreign national, shall engage or aid or assist in any unlading or trans-shipment of any merchandise in consequence of which any vessel becomes subject to forfeiture under the provisions of this section shall, in addition to any other penalties provided by law be liable to imprisonment for not more than two years.[17]

19 U.S.C. 1708(b) provides that anyone who, "with intent to defraud the revenue of the United States," aids in procuring liquor to be loaded on a vessel at a place outside the United States, without the required certificate of importation, shall be liable to imprisonment for not more than two years.[18]

3. The Offense

Section 1411 sets forth three separate offenses in subsection (a), each of which is denominated as "smuggling." Paragraph (1) states that a person commits an offense if he:

> introduces into the United States an object, the introduction of which a federal statute, or a regulaton, rule, or order issued pursuant therto—
>
> (A) prohibits absolutely; or
>
> (B) prohibits conditionally and all conditions for its introduction into the United States have not been complied with.

The prohibited conduct is "introduces . . . an object." Since no culpability level is specifically designated, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware that he was introducing an object.[19]

The elements that the introduction of the object is, either absolutely or conditionally, prohibited by a Federal statute, or a rule, regulation or order issued pursuant thereto are existing circumstances, as to which no state of mind need be proved.[20]

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[15] Through the operation of section 2009 of title 18 this provision is designated a Class A misdemeanor.

[16] The penalty provision has been stricken by the conforming amendments in title VII; the regulatory requirements remain in effect and will be covered by section 1411.

[17] Through the operation of section 2009 of title 18 this provision is designated a Class A misdemeanor.

[18] This section has been repealed by the conforming amendments in title VII; the conduct prohibited is either attempted smuggling or attempted violation of the tax laws, and as such will be covered by section 1001.

[19] See sections 303(b)(1) and 302(b)(1).

The remaining elements—i.e., that the object is introduced "into the United States" and that, in the case where its introduction is only conditionally prohibited, all conditions for its introduction have not been complied with—are also existing circumstances as to which the state of mind that must be proved is, at a minimum, "reckless."

The above culpability comports generally with that under 18 U.S.C. 545, except that it is unclear whether, under that statute, it is an element that the defendant knew that he was acting "contrary to law."[21] The Committee does not consider that a belief that the introduction of an object is prohibited ought to be necessary for conviction. Accordingly, it has established the requisite culpability level as "reckless" rather than "knowing" in order to reach those persons who act in conscious disregard of a substantial risk that their conduct in introducing an object is illegal.

The term "object" is defined in section 1414 to include any "article good, ware, and merchandise, whether animate or inanimate." This defintion is meant to be construed expansively and to be broader than the lone term "merchandise" used in 18 U.S.C. 545, encompassing such things, for example, as monetary instruments.[22] The Committee intends the section to apply to the introduction of any "object," notwithstanding that its importation may be regulated or be unlawful under another provision of the United States Code.[23] Thus, for example, "object" would include obscene material the importation of which is prohibited under 19 U.S.C. 1305.

The term "introduces" is defined in section 1414 to mean "import, transport, bring into, or reland in, the United States, from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States." This definition is meant to encompass the variety of characterizations in existing statutes (e.g., "smuggles," "clandestinely introduces," "brings in," and "imports").[24] The term "customs territory of the United States" is defined in section 1414(a)(1) to have the meaning set forth in general headnote 2 to the Tariff Schedules of the United States.[25]

The term "federal statute" is not defined in the Code. It is intended to reach all Acts of Congress, save only those enumerated in section 103, i.e., Acts of Congress applicable solely to the District of Columbia, and the Uniform Code of Military Justice. The same principle governs the scope of the terms "rule," "regulation," or "order." This is consistent with the interpretation placed by the courts upon the phrase "contrary to law" in 18 U.S.C. 545 as encompassing any existing laws (not only customs laws), whether or not such laws carry penal sanctions.[26]

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[20] See section 303(d)(1)(A).

[21] See *Roseman* v. *United States*, 364 F. 2d 18 (9th Cir. 1966), cert. denied, 386 U.S. 918 (1967); *Babb* v. *United States*, 252 F. 2d 702 (5th Cir.), cert, denied, 356 U.S. 974 (1958).

[22] Compare *Duke* v. *United States*, 255 F. 2d 721 (9th Cir.), cert denied, 357 U.S. 920 (1958) (psittacine birds are "merchandise"), with *Palmero* v. *United States*, 112 F. 2d 922 (1st Cir. 1940) (opium is not "merchandise").

[23] See *Roseman* v. *United States, supra* note 21.

[24] See 18 U.S.C. 545; see also Final Report; Comment, pp. 152–153.

[25] This is also the definition contained in 21 U.S.C. 951, which is made applicable to the drug offenses in the Code via section 1815(a).

Paragraph (2) provides that a person commits an offense if he:

> evades assessment or payment when due of the customs duty upon an object being introduced into the United States.

This provision is designed to safeguard the revenue raising function of the customs laws by providing an offense, akin to the general tax evasion offenses,[27] for persons who evade an assessment or payment (including any part thereof) of the customs duty on an object being introduced into the United States.

The proscribed conduct is evading an assessment or payment of the customs duty upon an object being introduced. The culpability level is, as under paragraph (1), "knowing," thus requiring an awareness by the offender that an assessment or payment of a customs duty on an object being introduced is being evaded.[28] The remaining elements—i.e., that the assessment or payment is "due" and that the object is being introduced "into the United States"—are existing circumstances. Because no culpability standard is specifically designated, the applicable state of mind that must be proved is "reckless," i.e., an awareness but disregard of the substantial risk that the circumstances existed.[29] The concept of evasion is intended to embrace the same types of conduct as are covered in the general tax evasion offenses. The evasion could also take the form of removing one's own goods from customs custody after they had been examined.[30] The terms "introduced" and "object" are defined in section 1414, and are discussed in connection with the offense described in paragraph (1).

Paragraph (3) states that a person commits an offense if he:

> evades an examination by the government of an object being introduced into the United States.

This branch of the statute is designed to reach the smuggling of objects required to be governmentally examined, even though no customs duty is assessable. The provision largely duplicates the coverage in paragraph (1). However, unlike paragraph (1), which is intended basically to carry forward the second paragraph of 18 U.S.C. 545, relating to knowingly importing merchandise contrary to law, the offense in this paragraph is aimed at preserving the thrust of the first paragrph of section 545, relating to smuggling or clandestinely introducing merchandise which should have been invoiced. It has been held that under section 545 it is not necessary that the items smuggled or introduced be subject to duty.[31]

The conduct in this offense is evading an examination by the government of an object being introduced. The culpability level is, as under the previous paragraphs, "knowingly," thus requiring proof that the defendant was aware that he was evading governmental inspection of the object. This standard essentially carries forward the "intent to defraud" element in the first paragraph of 18 U.S.C. 545, which has been construed to mean an intent to avoid and defeat United States customs laws.[32] The remaining element that the object is introduced "into the United States" is, as in the preceding paragraphs, an existing circumstance to which the "reckless" standard applies.

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[26] See *Babb* v. *United States*, *supra* note 21, at 707; *Roseman* v. *United States*, *supra* note 21, at 26 and cases cited therein.

[27] Section 1401 of the Code.

[28] See section 303(b)(1) and 302(b)(1).

[29] See section 303(b)(2) and 302(c)(1).

[30] See 18 U.S.C. 549.

[31] See v. *United States*, 220 F. 2d 266, 269 (2d Cir., 1955); see also *United States* v. *Boggus*, *supra* note 6 at 112–113.

As previously noted, a principal effect of section 1411 is to consolidate the existing provisons of the United States Code that deal with smuggling offenses. In addition to those sections in title 18 that have been consolidated, most of the regulatory provisions of title 19 will now be enforced through the operation of this section. For example, a violation of 19 U.S.C. 283 (failure to enter and pay duty on saloon stores) will be treated as a violation of section 1411 under the proposed Code.[33]

A further effect of codification will be to make attempted smuggling cognizable under the proposed Code, through the operation of section 1001. At present, only 18 U.S.C. 542 and 546 speak in terms of attempt. In addition, 18 U.S.C. 543 and 552, described above, will be enforced by the accomplice liability provisions of section 401.

The proposed smuggling statute of the National Commission included a provision dealing witht the requisities of an indictment or information.[34] The Committee determined to omit such a provision and to leave this procedural issue to existing law.

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).[35] This plenary scope of jurisdiction is in keeping with current law and finds ample support in the Constitution, which provides that Congress "shall have Power to lay and collect Taxes, Duties, Imposts, and Excises,"[36] and to "regulate Commerce with foreign Nations."[37]

5. Grading

At present, violations of the smuggling provisions of the United States Code, with the exception of 19 U.S.C. 1436, are all treated as felonies.[38] The normal maximum prison term is two years, with a five-year maximum for a violation of 18 U.S.C. 545 or 19 U.S.C. 1464, and a ten-year maximum under 18 U.S.C. 552. Maximum fines under title 18 are usually $5,000, with a $10,000 fine possible for a violation of 18 U.S.C. 545; under title 19 maximum fines vary from $500 to $2,000.

The Committee is of the opinion that the present penalty structure is too rigid, since it permits felony treatment of a wide variety of violations, ranging from serious to minor. As noted by the National Commission:[39]

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[32] See *United States* v. *Boggus, supra* note 6 at 113.

[33] By contrast, a violation of 19 U.S.C. 1436 may not amount to a violation of proposed section 1411, and the Committee has thus retained section 1436 as a separate offense.

[34] See Final Report, § 1411(5).

[35] There is also extraterritorial jurisdiction over this offense under section 204(e).

[36] Article I, sec. 8, cl. 1.

[37] Article I, sec. 8, cl. 3.

[38] 19 U.S.C. 1436 carries a one-year maximum prison term.

> In fact, official policies of the Bureau of Customs tend to ameliorate the harsh provisions of 18 U.S.C. 545. Minor tourist smuggling is dealt with by permitting payment of the duty or by confiscation of the contraband. Civil penalties and forfeitures are also used. . . . Most tourists seem to know how the bureau exercises its discretion. With realistic penalties, misdemeanor prosecutions of tourists might be undertaken and respect for the law increased.

With these considerations in mind, subsection (b) embodies a multi-tiered grading system designed to distinguish between the relative severity of smuggling offenses. An offense under this section is graded as a Class D felony (maximum of six years in prison) where the value of the object or the duty that would be due on it exceeds $500; it is a Class E felony (up to three years in prison) where, regardless of its monetary value or duty being $500 or less, introduction of the object is prohibited either absolutely or conditionally because it may cause or be used to cause bodily injury or property damage.[40] If the value of the object or the duty payable is greater than $100 but not greater than $500, the offense is a Class A misdemeanor (maximum of one year in prison). In any other case in which a duty was or would have been due, violation of section 1411 constitutes a Class B misdemeanor (up to six months' imprisonment). For any other violation, the offense is graded as a Class C misdemeanor (up to thirty days in prison).

SECTION 1412. TRAFFICKING IN SMUGGLED PROPERTY

1. In General and Present Federal Law

This section parallels the trafficking in stolen property offense in proposed section 1732. The section has no direct counterpart in existing Federal law. It is designed to create a distinction between the "trafficker" in smuggled goods (i.e., most commonly the professional "fence") and the individual, not in the business of dealing in smuggled property, who buys or receives smuggled wares for his own use. The latter individual's offense is covered in the following section at a reduced grading level. The offense here is graded commensurately with smuggling under section 1411. The Committee believes that the basic difference in the degree of social harm between the professional dealer in smuggled goods and the one-time or occasional purchaser who buys them for his own use is sufficiently apparent to justify the creation of a separate trafficking offense.

2. The Offense

Subsection (a) of section 1412 provides that a person commits an offense if he traffics in an object that has been unlawfully introduced into the United States, such introduction having been in violation of section 1411.

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[39] Final Report, Comment, p. 153.

[40] This will permit such regulatory offenses as the importation of adulterated food to be treated as felonies when done with *scienter,* while enabling the strict liability offenses to be punished at a misdemeanor level by statutes outside title 18.

The terms "introduced," "object," and "United States" have the meanings prescribed in section 1414 and have been discussed in connection with the previous section. The term "traffics" is defined in section 111 and means (a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value, or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing. Thus, this section covers dealings in smuggled property where the actor acquires the merchandise not for himself but to dispose of it to another person for a consideration. As indicated, the intent of the Committee is that the section be primarily used with respect to the professional "fence" of smuggled goods, whose activities encourage others to commit the underlying offense.

The conduct in this section is trafficking in an object. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[41]

The fact that the object has been "unlawfully introduced into the United States" is an existing circumstance. Since no culpability level is set forth in this section, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstance existed.[42]

The element that the introduction was in violation of section 1411 is also an existing circumstance. However, by virtue of section 303(d)(1)(A), no mental state need be established as to this fact.

3. Jurisdiction

No subsection setting forth the extent of Federal jurisdiction is contained in this section. Federal jurisdiction is governed by the provisions of section 201(b)(2).[43]

4. Grading

An offense under this section is graded as an offense of the same class as that specified in section 1411(b) for the smuggling of the same object. This reflects the Committee's judgment that the trafficker in smuggled goods is equally as serious an offender as the person who smuggled them.

SECTION 1413. RECEIVING SMUGGLED PROPERTY

1. In General and Present Federal Law

This section parallels the receiving stolen property offense in proposed section 1733. Along with the previous section, it is designed to carry forward the basic receiving offense in 18 U.S.C. 545, which punishes whoever "receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law."

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[41] See sections 303(b)(1) and 302(b)(1).

[42] See sections 303(b)(2) and 302(c)(1).

[43] The Committee does not consider that this crime "consists of" the entry of goods into the United States, see section 204(e), and hence does not intend that extraterritorial jurisdiction under that subsection attach to this offense.

2. The Offense

Subsection (a) provides that a person commits an offense if he buys, receives, posseses, or obtains control of an object that has been unlawfully introduced into the United States, such introduction having been in violation of section 1411.

The verbs used to describe the conduct in this offense constitute the latter part of the definition of "traffics," applicable under the preceding section, except that no intent to dispose of the smuggled object need be shown. Hence, this section is designed principally to reach the individual who obtains smuggled property for his own use.

The conduct in this section is "buys, receives, possesses, or obtains control of an object." As no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[44]

The element that the object has been "unlawfully introduced into the United States" is an existing circumstance. Since no culpability level is set forth in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[45] This standard (which obtains also under the prior section punishing trafficking) has been consciously fixed at a level slightly below that in 18 U.S.C. 545 and current receipt of stolen property statues, which require actual belief as to the smuggled or stolen character of the goods. The Committee considers that a person who is aware of the possible smuggled or stolen nature of merchandise and who knowingly obtains it in disregard of a substantial risk that the property is of the prohibited type engages in conduct sufficiently blameworthy to warrant penal sanctions.[46]

The element that the introduction of the object was in violation of section 1411 is an existing circumstance, as to which, under section 303(d)(1)(A), no proof of any mental state need be shown.

3. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the object with intent to report the matter to an appropriate law enforcement officer.

A comparable defense is contained in section 1733. The purpose is to except from criminal liability those situations in which a person, who comes upon valuable property that he knows or believes may be smuggled, purchases it or otherwise obtains control of it for Samaritan purposes, that is to report the matter to an appropriate law enforcement officer. Such cases today would doubtlessly not be prosecuted as an exercise of prosecutorial discretion. However, the Committee deems it more fitting that an affirmative defense of this nature be inserted in the legislation itself, so as perhaps to encourage persons to engage in such conduct and thus restore stolen or smuggled property to its proper custodian.

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[44] See sections 303(b)(1) and 302(b)(1).

[45] See sections 303(b)(2) and 302(c)(1).

[46] See the discussion of the comparable element under section 1733 (Receiving Stolen Property).

Since the defense is denominated as "affirmative," the defendant will bear the burden of proving all the elements of the defense by a preponderance of the evidence.[47] The term "law enforcement officer" is defined in section 111.

4. Jurisdiction

This section contains no subsection indicating the extent to which Federal jurisdiction exists over an offense herein. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

5. Grading

Subsection (c) provides that an offense described in this section is graded as an offense of the class next below that specified in section 1411(b) for the smuggling of the same object. This formulation preserves differential grading, commensurate with the seriousness of the offense, as under section 1411, discussed above, while at the same time it creates a distinction between the trafficker in smuggled property and the merely "casual" buyer or receiver who does not intend to dispose of the goods to another (usually for profit), but to retain them for his own use. It should be noted that, since Class D felony grading is provided under section 1411 where the value of the object exceeds $500, this section will still grade the receipt offense at a substantial (i.e., Class E) felony level where the property at issue is of significant worth (e.g., a stolen painting from a foreign museum, or jewelry or furs).

SECTION 1414. GENERAL PROVISIONS FOR SUBCHAPTER B

This section contains general definitions and various procedural provisions for the foregoing three sections.

Subsection (a) sets forth general definitions for the sections in this subchapter of the terms "introduce," "object," and "customs territory of the United States." These definitions have been explained in connection with section 1411 and need not be discussed here.

Subsection (b) deals with procedural matters relating to the grading of the offenses in this subchapter. It provides that more than one smuggling, trafficking, or receiving committed pursuant to one scheme or course of conduct may be charged as one offense, and that the value of, or the duty owing on, the objects introduced may be aggregated in determining the grade of the offense. This provision is derived from section 1411(4) of the Final Report of the National Commission and is designed to treat the smuggling, trafficking, or receiving of a variety of relatively inexpensive items as the commission of a single, serious offense rather than several minor ones.

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[47] See the definition of "affirmative defense" in section 111.

S. 1722 in the 96th Congress contained proof provisions with respect to sections 1412 and 1413 that would have created a prima facie inference that a person was aware of the substantial risk that property had been smuggled if he either (1) was in possession of an object recently smuggled into the United States, or (2) purchased or sold such an object at a price substantially below its fair market value, unless in either case the transaction was "satisfactorily explained". The first of these provisions was derived from the statutory inference in 18 U.S.C. 545, and both provisions would have codified well settled common law inferences that have been sustained in connection with possession of stolen property. However, the constitutionality of such inferences has never been thoroughly tested in the context of 18 U.S.C. 545 or otherwise with respect to smuggled goods, and the Committee therefore determined to delete these prima facie evidence provisions in S. 1630 and to leave the issue for resolution by the courts.

CHAPTER 15.—OFFENSES INVOLVING INDIVIDUAL RIGHTS

This chapter on offenses involving individual rights is divided into three subchapters. Subchapter A covers offenses involving civil rights; subchapter B covers offenses involving political rights; and subchapter C covers offenses involving privacy.

SUBCHAPTER A.—OFFENSES INVOLVING CIVIL RIGHTS

Sections (1501–1506)

The oldest meaningful Federal statutes in the field of civil rights date from the Reconstruction Period, the best known being sections 241 and 242 of title 18. After Reconstruction there was almost a century of legislative inaction on civil rights legislation inaction on civil rights issues. Beginning in 1957, Congress enacted civil rights legislation with increasing frequency, e.g., the Civil Rights Act of 1957, 1960, 1964, and 1968. However, the great bulk of this legislation is not concerned with criminal sanctions, but centers on use of the administrative process and civil injunctions for enforcement.

This subchapter deals with those sections of the United States Code relating to the civil rights area which contain criminal penalties—namely, 18 U.S.C. 241, 242, 245, and 42 U.S.C. 3631.[1]

Sections 1501 and 1502 replace 18 U.S.C. 241 and 242 and make substantial modifications both as to scope and culpability designed to improve the clarity and consistency of the offenses. Sections 1503–1505 are designed to reenact the more modern offenses in 18 U.S.C. 245 and 42 U.S.C. 3631 with fewer significant changes.

SECTION 1501. INTERFERING WITH CIVIL RIGHTS

1. In General

This section is a consolidation of 18 U.S.C. 241 and part of 242. The former statute has been recast to protect all persons rather than just citizens.[2] In addition, the proposal eliminates the requirement of present law that at least two persons commit the offense[3] and deletes certain archaic features of section 241 (e.g., "go in disguise on the highway").[4]

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[1] 18 U.S.C. 241 and 242, insofar as they apply to elections, are also carried forward in section 1511 (Obstructing an Election).

[2] This modification follows the recommendation of the Special Committee on the proposed New Federal Criminal Code of the New York City Bar Association, see Hearings, p. 7740, and of the ABA's Section of Criminal Law, see *id.* at 5808.

[3] By eliminating the conspiracy requirement, that is, by making the injuring of a person in the free exercise of a Federally-secured right a crime, rather than making a conspiracy to do so

18 U.S.C. 241 makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." The section also makes it a crime for two or more persons to "go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured." The penalty is ordinarily up to ten years in prison, but increases to a maximum of life imprisonment if death results.

18 U.S.C. 242 makes it an offense for anyone acting "under color of any law, statute, ordinance, regulation, or custom," willfully to subject any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens. The maximum penalty is one year in prison but rises to life imprisonment if death results.

The Supreme Court, in *Screws* v. *United States,*[5] upheld the constitutionality of 18 U.S.C. 242 against a challenge based on vagueness by construing the concept of "willfully" to require proof of a specific intent to deprive another of a Federal right, i.e., in that case, proof that the defendant sheriff, who had abused and killed a black victim in the course of an arrest, acted with reference to the victim's constitutional rights, and not out of personal animosity.[6] However, while the accused must be shown to have had a specific intent to deprive a person of a Federally protected right, it need not be proven that he knew that the right was in fact Federally protected. As stated in *Screws, supra,* "the fact that the defendants may not have been thinking in constitutional terms is not material where their aim was . . . to deprive a citizen of a right and that right was protected by the Constitution."[7]

The Federal courts have held that the same requirement of a specific intent to deprive another of a Federal right, applicable under 18 U.S.C. 242, applies also under 18 U.S.C. 241.[8] However, in *United States* v. *Guest,*[9] the Supreme Court indicated that the *scienter* element under section 241 was automatically satisfied by

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a crime, the Committee adopts the suggestion of the New York City Bar's Special Committee. Hearings, p. 7740.

[4] The National Commission by contrast chose to retain 18 U.S.C. 241 and 242 in their present form, although some commissioners favored the approach adopted here. See Final Report, §§ 1501, 1502 and Comment, pp. 155–156.

[5] 325 U.S. 91 (1945).

[6] *Id.* at 101–107. The Court at one point seemed to indicate that "reckless disregard" of a constitutional requirement would suffice, *id.* at 105, but the Federal courts in subsequent decisions have generally held that a specific intent is an essential element under the statute. See *United States* v. *Guest,* 383 U.S. 745, 760 (1966).

[7] *Id.* at 106. It is possible to read *Screws* as indicating that no mental state need be proved as to this element, or as indicating that "recklessness" must be shown. See *id.* at 105 ("When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement"). See also *United States* v. *O'Dell,* 462 F.2d 224, 232 n.10 (6th Cir. 1972).

[8] See e.g., *United States* v. *O'Dell, supra* note 7.

[9] *Supra* note 6, at 753–754.

proof of a conspiracy, since a conspiracy by its very nature requires knowledge of the criminal objectives.[10]

With respect to the nature of the rights protected, the broad scope of the statutes is illustrated by the cases under section 241. Thus it has been held that section 241 protects such important interests as the right of a citizen[11] to be free from slavery or involuntary servitude except as punishment for crime,[12] the right to be free from an unlawful search and seizure,[13] the right to remain in the official custody of a United States Marshal,[14] the right to inform of violations of Federal law,[15] the right to testify at proceedings held under authority of Federal law,[16] the right to travel interstate,[17] the right to vote in a Federal election,[18] the right to assemble and petition the Congress for a redress of grievances,[19] and the right not to be deprived of life without due process of law.[20]

More recently, 18 U.S.C. 241 was held to protect the right to testify at a Federal trial in response to a request or command of a Federal district court.[21] Additionally, a recent Supreme Court decision concerning 18 U.S.C. 241, which seems applicable also to 18 U.S.C. 242 with its similar "law of the United States" purview, indicates that those sections can have a broad reach to even civil statutes in the United States Code. In *United States* v. *Johnson*,[22] the Court sustained a prosecution under 18 U.S.C. 241 of persons who had interfered with blacks in their access to public accommodations, covered by the Civil Rights Act of 1964. Although the Act has an exclusive remedy provision which confines enforcement of the rights created therein to injunctive relief, the Court construed this to bar criminal actions only against proprietors or owners of the public accommodations, and not to foreclose criminal actions against outsiders who assault blacks for exercising their right to equality in public accommodations. The opinion of the Court by Mr. Justice Douglas creates a presumption that 18 U.S.C. 241 is to be accorded "a sweep as broad as its language." Thus, it would appear that any Federal statute creating a personal right that is not tied exclusively to a civil remedy [23] may be the basis for a prosecution under sections 241 and 242.[24]

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[10] It has been held that no overt act is necessary to establish a conspiracy under 18 U.S.C. 241. See *Williams* v. *United States*, 179 F.2d 644, 649 (5th Cir. 1950), aff'd on other grounds, 341 U.S. 70 (1951) ; *United States* v. *Morado*, 454 F.2d 167, 169 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

[11] See, as to the meaning of "citizens," *Baldwin* v. *Franks*, 120 U.S. 678, 690–692 (1887); *Powe* v. *United States*, 109 F.2d 147, 149 (5th Cir.), cert. denied, 309 U.S. 679 (1940).

[12] *Smith* v. United States, 157 Fed. 721 (8th Cir. 1907), cert. denied, 208 U.S. 618 (1908).

[13] See e.g., *United States* v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), cert denied, 431 U.S. 933 (1977); *United States* v. *Liddy*, 542 F.2d 76 (D.C. Cir. 1976). In *Liddy* the court rejected a contention that the statute was limited to cases in which the victim was aware, at the time it occurs, of the injury, threat, or intimidation.

[14] *Logan* v. *United States*, 144 U.S. 263 (1892).

[15] *Motes* v. *United States*, 178 U.S. 458, 462–463 (1900).

[16] *Fess* v. *United States*, 266 Fed. 881 (9th Cir. 1920).

[17] *United States* v. *Guest*, *supra* note 6 at 757–760.

[18] E.g., *United States* v. *Classic*, 313 U.S. 299 (1941); *United States* v. *Saylor*, 322 U.S. 385 (1944); see also *United States* v. *Anderson*, 481 F.2d 685, 698–701 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974) (right to vote in State election also covered).

[19] *United States* v. *Cruikshank*, 92 U.S. 542 (1875).

[20] *United States* v. *Price*, 383 U.S. 787, 799–807 (1966); see also *United States* v. *O'Dell*, *supra* note 7, at 231 (right to trial as means of resolving guilt is secured by due process and thus is within section 241).

[21] *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir.), cert denied, 419 U.S. 826 (1974). The above cases make it abundantly clear that in deciding whether a right is secured by the Constitution or laws of the United States, it is not enough simply to scan the Constitution or laws to see whether the right is mentioned specifically; certain rights are also implicitly conferred by the Constitution's establishment of a national government intended to be paramount and supreme within its sphere of action.

[22] 390 U.S. 563 (1968).

2. The Offense

Subsection (a) provides that a person commits an offense if he intentionally (1) deprives another person of, or (2) injures, oppresses, threatens, or intimidates another person: (A) in the free exercise or enjoyment of, or (B) because of his having exercised "a right, privilege, or immunity secured to such other person by the Constitution or laws of the United States."

Paragraph (1)—the deprivation branch—is derived from 18 U.S.C. 242; the remainder of the proposed statute is essentially a codification of 18 U.S.C. 241.[25] It should be noted that, unlike 18 U.S.C. 242, it is not an element of this offense that the defendant act "under color of law." [26]

The basic difference between this section and 18 U.S.C. 241 is that this section is drafted as a substantive offense and not as a conspiracy.[27] A conspiracy to violate this section will be punishable under section 1002 (Criminal Conspiracy). However, the Committee perceived no reason to confine this section to a situation in which two or more persons act pursuant to an agreement; if a lone individual intentionally deprives another of a Federally protected right, he should be subject to criminal sanctions.

The Committee has also somewhat expanded the reach of section 241 by eliminating the restriction that the victim be a "citizen." Instead, the citizen or non-citizen status of the victim will be irrelevant. The focus will be on the nature of the right, privilege, or immunity involved; if it is one secured by the Constitution or laws of the United States, the proposed statute will come into play.[28] To be sure, cases in which the non-citizen status of the victim has prevented successful prosecution are few. The Committee, though, sees no reason for maintaining the limitation in view of the fact that aliens in this country are protected by an abundance of Federal constitutional and statutory provisions, and hence are likewise deserving of protection, by the operation of penal sanctions, against persons who deliberately seek to deprive them of those rights.[29]

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[23] For an example of a case where the rights protected were held to be tied to civil remedies, see *United States* v. *DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) (rights enumerated in National Labor Relations Act must be vindicated exclusively through procedures there set forth).

[24] See Working Papers, p. 771; see also *United States* v. *Waddell*, 112 U.S. 76 (1884) (sustaining an information which charged the defendant with having entered upon the victim's homestead lands and driven him off as part of a conspiracy to intimidate him in the enjoyment of the rights created by the Federal homestead acts).

[25] The term "immunity" from 18 U.S.C. 242 has, however, been added to the words "right" and "privilege" found in section 241.

[26] An offense retaining this requirement, and thus carrying forward the basic parameters of 18 U.S.C. 242, is contained in section 1502.

[27] See also section 1301 (Obstructing a Government Function by Fraud), which makes a substantive offense out of what is currently only punishable under 18 U.S.C. 371 as a conspiracy to defraud the United States.

[28] See Hearings, p. 3537 (recommendation of the Association of the Bar of the City of New York).

[29] In a broad sense, such a statutory enlargement is consistent with the trend to interpret 18 U.S.C. 241 in an increasingly expansive manner in regard to the kinds of constitutional and statutory rights of citizens that are encompassed within it. See *United States* v. *Price*, *supra* note 20, at 796–807; *United States* v. *Johnson*, *supra* note 22.

Significantly, 18 U.S.C. 242 does not appear to be limited to a citizen-victim.[30] The Committee adopts this approach for section 1501.

A third, minor difference between this proposed section and 18 U.S.C. 241 is that the subject bill, following the suggestion of the National Commission, has deleted the second ("disguise on the highway") paragraph of section 241. As noted by Professor Robert Dixon, a consultant to the National Commission, nothing significant is lost by the deletion because there apparently have been no significant prosecutions under this provision. Moreover, lack of disguise should be no defense to a prosecution for injuring another's Federal rights. The term "highway" is clearly archaic in view of the recognition by the Federal courts of a plenary right of interstate travel not limited to highways. The repeal of the phrase "premises of another" similarly sacrifices nothing and in fact does away with a possible overbreadth because going on the premises of another, in itself, violates no Federal right (apart from Federal enclaves where ordinary trespass concepts apply).[31]

The conduct in this section is, in paragraph (1), depriving another person of a right, privilege, or immunity, and, in paragraph (2), injuring, oppressing, threatening, or intimidating[32] another person in the free exercise or enjoyment of, or because of his having exercised, a right, privilege, or immunity. The culpability standard is designated as "intentional." Therefore, by operation of section 302(a)(1), the prosecution must prove that the defendant had as his conscious objective or desire, e.g., the deprivation of another person's right, privilege, or immunity. The fact that the right, privilege, or immunity was secured to the victim by the Constitution or laws of the United States is an existing circumstance. However, since this element is designated in subsection (b) as a question of law, no mental state need be shown with respect thereto.[33]

The combination of demanding proof of the desire to deprive another of a right, but not requiring any scienter as to the fact that the right is secured by the Federal Constitution or laws, in the Committee's view carries forward the pressent culpability level under 18 U.S.C. 241 and 242 as enunciated in *Screws* v. *United States, supra.*[34]

The Committee intends to perpetuate existing law under 18 U.S.C. 241 with respect to the rights and privileges deemed to be "secured . . . by the Constitution or laws of the United States."[35]

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[30] See *Miller* v. *United States,* 404 F.2d 611 (5th Cir. 1968), cert. denied, 394 U.S. 963 (1969).

[31] See Working Papers, p. 808.

[32] The verbs "injure, oppress, threaten, and intimidate" are derived from current law as well as from the recommendations of the National Commission. See Final Report § 1501(a). In most cases which will arise under the statute, the Committee expects that the four words will be given their ordinary nontechnical meaning. Cf. *United States* v. *Deaver,* 14 Fed. 595, 597 (N.D.N. Car. 1882); *United States* v. *Guest, supra* note 6 at 760 (1965).

[33] See section 303(d)(3).

[34] *Supra* note 5; Working Papers, p. 782. See also *Anderson* v. *United States,* 417 U.S. 211, 226 (1974) and *United States* v. *Barker,* 546 F.2d 940 (D.C. Cir. 1976) holding that the intent to violate a right, that is federally protected in fact, need not be the predominent intent of the actor, so long as the intent exists, however secondary or incidental. The same doctrine is applicable under this section. Moreover, since the element whether the right deprived was Federal is essentially jurisdictional in nature, not requiring proof af any *scienter* with respect thereto is consistent with the general policy adopted in the proposed new Code. See section 303(d)(2).

[35] The Committee notes that the present statute has been construed to reach conduct aimed at depriving a person of the right to vote in a State election, as held in *United States* v. *Anderson, supra* note 18, at 698–701. See also the second paragraph of 18 U.S.C. 593, punishing any

Of course, when the right secured is one under the Equal Protection or Due Process Clauses of the Fourteenth Amendment requiring proof of a "State action" element, that element must be established by virtue of the Constitution itself, irrespective of the lack of any "color of law" requirement in this statute.[36]

Nothing in this section, however (or in any offense in this chapter) is intended to confer by implication any private right of action.[37]

3. Proof

Subsection (b), as previously noted, provides that the issue whether the deprivation, injury, oppression, threat, or intimidation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law. This codifies present law under which the question of whether a Federally secured right is involved is regarded as one for the courts alone.[38] Such a result is proper, since the matter is clearly not one suitable for jury resolution. However, the jury of course will determine all the other elements of the offense, including the existence of the necessary intent and conduct.

4. Jurisdiction

This section contains no subsection setting forth the degree to which Federal jurisdiction exists over an offense herein. Accordingly, Federal jurisdiction is governed by the revisions of section 201(b)(2). This broad extent of juriscdiction is consistent with the scope of current law.

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This is a substantial reduction from the ten-year maximum penalty under 18 U.S.C. 421 (although it accords with the penalty provided under 18 U.S.C. 242). However, the reduced grading hereunder is designed to reflect the ancillary jurisdiction feature of the proposed Code under which offenses such as murder, maiming, kidnapping, and aggravated rape,[39] as well as arson and aggravated property destruction,[40] contain jurisdictional bases enabling an offender under this section (as well as the other sections in this subchapter) to be punished for any such offenses against the person or property committed in the course of violating an individual's Federal civil rights.

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member of the armed forces who prevents or attempts to prevent "any qualified voter of any State from fully exercising the right of suffrage at any general or special election." Compare section 1511 (obstructing an election) (limited to an election to nominate or elect a candidate for a Federal office).

[36] See *United States* v. *Price, supra* note 20; *United States* v. *Guest, supra* note 6; Working Papers, p. 807.

[37] See *United States* v. *Guest, supra* note 6 at 754-755; *Quarles* v. *State of Texas,* 312 F. Supp. 835 (S.D. Tex. 1970).

[38] See, e.g., *Screws* v. *United States, supra* note 5 at 107; *Williams* v. *United States,* 341 U.S. 97, 102 (1951); *United States* v. *O'Dell, supra* note 7.

[39] Sections 1601, 1611, 1621, and 1641 respectively.

[40] Sections 1701 and 1702, respectively.

SECTION 1502. INTERFERING WITH CIVIL RIGHTS UNDER COLOR OF LAW

1. In General and Present Federal Law

This section is derived from 18 U.S.C 242 and is designed to afford Federal protection against persons who commit crimes of violence while acting under color of law, and thereby deprive another of a Federally secured right, privilege, or immunity.[41]

18 U.S.C 242 punishes, *inter alia,* whoever, "under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The maximum penalty is up to one year in prison unless death results, in which case the maximum is life imprisonment.

This statute contains four basic elements: (1) the defendant's acts must have deprived someone of a right, privilege, or immunity secured by the Constitution or laws of the United States; (2) the defendant's illegal acts must have been committed under color of law; (3) the person deprived of his rights must have been an inhabitant of a State, territory, or district; and (4) the defendant must have acted "willfully" (i.e., with a specific intent to deprive another of a Federally protected right, privilege, or immunity).[42]

Elements (1), (3) and (4) have to a large extent been discussed in connection with the preceding section, and that discussion applies to the same extent here.

The critical difference between this offense and 18 U.S.C. 241 (carried forward in the prior section) is the requirement that the conduct occur "under color of law." The Supreme Court has held that the phrase "under color of law" means the same thing in 18 U.S.C. 242 as it does under its civil counterpart, 42 U.S.C. 1983, where the phrase has been interpreted as equivalent to the "State action" required under the Fourteenth Amendment.[43] To act under color of law therefore does not necessitate proof that the accused is an officer of the State. It is sufficient if he is a knowing participant in joint activity with the State or its agents.[44]

Most cases under section 242 involve official misuse of force.[45] However, in *United States* v. *Senak, supra,* the court sustained in indictment charging that a public defender had exacted fees from a pauper client by threatening him with inadequate representation unless extra sums were paid to him; the contention that the public defender was not acting "under color of law" was rejected.[46] In short, the courts have held that "under color of law" is to be expansively construed. In general, it means under pretense of law, and includes misuse of power possessed by virtue of State law made possible only because the accused is clothed with the authority of law.[47] There is no requirement that the act be done under actual authority of law.[48]

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[41] Compare Final Report, § 1521, which proposed an offense limited to Federal public servants acting under color of Federal law who subject another to unlawful violence or detention or exceed their authority in making an arrest or a search and seizure.

[42] See *United States* v. *Senak,* 477 F.2d 304, 306 (7th Cir.), cert. denied, 414 U.S. 856 (1973).

[43] See *United States* v. *Price, supra* note 20 at 794 n.7.

[44] *Id.* at 794; see also *Williams* v. *United States, supra* note 38.

[45] E.g., *United States* v. *DeLerme,* 457 F.2d 156 (3d Cir. 1972); *Williams* v. *United States, supra* note 38; *Screws* v. *United States, supra* note 5. More recently in *United States* v. *Stokes,* 506 F.2d 771 (5th Cir. 1975), the court held that a person in custody has a constitutional right to be free from exercise of unreasonable force against him (i.e., an assault) by State law enforcement officers. Accordingly, the court determined that there is no need to prove an intent on the part of the defendant-officer to deprive his victim of a court trial or to inflict "summary punishment;" the only intent required to be shown is an intent to deprive the victim of the right not to be assaulted. The Committee has carried forward this interpretation into section 1502.

[46] See also *Robinson* v. *Bergstrom,* 579 F.2d 401 (7th Cir. 17978); cf. *United States* v. *Wiseman,* 445 F.2d 792, 794–796 (2d Cir. 1971), cert. denied, 404 U.S. 967 (1972) (conviction of process serv-

The concept of "deprivation" of a right under 18 U.S.C. 242 has also been broadly construed as not limited to a taking compelled by legal authority.[49]

2. The Offense

Subsection (a) provides that a person commits an offense if, acting under color of law, he engages in any conduct constituting an offense under any section in chapters 16 or 17, and thereby deprives another person of any right, privilege, or immunity secured to such other person by the Constitution or laws of the United States.

The Committee intends that the elements of "under color of law" and "deprives" be read to incorporate the body of case law under 18 U.S.C. 242 with respect to those concepts. The offenses in chapters 16 and 17 referred to embrace a nearly complete set of crimes against the person and property. Thus, this section is broader than Final Report § 1521 as proposed by the National Commission. The offenses in chapters 16 and 17 cover in all practical respects the ground occupied by current 18 U.S.C. 242, as illustrated by the prosecutions heretofore maintained under that statute. Thus, beatings or killings of individuals, or their contrived arrests,[50] would constitute offenses under chapter 16; extortion, blackmail,[51] or theft would be covered by virtue of their location in chapter 17.[52] The rational underlying the Committee's limitation of the underlying conduct to the offenses enumerated in chapters 16 and 17 is that specific allusion to the offenses in those portions of the subject bill will substantially constribute toward a more precise articulation of the kinds of conduct which are prohibited.[53]

It should be noted that this section does not purport explicitly to carry forward that part of 18 U.S.C. 242 that punishes whoever under color of law willfully subjects any inhabitants of any State, etc., to "different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race,

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ers who submitted false affidavits that they had in fact served named persons, sustained on ground that process servers perform a "public function" even though not employees of the State).

[47] Several witnesses addressed themselves specifically to the problems raised by State law enforcement officers' abuse of authority. See Hearings, pp. 3034–3039 (testimony of Jack Greenburg, Director-Counsel NAACP Legal Defense and Educational Fund); pp. 3160–3168 (statement of Burke Marshall, Yale Law School). See also *id.* at 6774–6777 for a discussion of Justice Department statistics concerning civil rights violations under color of law.

[48] See *United States* v. *Jones,* 207 F.2d 785 (5th Cir. 1953); *United States* v. *Ramey,* 336 F.2d 512, 515 (4th Cir. 1964) and cases cited therein. *cert.* denied. 379 U.S.. 972 (1965).

[49] *United States* v. *Senak, supra* note 42 at 307–309.

[50] See *United States* v. *Ramey, supra* note 48.

[51] For example, the conduct in *United States* v. *Senak, supra* note 42, would constitute blackmail under section 1722.

[52] It is unclear whether the conduct in *United States* v. *Wiseman, supra* note 46, would come within the present statute; however, it is possible that the false affidavits of service, resulting in the entering of default judgments against the victims, could be viewed as a theft under section 1731.

[53] See Hearings, pp. 6778–6779 (testimony of K. William O'Connor, Department of Justice).

than are prescribed for the punishment of citizens," Since such discrimination is barred under the Fifth and Fourteenth Amendments, quite aside from the provisions of particular Federal statutes, the clause is wholly encompassed in the first part of 18 U.S.C. 242 and is superfluous.[54] Similarly, although 18 U.S.C. 242 uses the words "secured or protected," the Committee has eliminated the latter as redundant in light of the lack of any authority distinguishing the two verbs.[55]

The conduct in this offense is engaging in any conduct constituting an offense under chapters 16 or 17. The culpability standard is implicit in the phrase "conduct constituting an offense," which is given the meaning in section 111 of "conduct with the state of mind, under the circumstances, and with the results, required for the commission of the offense."[56] Thus, the same mental states required for the commission of a particular offense in chapters 16 or 17 comprise the mental states necessary for a violation of this section.[57] By virtue of section 303(d)(1)(A) it is not, of course, necessary to show any mental state as to the fact that the conduct was an offense under chapter 16 or 17. Note that there need not be Federal jurisdiction over the chapter 16 or 17 offense in order for the conduct to be reached under this section, as the issue of jurisdiction is separate from the elements of the offense.[58]

The element that the conduct occurred while the accused was "acting under color of law" is an existing circumstance. Since no culpability level is specifically set forth in this section, the applicable state of mind that must be shown is at least "reckless," i.e., that the accused was aware of but disregarded the substantial risk that the circumstance existed, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[59]

The final element is that the conduct "thereby deprives another person of a right, privilege, or immunity secured to such person by the Constitution or laws of the United States."

The fact that the conduct deprived another of a right, privilege, or immunity is a result of conduct. As no degree of culpability is designated herein, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the result would occur, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the situation.[60] The fact that the right, privilege, or immunity deprived was secured by the Constitution or laws of the United States is an aspect requiring no proof of any mental state because it is designated in subsection (b) as a question of law.[61]

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[54] See Final Report, § 1502. Comment, p. 156. The consultant to the National Commission further suggested that little or nothing would be lost by deleting all of 18 U.S.C. 242 in view of the expansive construction accorded to 18 U.S.C. 241. See Working Papers, p. 808.

[55] See Working Papers, p. 809.

[56] The term "commission of the offense" is defined in section 111.

[57] This is consistent with the holding *United States* v. *Stokes*, *supra* note 45.

[58] See section 201(c).

[59] See sections 303(b)(2) and 302(c)(1).

[60] See sections 303(b)(3) and 302(c)(2).

[61] See sections 303(d)(3).

Requiring recklessness as to the result that the conduct (a crime) engaged in deprived another of his rights is designed to relax the stringent culpability test enunciated in *Screws* v. *United States, supra.*[62] The Supreme Court in that case adopted a specific intent principally in order to rescue the constitutionality of 18 U.S.C. 242 from an attack based on vagueness.

The standard is not constitutionally mandatory in the sense that Congress must adopt it in the context of any civil rights law designed to punish acts committed under color of law.[63] In this section, the Committee believes that it has rendered the statute substantially more definite,[64] thereby eliminating the need to retain a specific intent requirement.[65]

Placing the culpability level at "reckless" instead of requiring proof of an intent to deprive another of a right will not result in making every use of excessive force by a law enforcement officer a Federal crime. The recklessness standard specifically requires proof of an awareness by the defendant of the substantial risk that his actions will deprive another of a right secured to him, and a conscious disregard of that risk. However, such an awareness and its conscious disregard will normally be present whenever acts occur "under color of law", as opposed to acts undertaken by a law enforcement officer in a private capacity.[66] Thus, the ordinary situation in which excessive force is used under color of law may well constitute a violation of this section, while acts involving excessive force by a law enforcement officer in the course of a private altercation, for example, would not.

Nothing in this section is intended to confer or create any private right of action.[67]

3. Proof

Subsection (b) provides that the issue whether the deprivation involves a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law. An identical provision is contained in section 1501 and has been explained in connection with that section.

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This preserves the present penalty under 18 U.S.C. 242. As under the previous section, because of ancillary jurisdiction provisions in the major offenses in chapters 16 and 17, persons who commit offenses such as murder, arson, or kidnapping in the course of the commission of the present offense may be punished in the Federal courts irrespective of whether any other basis for Federal jurisdiction over such offenses exists.[68]

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[62] See the discussion of *Screws, supra* note 5 at 466.

[63] See, e.g., *United States* v. *Guest, supra* note 6 at 786 (Brennan, J., Concurring in part and dissenting in part).

[64] E.g., by specifying by reference to chapters 16 and 17, the precise statutes whose violation may serve as a predicate for an offense under this section.

[65] The Department of Justice supports this change. See Hearings, pp. 6774-6775.

[66] See Hearings, p. 6778.

[67] See *Brown* v. *Duggan*, 329 F. Supp. 207, 209 (W.D.Pa. 1971); *United States ex rel. Pope* v. *Hendricks*, 326 F. Supp. 699, 701 (E.D.Pa. 1971).

SECTION 1503. INTERFERING WITH A FEDERAL BENEFIT

1. In General and Present Federal Law

This section reenacts, in clearer form, the provisions of 18 U.S.C. 245(b)(1), (b)(4)(B), and (in part) (b)(5). The section is derived from the recommendations of the National Commission.[69]

18 U.S.C. 245 was enacted in 1968 after extensive consideration by Congress. Its main purposes were to increase protection for civil rights workers against violence and, more generally, to make prosecutions of violators of Federal rights more effective by providing language more specific than the vague terms found in 18 U.S.C. 241 and 242, which the Supreme Court had several times invited Congress to improve.[70] The statute is extremely complex and contains one list of activities as to which Federal power is invoked to protect all persons, and another list of activities as to which only racially motivated interference (or inteference on grounds of color, religion, or national origin) is prohibited. This section deals with the first such list of activities.[71]

The first subsection of section 245 defines no offenses. It contains general provisions making it clear that there is no intent to supersede or deny the concurrent enforcement of State law and provides for a certification of the Attorney General or Deputy Attorney General in writing prior to undertaking any prosecution. The former aspect is governed by section 205 of the proposed Code. The certification requirement has been eliminated on policy grounds as in other instances throughout the new Code.[72] The Committee anticipates that the same careful screening of prosecutions in this area followed by attorneys of the Department of Justice[73] will continue.

Subsection (b) of section 245 contains five paragraphs with numerous subdivisions setting forth offenses. Each offense is subject to a maximum prison term of one year, but if bodily injury results the penalty increases to ten years, and if death results, it rises to a maximum of life imprisonment.

Paragraph (1) punishes whoever, "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from":

> (A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll

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[68] See Working Papers, pp. 782–783.

[69] See Final Report, §§ 1511, 1513, 1514.

[70] See Working Papers, pp. 778–779.

[71] See also section 1505(a)(1).

[72] In support of the deletion of this certification requirement, see Hearings, p. 5809 (ABA Section of Criminal Law Report); Hearings, p. 7741, (Report of Special Committee of the New York City Bar Association).

[73] See Hearings, pp. 6774, 6777.

watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by the United States;[74]

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance.

Paragraphs (4) and (5) punish [75] whoever, "whether or not acting under color of law, by force or threat of force, willfully injuries, intimidates or interferes with, or attempts to injure, intimidate or interfere with":

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from:

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

2. The Offense

Subsection (a) of section 1503 provides that a person commits an offense if, "by force or threat of force, he intentionally injures, intimidates, or interferes with another person because such other person is or has been, or in order to intimidate any person from":

(1) applying for, participating in, or enjoying a benefit, privilege, service, program, facility, or activity provided by, administered by, or wholly or partly financed by, the United States;

(2) applying for or enjoying employment, or a perquisite thereof, by a federal government agency;

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[74] See *United States* v. *Price*, 464 F.2d 1217 (8th Cir.), cert. denied, 409 U.S. 1040 (1972) (assault on black person to prevent his use of Federal recreation area).

[75] The Committee notes that, for the several reasons stated by the consultant to the National Commission (see Working Papers, pp. 796–797), no effort has been made to recodify paragraph (3) of section 245(b), relating to the use of force or threat thereof to injure, intimidate, or interfere with, "during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce." The provision is riddled with ambiguities and would seem to be unnecessary. The anti-riot offenses contained in subchapter D of chapter 18 provide adequate protection and preserve the Federal interest in punishing such conduct; any additional conduct "during" a riot (a very broad concept) may in the Committee's opinion be effectively and more appropriately dealt with by the States.

(3) serving as a juror in a court of the United States or attending court in connection with possible service as such a juror;

(4) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in a primary, general, or special election:

(5) affording another person or class of persons opportunity to participate in any benefit or activity described in this section; or

(6) aiding or encouraging another person or class of persons to participate in any benefit or activity described in this section.

The "attempt" language has been eliminated since an attempt to violate this section is made punishable by section 1001 (Criminal Attempt). Likewise the "whether or not acting under color of law" phrase, which merely adds emphasis, has been deleted as unnecessary.[76]

The Committee has decided to maintain the "by force or threat of force" restriction without an expansion to include "economic coercion", as suggested in a bracketed alternative by the National Commission.[77] Certain types of nonforceful interference, particularly directed against voting, has been prosecuted under 18 U.S.C. 241 and 242 and may be reached under sections 1501 and 1502. Thus, the Committee believes that the proper province of this statute is the area of violence.[78]

The Committee has similarly determined to retain the verbs "injures, intimidates, or interferes with." These terms seem to give adequate coverage and to be unobjectionable on grounds of clarity.[79]

The Committee also has kept the "because" language as representing an appropriate boundary to the statutes' application; substituting, for example, the term "while" would yield a very broad statute covering, e.g., a simple assault on a person receiving social security benefits.[80] It should be noted that, by virtue of the "in order to intimidate any person" language, the statute covers the situation where a defendant intimidates X in order to discourage Y from participating in a federally protected activity.

18 U.S.C. 245 adds to the above language "or any class of persons." This has been omitted as redundant in view of the phrase "any person."[81]

Paragraphs (1) through (4) bring forward subparagraphs (A) through (E) of subsection (b)(1) of section 245. Paragraph (1) consolidates subparagraphs (B) and (E). The Committee intends that the phrase "wholly or partly financed by the United States" include contractual relationships with the Federal government as well as beneficiaries of Federal loans such as VA and FHA housing loans.[82]

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[76] Compare Final Report § 1511, which retained the phrase; see also Working Papers, pp. 779-780.

[77] The deletion of this bracketed alternative was recommended by the New York City Bar Association's Special Committee. See Hearings, p. 7742.

[78] See Working Papers, pp. 780-782.

[79] See *id.* at 783.

[80] *Ibid.*

[81] See Working Papers, pp. 783-784. The Committee does not intend that it be necessary to identify the particular victim or victims who are the object of the conduct.

Paragraph (2) brings forward subparagraph (C) of section 245(b)(1).[83] Separate coverage was deemed advisable notwithstanding the fact that the subject matter may be encompassed within paragraph (1), since such separate statement serves the function of limiting paragraph (1) and rebutting the notion of implied coverage therein of non-Federally financed employment.[84]

Paragraph (3) brings forward subparagraph (D) of section 245(b)(1). No significant change has been made. Again, the Committee has used separate codification notwithstanding the fact that the subject matter is probably embraced within paragraph (1).

Paragraph (4) carries forward subparagraph (A) of section 245(b)(1). The modifier "legally authorized" before "election official" has been eliminated as implicit in the concept of "acting as" an election official.

Paragraph (5) restates subparagaph (B) of section 245(b)(4). The provision protects persons who are willing to accord Federal rights but who may be subjected to intimidation or retaliation ofr that willingness. The persons may be either government officials or private individuals (e.g., landlords or employers).

The Committee, following the recommendation of the National Commission, has made a change in this provision by eliminating the "without discrimination" clause, set forth in subparagraph (A) and carried into subparagraph (B) by the "so participate" phrase. The limitation is inappropriate as applied to the benefits or activities described in this section (i.e., those deriving from subsection (b)(1) of section 245) because in regard to those offenses protection for the participants is general, without need to show racial motivation. Hence, it is anomalous to require a showing of racial motivation as to afforders and aiders.[85]

Paragraph (6) brings forward that part of subsection (b)(5) of section 245 that concerns aiding or encouraging citizens to participate in the benefits or activities described in subsection (b)(1).[86] For the same reasons indicated above, the restriction as to "without discrimination" for aiders has been eliminated.[87] In addition, the Committee has broadened the statute in two other ways. First, the term "citizen" has been replaced by "person." Apparently, the reason for the limitation in section 245 was to exclude alien agitators. However, as noted by the consultant to the National Commission, if alien agitators become a problem, "the problem is more appropriately handled by official action rather than by exempting from Federal purview private vigilante action."[88] Accordingly, the Committee believes it proper to legislate here in the customary way, i.e., in terms of "persons."

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[82] See *id.* at 785-786.

[83] The term "government agency" is defined in section 111 and is similar to the definition of "agency" in 18 U.S.C. 6.

[84] See Working Papers, pp. 787-788.

[85] See the discussion in Working Papers, pp. 797-798. Note that the "without discrimination" qualifier makes sense with respect to the benefits and activities enumerated in subsection (b)(2) of section 245 and has been retained in section 1504, which reenacts those offenses.

[86] Insofar as subsection (b)(5) affects the activities specified in subsection (b)(2) of section 245, it is continued in the next section (1504).

[87] See Working Papers, p.798.

[88] See *Id.* at 799-800.

The second manner in which the Committee has broadened this statute is by omitting the term "lawfully" as qualifying the victim's conduct (i.e., "lawfully aiding or encouraging"). A person who commits murder or otherwise interferes with one who is aiding another individual to participate in one of the benefits set forth in this section should not be sheltered from criminal prosecution merely because his victim was trespassing or committing some other nonviolent or petty breach of the law.[89] Even where the breach was non-petty, if it were not such as to call into play a defense predicated on the right to protect persons or property from harm, there seems no reason to bar the prosecution of the defendant simply because of his victim's illegal action.[90]

The conduct in this offense is acting by force or threat of force. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e. that the defendant was aware of the nature of his actions.[91]

The element that the force or threat injures, intimidates, or interferes with another person is a result of conduct. The culpability level is prescribed as "intentionally,"[92] thereby requiring proof that the defendant consiously desired to cause the result.[93]

The remaining elements (i.e., "because such other person is or has been or in order to intimidate any person from" doing any of the six things listed in the ensuing paragraphs) state the alternative purposes or objectives for which it must be proved that the conduct was performed.

3. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

4. Grading

An offense under this section is graded (as under the previous two sections) as a Class A misdemeanor (up to one year in prison). This preserves the basic penalty in current law. The aggravated penalties prescribed under section 245 if bodily injury or death results are perpetuated in the new Code by means of ancillary jurisdiction provisions applicable to the major offenses in chapters 16 and 17 (relating to offenses against persons and property), permitting separate Federal prosecution and punishment for any murder, maiming, kidnapping, or arson—to take but some examples—committed in the course of committing the present offense.

SECTION 1504. UNLAWFUL DISCRIMINATION

1. In General and Present Federal Law

This section substantially codifies 18 U.S.C. 245(b)(2), as well as those parts of 18 U.S.C. 245(b)(4) and (5) that deal with affording, or aiding or encouraging others to participate in, the enjoyment of the benefits or activities described in subsection (b)(2). In addition, the section brings into title 18, where it clearly belongs, the housing intimidation provision, 42 U.S.C. 3631, that, like 18 U.S.C. 245, is part of the Civil Rights Act of 1968.[94] The Committee has added, and carried forward, in certain provisions, discrimination on the ground of sex in the current prosciptions against discrimination on the grounds of race, color, religion, and national origin.

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[89] See *Id.* 785.
[90] See *Id.* 800.
[91] See sections 303(b)(1) and 302 (b)(1).
[92] See Working Papers. p. 782.
[93] See section 302(a)(2).

18 U.S.C. 245 has been discussed, in some aspects, in relation to the prior section (1503) and that discussion should be consulted here. Subsection (b)(2) of that statute makes it unlawful for whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with any person because of his race, color, religion or national origin and because he is or has been—

> (A) enrolling in or attending any public school or public college;
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> (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
>
> (C) applying for or enjoying employment, or any perquisite thereof by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
>
> (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror,
>
> (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunçhroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.

It is also an offense to attempt to so injure, intimidate or interfere.

Subsections (b)(4) and (b)(5) punish whoever, "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with," or so attempts to injure, intimidate or interfere with (4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

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[94] This section is derived rather closely from the recommendation of the National Commission. See Final Report § 1512; see also the anti-discrimination portions of §§ 1513 and 1514 of the Final Report.

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

Subsection (b) of section 245 also contains a so-called "Mrs. Murphy" exception providing that "[n]othing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence."

The penalty for a violation of section 245 is ordinarily up to one year in prison. However, if bodily injury or death results, the maximum penalty rises to ten years and life imprisonment, respectively.

42 U.S.C. 3631 is a parallel enactment that punishes, with a penalty identical to that provided in section 245:

Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facililty relating to the business of selling or renting dwellings; or

(b) any person because he is or has been or in order to intimidate such person or any other person or any class of persons from—

(1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

2. The Offense

Subsection (a) of section 1504 provides that a person commits an offense if "by force or threat of force, he intentionally injures, intimidates, or interferes with another person:

(1) because of such other person's race, color, religion, or national origin and because such other person is or has been, or in order to intimidate any person from:

(A) applying for, participating in, or enjoying, a benefit, privilege, service, program, facility, or activity provided or administered by a state or locality;

(B) applying for or enjoying employment, or a perquisite thereof, by a state or local government agency;

(C) serving as a juror in a state or locality or attending court in connection with possible service as such a juror;

(D) enrolling in or attending a public school or public college;

(E) applying for or enjoying the goods, services, privileges, facilities, or accommodations of:

(i) an inn, hotel, motel, or other establishment that provides lodging to transient guests;

(ii) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility that serves the public and that is principally engaged in selling food or beverages for consumption on the premises;

(iii) a gasoline station;

(iv) a motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment that serves the public; or

(v) any other establishment that serves the public, that is located within the premises of an establishment described in this subparagraph or that has located within its premises such an establishment, and that holds itself out as serving patrons of such an establishment;

(F) applying for or enjoying the services, privileges, facilities, or accommodations of a common carrier utilizing any kind of vehicle;

(G) traveling in or using a facility of interstate commerce;

(H) applying for or enjoying employment, or a perquisite thereof, by a private employer or joining or using the services or advantages of a labor organization, hiring hall, or employment agency; or

(I) selling, purchasing, renting, financing, or occupying a dwelling; contracting or negotiating for the sale, purchase, rental, financing or occupation of a dwelling; or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings; or

(2) because of such other person's sex, in violation of such other person's right, that in fact is federally secured, not to be subject to discrimination on that account, and because such other person is or has been, or in order to intimidate any person from, participating in any benefit or activity described in paragraph (1); or

(3) because such other person is or has been, or in order to intimidate any person from:

(A) affording another person or class of persons opportunity to participate, or protection in order to participate, without discrimination on account of race, color, sex, religion, or national origin, in any benefit or activity described in this section covered by paragraph (1) or on account of sex in any benefit or activity covered by paragraph (2); or

(B) aiding or encouraging another person or class of persons to participate, without discrimination on account of race, color, religion, or national origin, in any benefit or activity described in this section covered by paragraph (1) or on account of sex in any benefit or activity covered by paragraph (2)."

The introductory part of this section is worded so as to parallel section 1503. Thus, the discussion there of the terms "force or threat of force," "injures, intimidates, or interferes with," the "because" language, and the elimination of the "attempt" and "whether or not under color of law" clauses is equally applicable to section 1504.

The Committee has made a minor modification of section 245(b)(2) by adding the "in order to intimidate" phrase which appears in subsection (b)(1) and in section 1503, *supra*. The purpose of the phrase is to proscribe conduct designed to discourage possible future activity on the part of the victim. As noted by the consultant to the National Commission, no reason is evident why paragraph (b)(2) does not read this way.[95] In any event, it seems warranted to broaden the statute in this respect in order to give it scope commensurate with section 1503.

In terms of the kind of discrimination covered, the Committee has decided to retain in paragraph (1) all the motivational branches of current section 245 (i.e., race, color, religion, and national origin), and in addition has included sex in paragraph (2).

Existing Federal law protects a person's exercise of certain civil rights from interference based on the person's sex. Except in the Fair Housing Act,[96] however, the law does not penalize sexually motivated interference with those federally protected rights when the interference is carried out by force or threat of force. Although the use of force and threat of force to discriminate on sexual grounds would not appear to be a prevalent form of anti-civil rights activity, the Committee believes no sound reason exists not to cover the situation when it may occur.[97] The Committee wishes to make it clear, however, that by adding "sex" to the statute it does not intend to confer new rights not to be subject to discrimination on account of one's sex. The Committee's purpose is only to penalize the use of physical force to interfere with the exercise of existing rights. This purpose is conveyed by modifying the phrase "because of such other person's sex" with the additional language "in violation of such other person's right, that in fact is federally secured, not to be subject to discrimination on that account." In other words, the only rights covered by paragraph 2 are rights that already exist under Federal law.[98]

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[95] See Working Papers, p. 789.

[96] See 42 U.S.C. 3631.

[97] Compare generally the discussion in Working Papers at 789-794.

Paragraph (1)(A) carries forward subparagraph (B) of section 245(b)(2). No substantive change has been made.

Paragraphs (1)(B) and (1)(H) together bring forward subparagraph (C) of section 245(b)(2). No substantive change has been effected.

Paragraph (1)(C) carries forward subparagraph (D) of section 245(b)(2). Again no modification of a substantive nature has been made.

Paragraph (1)(D) brings forward subparagraph (A) of section 245(b)(2) without any change.

Paragraph (1)(E) carries forward subparagraph (F) of section 245(b)(2). No substantive alteration has been made,[99] but the various provisions of current law have been separated into subdivisions in order to make a more readable statute.

Paragraphs (1)(F) and (1)(G) continue the coverage of subparagraph (E) of section 245(b)(2). No substantive change has been effected.[100]

Paragraph (1)(I) brings forward 42 U.S.C. 3631(a) without substantive change.

Paragraph (2) has just been discussed.

Paragraph (3)(A) brings forward 42 U.S.C. 3631(b) and subparagraph (B) of section 245(b)(4) insofar as it relates to those activities covered in section 245(b)(2). No substantive change has been made.

Paragraph (2)(B) brings forward 42 U.S.C. 3631(c) and that part of section 246(b)(5) that deals with aiding or encouraging others to participate in the benefits or activities described in section 245(b)(2). As under section 1503(a)(6), the word "person" has been substituted for "citizen" in order to broaden the coverage of the provision.[101]

The conduct in this section (as in the preceding section) is using force or threat of force. Since no culpability standard is specifically set forth herein, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[102]

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[98] It should also be clear that the word "sex" is used, as it is in current law, to mean "gender" rather than "sexual preference." See *DeSantis* v. *Pacific Telephone and Telegraph Co., Inc.*, 608 F.2d 327, 329-330 (9th Cir. 1979) (the prohibition in Title VII of the Civil Rights Act "applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.")

[99] The word "advantages," which is in a list of terms at the beginning of the subparagraph has been dropped as redundant.

[100] As to the constitutional status of the right to travel interstate. See *Griffin* v. *Breckenridge*, 403 U.S. 88. 105-106 (1971) and cases cited therein; see also Working Papers, pp, 788-789. Following the suggestion of the consultant to the National Commission, no attempt has been made to expand this provision to include foreign travel.

[101] See the discussion of this issue in relation to the preceding section. The Committee also notes that 42 U.S.C. 3631(c) uses the word "discourage" instead of "intimidate". The latter term has been used in consolidating this provision with its counterpart in section 245.

The element that the force or threat of force injured, intimidated, or interfered with another person is a result of conduct. The culpability level is designated as "intentionally," thus requiring proof that the defendant consciously desired to achieve the result.[103]

The remaining elements, which begin with the phrase "because of" or "in order to," constitute alternative particular intents, for at least one of which it must be shown that the conduct was performed.

The element that the right violated under paragraph (2) is federally secured is an existing circumstance. However, since the phrase "in fact" is used to describe the circumstance, no state of mind need be proved with respect thereto.

3. Defense

Subsection (b) of section 1504 provides that it is a defense to a prosecution under subsection (a)(1)(E)(i) that (1) the defendant was the proprietor of the establishment involved or an employee acting on behalf of the proprietor, (2) the establishment was located within a building containing not more than five rooms for rent or hire, and (3) the building was occupied by the proprietor as his residence.

This provision carries forward the so-called "Mrs. Murphy's" exception in section 245(b).[104] It should be noted that the defense does not extend to the "affording" and "aiding" provisions. Hence prosecution would presumably be available, e.g., against (a) third party interference with respect to a black applicant in an exempt establishment; (b) third party interference with an aider of an applicant under the same circumstances; and (c) third party interference with a proprietor who wanted to desegregate. The defense thus applies to prosecution only of a proprietor or his employee.

4. Jurisdiction

This section contains no subsection setting out the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This is identical to the grading under section 1503 and the discussion there should be consulted here.

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[102] See sections 303(b)(1) and 302(b)(1).

[103] See section 302(a)(2); see also, as to the substitution of "intentionally" for "willfully". Working Papers, p. 782.

[104] By contrast the consultant to the National Commission advocated elimination of the exception. See Working Papers, pp. 794-795. The National Commission retained it but with the qualification that it extend only to "lawful action in support" of the guest policies of the establishment. See Final Report, § 1512(d). The Committee believes that the suggested qualification poses difficult problems of proof and interpretation and accordingly has decided to keep the exception in its present form.

SECTION 1505. INTERFERING WITH SPEECH OR ASSEMBLY RELATED TO CIVIL RIGHTS ACTIVITIES

1. In General and Present Federal Law

This section carries forward the final clause of 18 U.S.C. 245(b)(5), with certain modifications. The section is derived from the recommendations of the National Commission.[105]

18 U.S.C. 245(b)(5) punishes[106] whoever, whether or not acting under color of law, by force or threat of force, willfully injures, intimidates, or interferes with any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

The subsection also makes it an offense to attempt to commit any of the aforementioned acts. The phrase "participating lawfully in speech or peaceful assembly" is defined in section 245(b) to exclude the "aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot."

2. The Offense

Subsection (a) of section 1505 provides that a person commits an offense if, "by force or threat of force, he intentionally injures, intimidates, or interferes with another person because he is or has been, or in order to intimidate him or any other person from, participating in speech or assembly opposing a denial of opportunity to participate" (1) in a benefit or activity described in section 1503, or (2) in a benefit or activity described in section 1504, without discrimination on account of race, color, sex, religion, or national origin.

The prefatory part of this subsection is patterned after section 1503. Thus, the discussion there of the terms "force or threat of force," "injures, intimidates, or interferes with," the "because" language, and the deletion of the "attempt" and "whether or not under color of law" clauses is equally applicable.

As in section 1504, the Committee has added the concept of sex discrimination to the forms of discrimination currently proscribed under section 245. Like the addition in section 1504, however, the inclusion of sexually motivated discrimination here is not intended to confer any new right.

One other significant change from existing law is the Committee's elimination, subject to the narrow defense afforded in subsection (b), of the modifier "lawfully". As observed by the consultant to the National Commission, the term[107] "raises irrelevant issues because in criminal law we do not normally concern ourselves with the question whether the victim has clean hands, apart from self defense concepts. If taken literally, the "lawfully" requirement could even prevent prosecution under 18 U.S.C. 245 of a murderer whose "peaceful assembly" victims were operating in violation of a valid permit requirement. . . . If the word is deleted from the statute, the lawfulness of the protest would no longer be a statutory element of proof." Although the National Commission retained the word,[108] the Committee believes that the considerations advanced by the consultant are generally persuasive and accordingly has deleted the term here,[109] as it did in relation to the "aiding or encouraging" branch of section 245(b)(5), carried forward in section 1503.[110] Thus, under this section it will not be an element of the offense that the individuals participating in speech or assembly were doing so lawfully. At the same time, the Committee added a defense discussed below to make it clear that there is no intent to eliminate appreciation of the normal defenses generally available under case law for protection of persons or property from unlawful force, e.g., a defense of self-defense.

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[105] See Final Report, § 1515.

[106] As has been noted in relation to the two preceding sections, the penalty prescribed is normally up to one year in prison, but it rises to a maximum of ten years if bodily injury results, and to life imprisonment if death ensues from the violation.

[107] Working Papers, pp. 800–801.

Section 245(b)(5), by virtue of the "so participates" phrase, incorporates the element of a discriminatory motive into both sets of activities reached (i.e., those under subsections (b)(1) and (b)(2)), even though a direct interference with an activity described in subsection (b)(1) may be prosecuted without a showing of racial or other form of discrimination. The apparent purpose of Congress in making the discriminatory motivation requirement applicable generally to interference with the designated kinds of speech or assembly was to limit the range of Federal auxiliary jurisdiction overlap with local jurisdiction with respect to local violence.[111] However, the Committee deems the difference in the elements of the offenses between the direct interferer and the indirect interferer who breaks up an assembly supportive of section 245(b)(1) activities to be anomalous, and consequently has—following the recommendation of the National Commission—deleted the requirement of a discriminatory motivation as to those benefits or activities described in section 1503 (which carries forward subsection (b)(1) of section 245), while retaining it as to the activities described in section 1504 (which brings forward subsection (b)(2) of section 245), where discriminatory purpose is also an element of a direct interference offense. A similar resolution of the issue was adopted by the Committee in section 1503 with regard to afforders and aiders, and the discussion under that section is pertinent here.

The Committee has refrained from expanding the list of rights protected beyond that in present law "absent a convincing reason for extending Federal penal jurisdiction to make a Federal case out of every brawl between opposing demonstrators on political, social, economic, and international issues."[112]

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[108] See Final Report, § 1515.

[109] The New York City Bar Association's Special Committee also recommended the deletion of the term "lawfully." See Hearings, p. 7742.

[110] The Committee has also deleted the separate definition of "participating lawfully," etc. in section 245(b), a deletion recommended by the National Commission on grounds independent of the decision whether to retain the "lawfully" qualification. See Working Papers, p. 803.

[111] See Working Papers, p. 801.

[112] See Final Report, § 1515. Comment, p. 162. The Committee also notes that it has not reenacted that part of 18 U.S.C. 245(c) providing that: "Nothing in this section shall be construed so

The conduct in this offense is acting "by force or threat of force." Since no culpability standard is designated herein, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of his actions.[113]

The fact that the force or threat thereof injured, intimidated or interfered with another person is a result of conduct. The culpability level is prescribed as "intentionally," thereby requiring proof that the offender consciously desired to cause the result.[114]

The remaining elements, which begin with the phrase "because of" or "in order to," state the particular alternative purposes for which it must be proved that the conduct was performed.

3. Defense

Subsection (b) expressly provides a defense to prosecution under this section that (1) the other person was acting unlawfully, (2) the force or threat of force was intended to stop or mitigate the unlawful act in protection of a person, or in protection of property in a person's custody or possession, and (3) the force was limited to the degree reasonably necessary for that purpose. The defense is designed to reach the situation, e.g., in which a property owner, using reasonable force, physically removed or threatened to remove a person who was trespassing on his property while engaging in civil rights activities covered by the section. However, it would clearly not reach, e.g., acts of shooting at demonstrators who, in the course of an otherwise lawful march, acted unlawfully in causing minor damage to the property of bystanders. This merely makes explicit what would otherwise have been implicit— that the fact that Congress has altered the current law in this section by making it a crime to interfere with an individual exercising a right of speech or assembly in an *unlawful* manner does not abrogate the common law defenses for protection of person or property.

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). As noted above, this is equivalent to the ordinary maximum penalty authorized under 18 U.S.C. 245.

SECTION 1506. STRIKEBREAKING

1. In General and Present Federal Law

This section is designed to continue the prohibition in 18 U.S.C. 1231 against the obstruction of or interference with picketing or

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as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State." The provision is superfluous in light of the justification defenses, in present law, continued by section 501. See Working Papers, pp. 804-805.

[113] See sections 303(b)(1) and 302(b)(1).

[114] See section 302(a)(2).

employee organizational or collective bargaining rights by importing strikebreakers from another State or country. 18 U.S.C. 1231 punishes by up to two years in prison whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of the rights of self-organization or collective bargaining. It also punishes any person who is knowingly transported or who travels in interstate or foreign commerce for any of the purposes above. There have been no reported prosecutions under this section, perhaps because potential violators have found no difficulty in recruiting local strikebreakers; but the Committee believes that the statute may nevertheless be useful in certain situations and accordingly has continued it in this section.

2. The Offense

Subsection (a) provides that a person commits an offense if, by force or threat of force, he intentionally obstructs or interferes with (1) peaceful picketing by employees in the course of a labor dispute affecting wages, hours, or conditions of labor, or (2) the exercise by employees of the rights of self-organization or collective bargaining.

The conduct in section 1506 is the resort to force or threat of force. Since no culpability standard is specifically stated, the applicable state of mind to be proved is at least "knowing," i.e., that the actor was aware of the nature of his actions.[115]

The element that the force or threat obstruct or interfere with the labor activities described in paragraph (1) or (2) is a result of conduct. The culpability level is prescribed as "intentional", thus requiring proof that the actor consciously desired to cause the result.[116]

It should be noted that whereas the first paragraph of 18 U.S.C. 1231 punishes the transportation in commerce only of persons "employed . . . or to be employed", that element has been deleted from this section. Thus, under section 401 (Liability of an Accomplice) a person would be guilty of an offense if he aided or caused a person to be transported for a purpose prohibited by this section, irrespective of whether the other person was to be hired by the organization involved in or affected by the labor dispute.[117]

3. Jurisdiction

There is Federal jurisdiction over the offense described in this section if the person moves across a State or United States boundary with intent to commit the offense. This maintains the current reach of Federal jurisdiction under 18 U.S.C. 1231.

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[115] See sections 303(b)(1) and 302(b)(1).

[116] See section 302(a)(2).

[117] The same result could be reached under 18 U.S.C. 1231 today by application of 18 U.S.C. 2 to the second paragraph of section 1231, which punishes strikebreakers themselves who travel in commerce for one of the prohibited purposes, without regard to their status as employees or prospective employees.

4. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This reduces the present penalty level in 18 U.S.C. 1231; the Committee deemed this preferable to classifying the offense as a three-year (Class E) felony.

SUBCHAPTER B.—OFFENSES INVOLVING POLITICAL RIGHTS

(Sections 1511-1518)

This subchapter deals with offenses involving the electoral process. Currently, legislation regulating voting and registration through the use of the criminal sanctions is spread over several titles of the United States Code, most of it being found in 2 U.S.C. 241-256 (corrupt practices legislation); 5 U.S.C. 1501-1508 and 7321-7327 (Hatch Act provisions); 18 U.S.C. 241, 242, 592-613 (Civil Rights Act, corrupt practices legislation, Hatch Act provisions); and 42 U.S.C. 1973 i(c) (Voting Rights Act).

The approach the Committee has taken is to select for retention in title 18 those political prohibitions which touch on conduct reprehensible enough and also clear enough to be handled effectively through the penal process. The same approach was taken by the National Commission.[1] The result is a series of proposed sections designed to protect the electoral process. In this respect, this subchapter differs from the preceding subchapter. The focus of this subchapter is on the electoral process and the right to vote,[2] while subchapter A sweeps more broadly in protecting in general the civil rights of all persons as guaranteed by the Constitution and the laws of the United States.

Matters covered by this subchapter are obstructing an election (section 1511); obstructing registration (section 1512); obstructing a political campaign (section 1513); interfering with a Federal benefit for a political purpose (section 1514); misusing authority over personnel for a political purpose (section 1515); soliciting a political contribution by a Federal public servant or in a Federal building (section 1516), and making an excess campaign expenditure (section 1517). Section 1518 contains certain definitions applicable to the foregoing sections.

SECTION 1511. OBSTRUCTING AN ELECTION

1. In General

Section 1511 is designed to accomplish three basic purposes. First, it creates the specific offense of voting fraud usually prosecuted under the general language of 18 U.S.C. 241 (conspiracy against rights of citizens). Second, it encompasses the present vote bribery statute, 18 U.S.C. 597. Third, it embraces in its general language the obstruction of elections penalties of the Voting Rights Act of 1965.[3] Unlike the proposal of the National Commission,[4] the section does not reach State elections but is confined in its scope to Federal elections or mixed Federal and State elections.

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[1] See Working Papers. pp. 814-815.

[2] See generally, Hearings, pp. 6792-6793 (testimony of John C. Keeney, Department of Justice).

2. Present Federal Law

The principal statute for prosecuting election fraud is 18 U.S.C. 241. That statute, enacted in 1870 to enforce the guarantees of the Fourteen and Fifteen Amendments to the Constitution,[5] makes it a ten-year felony to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him under the Constitution or laws of the United States. Under this section, the government has successfully prosecuted conspiracies to stuff a bollot box with forged ballots,[6] to impersonate qualified voters,[7] to alter legal ballots,[8] to prevent voters from voting,[9] to fail to count votes and to alter the votes counted,[10] to discriminate on account of race,[11] and to cast illegal absentee ballots.[12] Section 241 reaches fraud even when the result does not affect the outcome of the election, or when the number of fraudulent ballots represents an infinitesimal fraction of the number of votes cast.[13] Virtually the only situation which this statute has been held not to cover is a conspiracy to bribe voters, the Supreme Court holding that when Congress repealed certain bribery laws in 1894, it impliedly also excluded bribery from this section.[14]

Furthermore, while section 241 speaks in terms of injuring or intimidating "any citizen" in the free exercise of any right, it has been held that the statute reaches conduct affecting the integrity of the Federal electoral process as a whole without showing an act relating to a particular voter or official. In *United States* v. *Nathan,*[15] the defendants conspired to cast false ballot in favor of the Democratic candidate for Congress, and cast 71 such ballots. Overruling the defense that the defendants lacked specific intent regarding particular voters, the court said:

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[3] 42 U.S.C. 1973 i(c).

[4] Final Report, § 1531.

[5] 16 Stat. 141.

[6] *United States* v. *Saylor,* 322 U.S. 385 (1944): *United States* v. *Nathan,* 238 F.2d 401 (7th Cir.), cert. denied, 353 U.S. 910 (1957).

[7] *Crolich* v. *United States,* 196 F.2d 879 (5th Cir.), cert. denied 344 U.S. 830 (1952).

[8] *United States* v. *Powell,* 81 F. Supp. 288 (E.D. Mo. 1948).

[9] *United States* v. *Wilson,* 176 F.2d 184 (8th Cir.), cert. denied, 338 U.S. 870 (1949).

[10] *United States* v. *Ryan,* 99 F.2d (8th Cir. 1938), cert. denied 306 U.S. 635 (1939); *Walker* v. *United States,* 93 F.2d 383 (8th Cir. 1937), cert. denied, 303 U.S. 644 (1938).

[11] *Exparte Yarbrough,* 110 U.S. 651 (1884); *Guinn* v. *United States,* 238 U.S. 838 (1915); *United States* v. *Classic,* 313 U.S. 299 (1941).

[12] *United States* v. *Chandler,* 157 F. Supp. 753 (S.D.W.Va. 1957): *Fields* v. *United States,*228 F. 2d 544 (4th Cir. 1955), cert. denied, 350 U.S. 982 (1956); *United States* v. *Weston,* 417 F2d. 181 (4th Cir. 1969), cert. denied, 396 U.S. 1062 (1970).

[13] *Pritchard* v. *United States,* 181 F.2d 326 (6th Cir.), aff'd 339 U.S. 974 (1950) (per curiam). The Court pointed out: "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial." *Id.* at 331.

[14] *United States* v. *Bathgate,* 246 U.S. 220 (1918).

[15] *Supra* note 6.

> [I]t is immaterial that the defendants were without knowledge of the constitutional rights of citizens. When they acted in concert to pollute the ballot box they acted in reckless disregard of such rights and must be held to the consequences.[16]

In short, the court ruled that the statute reaches situations involving the electoral process, e.g., general ballot box stuffing, apart from any intent or act relating to *any particular* voter.

With respect to the *scienter* required under section 241, the courts have held that the same requirement of a specific intent to deprive another of a Federal constitutional right, determined in *Screws* v. *United States,*[17] to apply under 18 U.S.C. 242, applies also under this section.[18] However, while the accused must be shown to have had a specific intent to deprive a person of a Federally protected right, if need not be proved that he knew that the right was in fact constitutionally protected. As stated in *Screws,* "[t]he fact that the defendants may not have been thinking in constitutional terms is not material where their aim was . . . to deprive a citizen of a right and that right was protected by the Constitution." [19] In *United States* v. *Guest,*[20] the Supreme Court indicated that the specific intent element under section 241 was automatically satisfied by proof of the conspiracy, since a conspiracy by its very nature requires knowledge of the criminal objectives.[21]

18 U.S.C. 597 is the present vote bribery statute. It penalizes making or offering to make an expenditure to any person to vote or to withhold his vote for or against any candidate, or soliciting or receiving such an expenditure in consideration of his vote or withholding thereof. The penalty is not more than one-year of prison, but rises to a maximum of ten years "if the violation was willful." This statute clearly reaches the vote bribery situation held by the Supreme Court not to infringe 18 U.S.C. 241. It is limited to candidates for Federal elections, but, as amended by the Federal Election Campaign Act of 1971, 18 U.S.C. 591(b), extends to candidates in primary as well as general elections.

Finally, 42 U.S.C. 1973i(c), enacted as part of the Voting Rights Act of 1965, punishes by up to five years in prison whoever pays, offers to pay, or accepts payment either for registering to vote or for voting at a Federal election.[22] The statute has been sustained as constitutional.[23]

3. The Offense

Subsection (a) provides that a person commits an offense if, "in connection with a primary, general, or special election to nominate or elect a candidate for a federal office," he (1) obstructs or impairs the lawful conduct of such election, (2) offers, gives, or agrees to give anything of value to another person, or a member of that other person's immediate family, for or because of that person's voting, refraining from voting, or voting for or against such candidate, or (3) solicits,[24] demands, accepts, or agrees to accept anything of value for or because of his voting, refraining from voting, or voting for or against such candidate.

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[16] *Id.* at 407; see also *United States* v. *Weston, supra* note 12.

[17] 325 U.S. 91 (1945).

[18] See *United States* v. *Guest,* 383 U.S. 745 (1966); *United States* v. *O'Dell,* 462 F.2d 224, 232-233 (6th Cir. 1972).

[19] *Supra* note 17, at 106.

[20] *Supra* note 18, at 753-754.

[21] It has been held that this section does not require proof of an overt act to establish the offense. See *Williams* v. *United States,* 179 F.2d 644, 649 (5th Cir. 1950), aff'd on other grounds, 341 U.S. 70 (1951); *United States* v. *Morado* 454 F.2d 167, 169 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

[22] It also proscribes the giving of false information as to one's name, address or period or residence in the voting district in order to qualify for registration.

[23] See *United States* v. *Lewin,* 467 F. 2d 1132 (7th Cir. 1972).

This section is designed to be a general vote bribery and vote fraud statute. The term "Federal office" is broadly defined in section 1519 to mean the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.[25]

In one respect, however, this section dealing specifically with obstruction of an election is meant to be more narrow than existing law may be under the civil rights statutes. In *United States* v. *Anderson*[26] the Fourth Circuit ruled that 18 U.S.C. 241 reaches a conspiracy to deprive a person of his right to vote at a State election. The court stated:

> [T]he Federal government has power not only to punish conspiracies to poison federal elections, but has power also to punish conspiracies, involving state action at least, to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections.[27]

Paragraph (1) is not intended to extend this far.[28] It would not reach the obstruction of an election involving only candidates for State office. It would reach, however, the obstruction of any election in which a candidate for Federal office is on the ballot. Thus, even though the defendant's acts are directed at the State portion of a mixed Federal-State election, i.e., at the candidates for State office, the conduct is cognizable under this section because it is "in connection with (an) . . . election to nominate or elect a candidate for a federal office."

It is the view of the Committee that the presence of the names of candidates for Federal office on the ballot of an election obstructed or impaired provides a sufficient constitutional nexus for involvement by the Federal government, even under a narrow reading of *United States* v. *Guest, supra, Katzenbach* v. *Morgan,*[29] *and Oregon* v. *Mitchell.*[30] At stake is the integrity of the election process. Obstruction of a mixed election, even if directly aimed only at the State portion, nevertheless permeates the entire election, thwarting the integrity of the process by which all candidates are elected.

Paragraph (1)—obstructing the conduct of an election—is the most general of the three offenses here described. The conduct is obstructing or impairing the lawful conduct of an election.[31] Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[32] The fact that the election was in connection with an election for a Federal office is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the election was of the type covered herein.[33]

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[24] "Solicits" does not mean the conduct proscribed in section 1003 (Criminal Solicitation), and is defined to bear its dictionary meaning of "importune," "approach with a request or plea," or "try to obtain by asking for." See section 111.

[25] The definition is derived from 18 U.S.C. 591 (c).

[26] 481 F.2d 685, 698-701 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974).

[27] *Id.* at 700-701.

[28] The National Commission proposal would have reached *all* elections, both State and Federal. § 1531.

[29] 384 U.S. 641 (1966).

[30] 400 U.S. 112 (1970). See Working Papers pp. 772-776, 813.

Unlike the offenses defined in paragraphs (2) and (3) of this section, there need not be any proof that the conduct obstructed or impaired a *particular* voter's ballot to obtain a conviction under this paragraph. Instead, by focusing on the "lawful conduct" of the election, rather than on an individual's rights, as does 18 U.S.C. 241, paragraph (1) makes it clear that the emphasis is on protecting the *integrity* of the *election process.* While section 241 has been interpreted to reach situations where there is no act directly related to any particular voter,[34] paragraph (1) places this interpretation on a firm basis to give fair warning.[35] Accordingly, this paragraph, being directed toward the basic integrity of the election process, reaches any interference with the election process, such as general ballot box stuffing, tampering with machines, absentee ballot irregularities, interference with election officials, etc., even if a particular voter interfered with cannot be identified.

Paragraph (2) is more specific than the first paragraph. It makes an offense of vote frauds or the selling of votes typically prosecuted under either the general language of 18 U.S.C. 241 or the more particular 18 U.S.C. 597. The elements of the offense are: (a) offering, giving, or agreeing to give (b) to another person (c) anything of value (d) for or because of any person's voting, refraining from voting, or voting for or against (e) a candidate for Federal office.

Offering, giving, or agreeing to give constitute the conduct proscribed. Because no level of culpability is specifically set forth, the state of mind that must be proved is at least "knowing" with respect of this element.[36] The element that anything of value is offered, etc. "for or because of any person's voting, refraining from voting or voting for or against such candidate" states the specific intent that must be shown to have accompanied the defendant's conduct. The remaining elements are attendant circumstances requiring at least a "reckless" state of mind.[37]

The term "anything of value" is generally defined in section 111. For the purposes of this subchapter, the scope of the phrase is limited in section 1519 to exclude "non-partisan physical activities or services to facilitate registration or voting." The purpose of the exclusion is to remove from the scope of the offense the transfer of money to finance ordinary "get-out-the-vote" campaigns.[38]

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[31] In addition to the statutes previously discussed, this formulation would also cover the seldom invoked prohibition on bringing troops to the polls. See 18 U.S.C. 592.

[32] See sections 303(b)(1) and 302(b)(1).

[33] See sections 303(b)(2) and 302(c)(1).

[34] *United States* v. *Nathan, supra* note 6.

[35] See Working Papers, pp. 812–813.

[36] See sections 303(b)(1) and 302(b)(1).

[37] See sections 303(b)(2) and 302(c)(1).

[38] Cf. Working Papers, p. 814; see also 18 U.S.C. 591(e)(5).

Paragraph (3), like the preceding paragraph, is derived from 18 U.S.C. 597. It is intended to be a general vote bribery statute with respect to candidates for Federal office.

The elements of an offense under this paragraph are: soliciting, demanding, accepting, or agreeing to accept anything of value for or because of a person's voting, refraining from voting, or voting for or against a candidate for Federal office. Soliciting, demanding, accepting or agreeing to accept are conduct elements and require a minimum culpability level of "knowing" under the principles of section 303(b). The "for or because of" element is a specific intent requirement to which the analysis under paragraph (2) applies. The remaining elements are attendant circumstances requiring at least a "reckless" state of mind.

The definitions of the elements are the same as those prescribed for paragraph (2).

4. Bar to Prosecution

The bar to prosecution in subsection (b) has two basic purposes. First, it is designed to clarify the scope of subsection (a)(1) by eliminating from its purview conduct that is regulated by the Federal Election Campaign Act. As noted above, subsection (a)(1) is intended to cover such election misconduct as ballot box stuffing and tampering with machines, not the often highly technical violations governed by the F.E.C.A. Second, the bar has the effect of confining the application of subsection (a)(1) to serious forms of obstruction or impairment of elections outide the ambit of the F.E.A.C. The Committee intends those acts which are violations of the Federal Election Campaign Act to be vindicated pursuant to the array of remedies found in that statute, but in no event will such conduct constitute a felony.

5. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction exists over the offense. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).[39]

6. Grading

An offense under this section is graded as a Class E felony (up to three years in prison).

Section 1511 is graded as a felony in recognition of the importance of the right to vote to our democratic form of government. However, it was not felt necessary to grade the offense as high as 18 U.S.C. 241 and 597, which carry a maximum sentence of imprisonment for ten years. Obstruction of an election, unlike other kinds of conduct associated with the deprivation of rights protected by 18 U.S.C. 241, is seldom accompanied by force or violence. Furthermore, the grading reflects the sentencing experience of recent cases involving vote fraud.[40]

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[39] Since an election involving a candidate for Federal office is a Federal government function, there is extraterritorial jurisdiction over an offense under this section by virtue of section 204(c)(7) if the offense is committed by a national or resident of the United States.

[40] See *United States* v. *Weston supra* note 12; *United States* v. *Morado*, 454 F.2d 167 (5th Cir.). cert. denied, 406 U.S. 917 (1972).

SECTION 1512. OBSTRUCTING REGISTRATION

1. In General and Present Federal Law

Section 1512, by and large, parallels the previous section. However, while section 1511 focuses on the election, section 1512 is directed at an earlier point in the process, *viz.,* registration for voting.

Section 1512 is based on 42 U.S.C. 1973i(c). That statute prohibits (1) giving false information in order to establish eligibility to vote; (2) conspiring with another to encourage the latter's false registration; and (3) paying or receiving payment for registering or voting.[41] Although section 1973i(c) reaches giving false information in connection with registration and buying registration for voting, it does not extend to registration irregularities generally.

2. The Offense

Subsection (a) provides that a person commits an offense if, in connection with registration to vote at a primary, general, or special election to nominate or elect a candidate for a Federal office, he (1) obstructs or impairs the lawful conduct of such registration, (2) offers, gives, or agrees to give anything of value to another person, or a member of that other person's immediate family, for or because of that person's registering to vote, (3) solicits, demands, accepts, or agrees to accept anything of value for or because of his registering to vote, or (4) gives information, that he knows is false, to establish his eligibility to vote. "Solicits" is intended to have the same meaning as in the previous section.

The first three paragraphs of the offense parallel the paragraphs of section 1511. The only difference is the substitution of the word "registration" for "election". Because the elements are, by and large, identical, the discussion of the requirements of proof under section 1511 suffices for this section also.

Paragraph (4) in essence would reenact the first clause of 42 U.S.C. 1973i(c), which makes it an offense for a person to "knowingly or willfully give false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register. . . ."

The conduct in paragraph (4) is giving information. Since no culpability standard is specifically set forth, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was giving information.[42] The fact that the information is false is an existing circumstance. The culpability is explicitly designated as "knowing," thus requiring proof that the actor was conscious of or believed in its falsity. This carries forward the *scienter* requirement under 42 U.S.C. 1973i(c).[43] The element that the information is given "to establish eligibility to vote" states the specific intent that must be shown to have accompanied the actor's conduct. As in the previous section, the fact that the registration is to vote in an election for a Federal candidate is an existing circumstance as to which the applicable state of mind to be proved is, at a minimum, "reckless."[44]

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[41] The vote buying aspect of 42 U.S.C. 1973i(c) is incorporated in section 1511.

[42] See sections 303(b)(1) and 302(b)(1).

[43] See *United States* v. *Barker,* 514 F.2d 1077 (7th Cir. 1975).

[44] See sections 303(b)(2) and 303(c)(1).

3. Bar to Prosecution

Subsection (b) parallels the bar to prosecution of section 1511 based on regulation of the prohibited conduct under the Federal Election Campaign Act of 1971. The discussion of that provision under section 1511 applies here as well.

4. Jurisdiction

No subsection indicating the circumstances under which Federal jurisdiction attaches is contained in this section. Accordingly, under section 201(b)(2), there is Federal jurisdiction over an offense described in this section if it is committed within the general or special jurisdiction of the United States.[45]

5. Grading

An offense under this section is graded as a Class E felony carrying a maximum three-year term of imprisonment, as compared with the five-year maximum presently authorized under 42 U.S.C. 1973i(c). The interest of the Federal government is directly concerned with the integrity of voting at all Federal elections. Registration to vote is thus of critical Federal concern since illegal registration may lead to illegal voting and a failure to permit lawful registration may deprive a person of his right of sufferage altogether.

SECTION 1513. OBSTRUCTING A POLITICAL CAMPAIGN

1. In General and Present Federal Law

The purpose of this section is to safeguard the Federal election campaign process. It is intended to be a response to the abuses that arose out of the 1972 Presidential compaign. In this respect, it criminalizes conduct the purpose of which is to obstruct a campaign of a candidate for Federal office.

The section contains two offenses, both of which are new. Paragraphs (1) and (2) would make it an offense to engage, during a campaign preceding a primary, general, or special election for a Federal office, in conduct which respectively constitutes (1) any crime defined in title 18, United States Code, or (2) a felony under the laws of the State in which the conduct occurs, if the conduct is accompanied with an intent to influence the outcome of such election.[46]

This section is closely related to sections 1511 and 1512, but whereas those sections are concerned with the actual election and the registration process, this section focuses on the campaign preceding the election.

The Committee is aware that under a liberal construction of section 1511 it could be argued that the offenses in this section are unnecessary since the conduct there covered could be encompassed within a broad reading of the phrase "in connection with a primary, general, or special election" in the former section. The Committee believes, however, that a separate section is appropriate to insure that illegal acts done either to hinder or obstruct the political campaign of a candidate or to further the political campaign of a candidate do not go unpunished. There is no equivalent statute under existing law, although arguably such acts could be prosecuted under 18 U.S.C. 241, which makes it a felony to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him under the Constitution or laws of the United States. However, section 241 has apparently not been used in regard to illegal obstruction activities during campaigns, and in any event that section cannot be utilized where there is no conspiracy involved.

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[45] See also the discussion in relation to section 1511, which is applicable here, as to extraterritorial jurisdiction under section 204(c)(7).

[46] A somewhat related offense prohibiting the anonymous publication of a statement concerning a candidate for Federal office, is contained in 2 U.S.C. 441d (formerly 18 U.S.C. 612).

In effect, these two paragraphs extend Federal jurisdiction to any crime that is committed during a Federal campaign with the intent to influence the outcome of the Federal election. Federal jurisdiction over the break-in of the Democratic headquarters in the Watergate Hotel was purely fortuitous. The Federal government had jurisdiction because the hotel was located in the District of Columbia. If the same break-in for the same purposes had occurred in another State—for instance in Miami during the Democratic National Convention—the Federal government would not have had jurisdiction despite the overwhelming Federal interest. The proposed Code cures this defect by vesting jurisdiction in the Federal government over any felony relating to a Federal campaign.

2. The Offense

Subsection (a) of section 1513 provides that a person commits an offense if, during a campaign preceding a primary, general, or special election to nominate or elect a candidate for a Federal office, and with intent to influence the outcome of such election, he:

> (1) engages in conduct constituting a crime under any section of this title; or
>
> (2) engages in conduct constituting a felony under the law of the state in which the conduct occurs.

The term "Federal office" is defined in section 1518(b).

Paragraph (1) proscribes engaging in conduct constituting a crime under any section of this title. The term "crime" is defined in section 111 to exclude an infraction.

It makes no difference that Federal jurisdiction over the underlying offense may be lacking, since jurisdiction is not an element of the offense.[47] Thus, if a defendant, with the requisite intent, engaged in conduct constituting a criminal entry as defined in section 1712 but there was no Federal jurisdiction under section 1712(c), he could still be prosecuted for violating this section.

Paragraph (2) proscribes engaging in conduct which constitutes a felony under the laws of the State in which the conduct occurs. Conduct which is considered only a misdemeanor under the State law in question would not be covered by section 1513. While this may result in some disparity,[48] the Committee believes that only that conduct which the States themselves consider to be serious should be incorporated into section 1513.

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[47] See sections 102 and 201(c).

[48] For example, some states have statutes which regulate political campaign expenditures. See West's Calif. Ann. Elec. Code, §§ 11504 (1961); Fla. Stat. Ann. §§ 106.08–106.21, § 991172 (1974 Supp.): McKinney's N.Y. Ann. Elec. Law § 321, 322 (1964); Purdon's Penn. Stat. Ann. 25 P.S. § 3226 (1963); Vernon's Ann. Texas Stat. Elec. Code, Art. 14.03 (1967). However, the penalties

The conduct element in this offense under paragraphs (1) and (2) is "engages in conduct." Since no culpability level is set forth in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[49] Under the operation of section 303(d)(1)(A), it is not, however, necessary to show that the defendant was conscious of the fact that his conduct was made criminal by a section of this title or was a felony under State law; it is only essential that he be shown to have been aware that he was performing the conduct.

The general element that the conduct occurred "during a campaign," etc., is an existing circumstance as to which the applicable state of mind is "reckless."[50]

The final element to this offense is that the conduct must be engaged in with the intent to influence the outcome of the defined election. This describes the purpose the defendant must be proved to have had when he engaged in one of the types of conduct referred to in paragraphs (1) or (2). For example, if a defendant assaults a candidate for Federal office for the purpose of preventing him from campaigning or to intimidate him from campaigning, he would be guilty of under this section since his intent would be to influence the outcome of the election. On the other hand, if the defendant assaults such a candidate for the purpose of avenging some personal grievance there would be no violation of this section since the defendant's intent was not to influence the outcome of the election but merely to right a personal wrong. Likewise, a person who breaks into a candidate's campaign headquarters for the purpose of interfering or obstructing the candidate's campaign would be guilty of a violation of this section but a person who breaks in for the sole purpose of stealing money would not be guilty hereunder.

3. Jurisdiction

This section contains no subsection indicating the circumstances in which Federal jurisdiction attaches to an offense herein. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).[51]

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). In addition it should be noted that under section 2201, where the defendant is an "organization" (a term defined in section 111), the maximum fine that may be imposed is $1,000,000. This is designed to provide an effective deterrent to illegal campaign activities, of the sort covered here, by relatively af-

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range from a five-year felony in Texas (See Vernon's Ann. Texas Stat. Elec. Code, Art. 14.06 (1967)) to only a misdemeanor in Pennsylvania (See Purdon's Penn. Stat. Ann. 25 P.S. § 3544 (1963)). Thus, a person who violated the Texas campaign expenditure provision with the requisite intent during a Federal election campaign could be found guilty under section 1513, but not a person who violated the Pennsylvania campaign expenditure provision.

[49] See sections 303(b)(1) and 302(b)(1).

[50] See sections 303(b)(2) and 302(c)(1).

[51] See also the discussion in relation to section 1511, which is applicable here, as to extraterritorial jurisdiction under section 204(c)(7).

fluent political organizations that might otherwise be tempted to treat any fine as an insignificant cost of "business."

SECTION 1514. INTERFERING WITH A FEDERAL BENEFIT FOR A POLITICAL PURPOSE

1. In General

The purpose of this section is to depoliticize the granting or withdrawal of Federal benefits. The section makes it an offense to grant, withhold, or deprive a person of the benefit of a Federal program, or otherwise to use official authority regarding such a program, with intent to influence another person in exercising his right to vote. It expands upon the theory underlying existing legislation, which refers to the deprivation of now obsolete "work relief" appropriations, to cover all Federal benefits and government contracts.[52]

2. Present Federal Law

This section is derived primarily from 18 U.S.C. 594, 595, and 598, all originally portions of the Hatch Act.

18 U.S.C. 594 makes it an offense to intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such person to vote for a candidate for Federal office.

18 U.S.C. 595 makes it an offense for a person employed in an administrative position by the Federal, State, or local government, in connection with any activity financed in whole or in part by loans or grants made by the United States, to use his official authority for the purpose of interfering with the election of a candidate for Federal office. There is an exception for employees of educational or research institutions supported in whole or in part by any "recognized" religious, philanthropic, or cultural organization.

18 U.S.C. 598 makes it an offense to use funds appropriated by Congress for work relief, or for increasing employment by means of loans and grants for public-works projects, or to exercise or administer "any authority conferred by an Appropriation Act" for the purpose of interfering with, restraining, or coercing an individual in the exercise of his right to vote.

These offenses are all misdemeanors carrying a one-year maximum penalty. During the more than thirty years they have been on the books, almost no cases have been reported under their provisions.

3. The Offense

Subsection (a) of section 1514 provides that a person commits an offense if, with intent to interfere with, restrain, or coerce another person in the exercise of his right to vote at a primary, general, or special election to nominate or elect a candidate for a Federal, State, or local office,[53] he (1) grants or threatens to grant to any other person, (2) withholds or threatens to withhold from any person, (3) deprives or threatens to deprive any other person of, or

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[52] See Final Report, §1532; Working Papers, p. 818.

[53] The term "federal office" is defined in section 1518.

(4) otherwise uses or purports to be using his official authority with respect to, the benefit of a Federal program or a federally supported program, or a Federal government contract.

As previously indicated, this section consolidates and expands upon the provisions of 18 U.S.C. 594 and 598. The exception in 18 U.S.C. 595 has been dropped. In addition, the Committee has enlarged the coverage of present law to reach the granting of a benefit for the purpose of interfering with a person's right to vote, as well as the withholding or deprivation of a benefit for such purpose.[54] Moreover, by expressly including primary elections, this section is designed to overcome the holding in *United States* v. *Malphurs,*[55] that the Hatch Act does not extend to primary elections.

The conduct in this section is granting to, withholding from, depriving another of, or using or purporting to be using official authority with respect to, a benefit (or threatening to do any of the first three). Since no culpability standard is specifically set forth, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the natue of his actions.[56] The fact that the benefit involved derived from a Federal program or a federally-supported program, or a Federal government contract is an existing circumstance. As no culpability level is set forth in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e. that the offender was conscious of but disregarded the substantial risk that the circumstances existed.[57]

The remaining element of an intent to interfere with, restrain, or coerce another person in the exercise of his right to vote at a primary, general, or special election, etc., states the specific purpose that must be proved to have accompanied the actor's conduct. This intent requirement closely follows existing law. 18 U.S.C. 594 requires a "purpose of interfering with the right . . . to vote"; 18 U.S.C. 595 requires a "purpose of interfering with . . . the nomination or election"; and 18 U.S.C. 598 requires a "purpose of interfering with . . . any individual in the exercise of his right to vote at any election."

4. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction attaches to an offense herein. Hence, Federal jurisdiction is governed by the provisions of Section 201(b)(2).

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison).

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[54] Cf. 18 U.S.C. 600 and 601.

[55] 41 F. Supp. 817 (S.D. Fla. 1941), vacated on other grounds. 316 U.S. 1 (1942).

[56] See sectins 303(b)(1) and 302(b)(1).

[57] See sections 303(b)(2) and 302(c)(1).

SECTION 1515. MISUSING AUTHORITY OVER PERSONNEL FOR A POLITICAL PURPOSE

1. In General

Section 1515 protects Federal public servants by prohibiting the exercise of control over Federal employment as leverage to obtain political contributions. It thus complements the preceding section which prohibits the exercise of control over Federal program benefits. Section 1515 broadens, or at the least clarifies, 18 U.S.C. 606 from which it is derived by adding "fails to promote" to the list of conduct currently prohibited by that statute.[58]

2. Present Federal Law

18 U.S.C. 606 makes it an offense punishable by up to three years in prison for a Federal employee mentioned in 18 U.S.C. 602 to discharge, promote, degrade, or change the rank or compensation of another Federal employee, or to promise or threaten to do so, for giving or withholding or neglecting to make a political contribution. The persons designated in 18 U.S.C. 602 include a United States Senator, Representative, Delegate, or Resident Commissioner, or a candidate for Congress, individuals elected to such offices, "or an officer or an employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States."

3. The Offense

Subsection (a) of section 1515 provides that a person commits an offense if, as a Federal public servant, he (1) promotes, fails to promote, demotes, or discharges, (2) recommends the promotion, nonpromotion, demotion, or discharge of, or (3) changes in any manner, or promises or threatens to change, the official position or compensation of "another federal public servant, for or because of any person's giving, withholding, or neglecting to make a political contribution."

The term "public servant" is defined in section 111 to mean "an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government, and includes a person who has been elected, nominated, or appointed to be a public servant."[59] Within this ambit, coverage of the persons designated in 18 U.S.C. 602 is complete, except that candidates who are not incumbents are not covered. Since the offense under this section (as well as under 18 U.S.C. 606) assumes that the defendant has the authority to affect employment, coverage of non-incumbent candidate was not deemed necessary Moreover, should a non-incumbent candidate influence a Federal public servant to commit the offense under this section, accomplice (section 401) or coconspirator (section 1002) liability should suffice to reach such person. The same reasoning holds true for a State public servant who influences a Federal public servant to commit an offense hereunder. However, in the reverse situation where a Federal public servant acts to bring about the dismissal of a State public servant, the Committee considered that the conduct should be left for punishment under State law.

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[58] The related misdemeanor statute, 18 U.S.C. 601, as amended in 1976 (P.L. 94-453), which protects both Federal and State employees against various kinds of economic coercion designed to induce them to make a political contribution, is carried forward in title 18 Appendix. See also section 1723 (Blackmail).

[59] The term "federal public servant" is defined to exclude District of Columbia public servants.

The conduct in this section is promoting, failing to promote, demoting, or discharging, or recommending any of the foregoing, or changing or promising or threatening to change the official position or compensation of another. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[60] The elements that the other person was a Federal public servant and that the conduct was performed by an individual "as a federal public servant" are existing circumstances. As no culpability level is specifically designated, the applicable state of mind to be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.

The element that the conduct was done "for or because of any person's giving, withholding, or neglecting to make a political contribution)"[61] states the particular purpose that must be shown to have accompanied the actor's conduct. It is designed to extend the section to those instances where the defendant acted because of the fact that another person, not necessarily the victim, gave, withheld, or neglected to make a political contribution.

4. Jurisdiction

This section contains no subsection indicating the circumstances in which Federal jurisdiction exists over an offense herein. Accordingly, Federal jurisdiction is governed by the provisions of section 201(b)(2).

5. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This is the same as the three-year maximum now authorized under 18 U.S.C. 606. By contrast, the National Commission would have reduced the offense to a misdemeanor.[62]

SECTION 1516. SOLICITING A POLITICAL CONTRIBUTION AS A FEDERAL PUBLIC SERVANT OR IN A FEDERAL BUILDING

1. In General

This section complements the preceding provision. It generally makes it an offense for a Federal public servant to solicit a political contribution from another Federal public servant, to make a political contribution to a Federal public servant who solicits such a contribution, or to solicit or receive a political contribution in a Federal building or facility. Like current law, section 1516(a)(1)(B) prohibits certain unsolicited political contributions by Federal public servants.[63]

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[60] See sections 303(b)(1) and 302(b)(1).

[61] The term "political contribution" is defined in section 1518(c) as "anything of value used or to be used for the nomination or election of any person to federal, State, or local office." The phrase "anything of value" is defined in section 111 and section 1518(a).

[62] See Final Report, § 1533.

Although many of the deleterious ramifications of exacting political contributions from Federal public servants are covered by the previous section, the Committee believes that this section is necessary to protect Federal public servants from political coercion whether or not the coercion ultimately culminates in adverse action affecting employment.

2. Present Federal Law

This section consolidates and somewhat modifies 18 U.S.C. 602, 603, and 607.[64]

18 U.S.C. 602 punishes by up to three years in prison whoever, being a Senator, Representative in, or Delegate or Resident Commissioner to, or a candidate for, Congress, or an officer or employee of the United States, "or a person receiving any salary or compensation from money derived from the Treasury of the United States," solicits, receives, or is in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political purpose whatever, from any other such officer, employee or person.

The language "any political purpose whatever" has been broadly construed to extend beyond those political purposes controlled by the United States and to include a State primary election.[65] It has also been held that it is immaterial whether the giver and the recipient of the contribution believed that it was for the same political purpose; so long as the contribution was received for a political purpose, the receiver is guilty.[66]

18 U.S.C. 603 makes it a three-year felony to solicit or receive any contribution for any political purpose in any room or building occupied in the discharge of official duties by any person mentioned in 18 U.S.C. 602, or in any navy yard, fort, or arsenal.[67]

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[63] See also Final Report, § 1534.

[64] It should be noted that title 2, as a result of the recent amendments to the Federal Election Campaign Act (P.L. 94-283), contains a number of other prohibitions dealing with improper political contributions and related improper campaign activities that formerly were in title 18, 2 U.S.C. 441a (formerly 18 U.S.C. 608) places various limitations on contributions, in connection with a campaign for nomination or election, by individuals, candidates, and political parties and committees. Compare *Buckley* v. *Valeo*, 424 U.S. 1 (1976). 2 U.S.C. 441b (formerly 18 U.S.C. 610) prohibits contributions by banks, labor organizations, and corporations. See *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972). 2 U.S.C. 441c (formerly 18 U.S.C. 611) prohibits political contributions by government contractors. 2 U.S.C. 441d (formerly 18 U.S.C. 612) prohibits the dissemination anonymously of certain types of political statements. 2 U.S.C. 441e (formerly 18 U.S.C. 613) prohibits political contributions by foreign nationals. 2 U.S.C. 441f (formerly 18 U.S.C. 614) prohibits political contributions in the name of another person. 2 U.S.C. 441g (formerly 18 U.S.C. 615) prohibits contributions of United States or foreign currency exceeding $100 to any candiate in a campaign. 2 U.S.C. 441h (formerly 18 U.S.C. 617) prohibits fraudulent misrepresentations by a candidate that he is acting for or on behalf of another candidate on a matter damaging to such candidate. All these provisions were offenses in title 18. However, as amended and transferred to title 2, they are decriminalized except to the extent that (1) they involve the making, receiving or reporting of a contribution or expenditure having an aggregate annual value of $1,000 or more or (2) the offense consists of a knowing and willful violation of 2 U.S.C. 441(b)(3) (prohibiting coercive solicitations by a segregated fund of a labor organization or corporation to be used for political purposes). In these instances, the conduct is punishable under 2 U.S.C. 441j by up to one year in prison and a fine of $25,000 or 300% of the illegal contribution or expenditure, whichever is greater.

[65] See *United States* v. *Wurzbach*, 280 U.S. 396 (1930).

[66] See *Brehm* v. *United States*, 196 F.2d 769, 771 (D.C.), cert. denied, 344 U.S. 838 (1952).

[67] 18 U.S.C. 604 punishes by up to one year in prison whoever solicits or receives any assessment, subscription, or contribution for any political purpose from any person known to be entitled to or receiving compensation, employment, or other benefit from a Federal work relief or

18 U.S.C. 607 punishes by up to three years in prison whoever, being an officer, clerk, or other person in the service of the United States, gives or hands over to any such officer, clerk, or person, or to any Senator, Member of, or Delegate to, Congress, any valuable thing on account of or to be applied to the promotion of any political object.

There are no cases reported under 18 U.S.C. 607. However, on its face, the section appears to prohibit a Federal employee from making an unsolicited, voluntary political contribution to an incumbent candidate for the Senate or House of Representatives. The Committee does not propose to continue this aspect of the current law.

Significantly, the Civil Service Commission takes the position that Federal employees are entitled to "make a financial contribution to a political party or organization."[68] Thus, under existing law, a Federal employee is apparently free to make a political contribution to an incumbent candidate's political committee or party but not to the candidate himself. One difficulty with the Civil Service Commission compromise, however, is that such a contribution would appear to be a form of "indirect" giving, which is prohibited under 18 U.S.C. 607. Moreover, a Federal employee acting upon his right to make a political contribution may not appreciate the subtleties involved and as a result lose his job.[69]

3. The Offense

Subsection (a) of section 1516 of the reported bill provides that a person commits an offense if (1) as a Federal public servant, he (A) solicits a political contribution from another person who he knows is a Federal public servant, or (B) makes a political contribution to another who is his employer or employing authority, or to a political committee designated by such person pursuant to section 302(e) of the Federal Election Campaign Act, or (2) he solicits or receives a political contribution in a Federal building or facility.[70]

Paragraph (1)(B) resolves the problem discussed above with respect to 18 U.S.C. 607 by focusing solely on the relationship between the donor and the person to whom or for whose benefit the contribution is given. If there is an employee-employer relationship, any contribution, whether solicited or unsolicited, is barred; but in the absense of such a relationship unsolicited contributions are not barred.

The term "Federal public servant," defined in section 111 (see "public servant"), has been discussed in connection with the preceeding section and that discussion should be consulted here. The definition of "Federal public servant" is very broad and extends to government contractors.[71] As under present law, the definition does not include non-incumbent candidates.

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relief program. It is the view of the Committee that this provision is unnecessary, overbroad, and constitutionally suspect. Accordingly, it is not proposed to be retained in the new Code. See also Working Papers, p. 818.

[68] See 5 C.F.R. 733, 101(a).

[69] See 5 U.S.C. 7323-7325.

[70] "Solicits" is designed to carry the same meaning as in section 1511.

[71] See Working Papers, p. 819; compare *United States* v. *Burleson,* 127 F. Supp. 400 (E.D. Ky. 1954).

The term "political contribution" is defined in section 1518 as having the meaning prescribed in the Federal Election Campaign Act (2 U.S.C. 431(e)).[72]

Paragraph (2) carries forward 18 U.S.C. 603. However, there is no requirement, as under that current statute, that the building be "occupied" by a Federal public servant;[73] it is sufficient if the building is a "Federal building or facility."[74]

The conduct in paragraph (1) is soliciting or making a contribution. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of what he was doing.[75] The facts that the person solicited is a Federal public servant (in subparagraph (A)) and that the person to whom the contribution was made (in subparagraph (B)) is a Federal public servant or the donor's employer or employing authority, are existing circumstances. Under paragraph (1)(A), the required culpability is set at "knowing," thus requiring proof that the offender was aware of the person's status as a Federal public servant. This may well be a higher degree of culpability than is required under existing law.[76] However, in the Committee's view this higher level is necessary to avoid unjust results. Often contributions are solicited from a large number of persons by mail. Mailing lists are purchased and utilized during election campaigns, often without being reviewed. The inadvertent inclusion of a Federal employee's business address is not felt to provide a justifiable basis for a criminal prosecution. By requiring the solicitor to know that the person solicited is a Federal public servant, such a consequence is avoided. By contrast, the culpability level under paragraph (1)(B) is "reckless," since no culpability is specifically prescribed with respect to the fact that an employment relationship exists between the contributor and the person to whom or for whose benefit the contribution is made. No special circumstances, such as may be present under paragraph (1) (A), appear to warrant a higher level of culpability.

The remaining elements—"as a Federal public servant" and "political contribution"—are also attendant circumstances. Since, however, no culpability standard is specifically set forth, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[77]

In paragraph (2) the culpability analysis is similar. The conduct is soliciting or receiving a contribution and the culpability standard is at least "knowing." The facts that the contribution was a "political contribution" as defined in section 1518 and that the solicition or receipt took place "in a Federal building or facility" are existing circumstances as to which the minimum culpability level that must be proved is "reckless."

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[72] The F.E.C.A. definition exempts voluntary and various types of minor contributions from the concept of a political contribution. The Committee believes this to be an appropriate definition in this context, as compared with the broader definition of "political contribution" applicable to section 1515.

[73] See *United States* v. *Burleson, supra* note 71.

[74] The terms "building" and "public facility" are defined in section 111.

[75] See sections 303(b)(1) and 302(b)(1).

[76] See *United States* v. *Scott,* 74 F.2d 213, 218 (C.C.D.Ky. 1895).

[77] See sections 303(b)(2) and 302(c)(1).

4. Affirmative Defense

Subsection (b) provides that it is an affirmative defense to a prosecution under this section that both the public servant soliciting a political contribution or making a political contribution in response to a solicitation and the public servant solicited for or receiving such contributions are Members of, members-elect of, or candidates for, Congress. In the Committee's view, the relevant Hatch Act provisions, 18 U.S.C. 602, 603, and 607, were not intended to prohibit political contributions wholly among Members of Congress, since such contributions are not inherently suspect as resting on an implicitly coercive or extortionate basis. This subsection is not intended to change the thrust of the Hatch Act, but merely to codify a limitation that is implicit in the Act by permitting a defense upon proof by the defendant that the transaction was wholly between persons of the classes described.[78] Note that the defense would not exempt contributions between a Member of Congress and his staff.[79]

5. Jurisdiction

This section contains no subsection indicating the circumstances in which there is Federal jurisdiction over an offense herein. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).

6. Grading

An offense under this section is graded as a Class E felony (up to three years in prison), preserving the level of current law. In addition, the administrative sanction of dismissal is provided under the Hatch Act.[80]

SECTION 1517. MAKING AN EXCESS CAMPAIGN EXPENDITURE

1. In General and Present Federal Law

This section carries forward 26 U.S.C. 9042(a), part of the Presidential Primary Matching Payment Account Act.[81]

26 U.S.C. 9035 prohibits any candidate from knowingly incurring qualified campaign expenses in excess of the expenditure limitations under section 320(b)(1)(A) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(b)(1)(A). The limitation imposed under that section is generally $10,000,000 in the case of a candidate for nomination for election, and $20,000,000 in the case of a candidate for election, to the office of President of the United States. The term "candidate" is defined in 26 U.S.C. 9032(2) to mean an individual who seeks nomination for election to be President of the United States. A person shall be deemed to seek such nomination if he (A) takes the action necessary under the law of a State to qualify himself for nomination for election, (B) receives contributions or incurs qualified campaign expenses, or (C) gives his consent for any

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[78] See the definition of "affirmative defense" in section 111.

[79] The definition of "political contribution," as applicable to this section, is, however, designed to exempt certain contributions such as a congressional staff person using his car to transport his employer to political meetings during a campaign.

[80] See 5 U.S.C. 7323-7325.

[81] P.L. 93-443, October 15, 1974.

other person to receive contributions or to incur qualified campaign expenses on his behalf. The term "qualified campaign expenses" is defined in 26 U.S.C. 9032(9) to mean a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (A) incurred by a candidate, or by his authorized committee,[82] in connection with his campaign for nomination for election, and (B) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which the expense is incurred or paid. An expense is deemed incurred by a candidate or an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee to incur such expense on behalf of the candidate or committee.

The first sentence of 26 U.S.C. 9042(a) provides that whoever violates 26 U.S.C. 9035 shall be subject to imprisonment for up to five years. The second sentence imposes an identical penalty on any officer or member of any political committee[83] who knowingly consents to any expenditure in violation of section 9035.

2. The Offense

Subsection (a) of section 1517 provides that a person commits an offense if (1) he violates section 9035 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9035) or (2) as an officer or member of a political committee, as defined in the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032(8)), he consents to an expenditure in violation of section 9035 of that Act.

The term "violate" is defined in section 111 to mean in fact to engage in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Thus, paragraph (1) carries forward the precise elements (including culpability elements) of 26 U.S.C. 9035 and the first sentence of 9042(a).

The second paragraph brings forward the second sentence of section 9042(a). The conduct is consenting to an expenditure. As no culpability standard is specifically prescribed, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of this actions.[84] The element that the offender is an officer or member of a political committee as defined in 26 U.S.C. 9032(8) is an existing circumstance. Since no culpability level is specifically designated, the applicable state of mind to be proved is, at a minimum, "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that he was in such a status.[85] Whether a mental state need be shown as to the fact that the expenditure was in violation of 26 U.S.C. 9035 is to be determined by reference to such provision and not by section 303(d)(1)(A).[86]

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[82] The term "authorized commitee" is defined in 26 U.S.C. 9032(1).

[83] The term "political committee" is defined in 26 U.S.C. 9032(8).

[84] See sections 303(b)(1) and 302(b)(1).

[85] See sections 303(b)(2) and 302(c)(1).

[86] See section 303(a)(2).

3. Jurisdiction

This section contains no subsection stating the extent of Federal jurisdiction. Accordingly, Federal jurisdiction is governed by the provisions of section 201(b)(2).

4. Grading

An offense under this section is a Class E felony (up to three years in prison). This is a reduction from the current five-year maximum penalty. However, particularly in view of the vastly increased fine levels afforded by the new Code, the Committee considers this classification to be appropriate as opposed to the alternative of grading the offense as a Class D felony (up to six years in prison).

SECTION 1518. DEFINITIONS FOR SUBCHAPTER B

This section contains definitions applicable to the offenses in this subchapter. The terms defined are "anything of value," "federal office," and "political contribution." The definitions are discussed in relation to the sections to which they apply.

SUBCHAPTER C.—OFFENSES INVOLVING PRIVACY

(Sections 1521–1525)

Subchapter C contains four substantive provisions designed to protect private communications. The subchapter affords protection not only against electronic surveillance of private conversations, but also against interference with other forms of private communications such as written correspondence.

Section 1521, in defining the crime of eavesdropping, is the Code's basic offense proscribing the interception and disclosure of private oral communications. Related to that section is section 1522 which forbids "trafficking" in or advertising eavesdropping devices. Both sections along with section 1526, the definitional section, substantially re-enact 18 U.S.C. §§ 2510–12, enacted June 19, 1968 as part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, insofar as these provisions define the crimes of wiretapping and eavesdropping. Section 1523 creates an offense of possessing an eavesdropping device, with intent to use it in violation of either of the two preceding sections.

Section 1524, structurally similar to section 1521 on eavesdropping, makes it a crime for a person to (1) intercept, open, or read private correspondence sent to another without the prior consent of the sender or the intended recipient; or (2) to disclose or use the contents of private correspondence knowing that the contents had been intercepted. This section broadens the present prohibition in

18 U.S.C. 1702 against the interception of mail to include other types of communication and also creates a new offense for disclosing or using the contents of such correspondence knowing it to have been intercepted. Completing this series of offenses, section 1525 prohibits public servants from revealing private information submitted to the government for official purposes.

SECTION 1521. EAVESDROPPING

1. In General

Section 1521 protects the confidentiality of private oral communications by making it a crime to intercept and disclose such communications without authorization. Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized parties has little justification where communications are intercepted without the consent of one of the participants.[1] Recognizing this policy, Congress enacted 18 U.S.C. 2511 as part of the Omnibus Crime Control and Safe Streets Act of 1968, prohibiting the unjustifiable interception, disclosure or use of any private oral communications. Proposed section 1521 is designed to parallel the purpose and scope of current section 2511.

2. Present Federal Law

Section 2511 of Title 18, U.S.C., contains the basic prohibition against willful interception and disclosure of all wire or oral communications, except as specifically authorized.[2]

In addition to the blanket proscription of 18 U.S.C. 2511(1)(a), Congress included a subsection (b) forbidding the interception of oral communications under certain specified circumstances which in reality comprise the jurisdictional bases for Federal prosecution. Essentially, they relate to the territorial and interstate or foreign commerce jurisdiction of the United States. Section 2511 also prohibits attempts ("endeavors") and solicitations ("procures any other person") to intercept.

The scope of section 2511 is structured by the definitions of the terms used in the section. The term "oral communication" is defined to mean any "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." This definition is derived from *Katz* v. *United States,*[3] in which the Supreme Court indicated that oral communications were within the protection of the Fourth Amendment ban on unreasonable searches and seizures, but that the interest in privacy which the Amendment safeguarded applied only when the parties had a justifiable expectation that their communication was not being overheard.[4]

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[1] Report of the Senate Committee on the Judiciary on S. 917 (S. Rept. No. 1097, 90th Cong., 2d Sess. 1968).

[2] The "except as otherwise specifically provided" language is a reference to 18 U.S.C. 2516 *et seq.* which set forth procedures whereby investigative and law enforcement officers may obtain warrants to conduct electronic surveillance or, in an emergency, may intercept a wire or oral communication without a warrant if an application to do is submitted to a court within forty-eight hours thereafter. These provisions are continued essentially unchanged in subchapter A of chapter 31. In addition, 18 U.S.C. 2511 (e) and (f) expressly exempt electronic interception of foreign intelligence information pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801).

[3] 389 U.S. 347 (1967).

The definition of "wire communication" in 18 U.S.C. 2510 is not subject to any such restriction. The term is defined as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between point of origin and the point of reception." The apparent reason for the distinction is that when a person communicates by wire (e.g., over the telephone) he may reasonably be able to assume privacy, whereas that assumption may usually be invalid for non-wire communications.[5]

The word "intercept" is also defined in section 2510 and means the "aural acquisition of the contents[6] of any wire or oral communication through the use of any electronic, mechanical, or other device." The latter phrase is itself defined to exclude a telephone or telegraph instrument, equipment or facility furnished to the subscriber or user by a communications common carrier in the ordinary course of its business,[7] or by an investigative or law enforcement officer in the ordinary course of his duties.[8]

Because of the limitations in the definition of "intercept" and the reach of the statute only to wire or oral communications, it should be emphasized that many forms of surveillance are not covered.[9] For instance the statute would not reach the interception through visual electronic surveillance of a telephone conversation (it not being an "aural acquisition" of the contents of the same). The relatively narrow focus of the law was intended to meet the prevalent abuses represented by wiretapping and other kinds of electronic surveillance aimed at the aural acquisition of oral and wire communications.

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[4] Clearly a conversation in a crowded restaurant or public conveyance would not be accompanied by a justifiable expectation of privacy whereas a conversation in one's own home normally would be. Closer cases are not hard to imagine. In one interesting recent case, the court concluded that no reasonable expectation of privacy was present where the conversation "did not occur in . . . the home of a friend into which appellants had been invited," but rather "in the house of complete strangers to which appellants had made several suspicious visits and into which they tried to gain entry by false representations." *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir.), cert, denied, 415 U.S. 984 (1974); see also *People* v. *Santos*, 101 Cal. Rep. 678, 26 Cal. App. 3d 397 (1972) (conversation between defendant and wife over telephone intercom at jail not protected).

[5] See *United States* v. *Hall*, 488 F.2d 193 (9th Cir. 1973). As there noted, the definition of "wire communication" is not without ambiguity. In that case the court held that radio-telephone conversations are "wire communications" if they are carried to or from a landline telephone, notwithstanding that this construction would apparently make criminals out of hundreds of citizens who listen to a mobile telephone band or a ship-to-shore frequency.

[6] The word "contents" is also defined in section 2510 to include any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of the communication.

[7] The exclusion of telephone equipment applies to overhearings on an extension telephone even though no consent is given. Using this analogy, the Fifth Circuit in *Simpson* v. *Simpson*, 490 F.2d 803 (1974), cert. denied, 419 U.S. 897 (1975), concluded that the statute was not intended to reach a telephone tap placed by one spouse on the other spouse's calls made from the family telephone which both shared. See also *Anonymous* v. *Anonymous*, 558 F.2d 677 (2d Cir. 1977). The Sixth Circuit disagrees, *United States* v. *Jones*, 542 F.2d 661 (1976). For a decision construing the "ordinary course of business" provision see *Briggs* v. *American Air Filter., Inc.*, 630 F.2d 414 (5th Cir. 1980).

[8] Hearing aids and similar devices are also excluded when used to correct abnormal hearing to not better than normal.

[9] See e.g., *United States* v. *Lee*, 274 U.S. 559 (1927) (use of searchlight at night); *United States* v. *Minten*, 488 F.2d 37 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974) (use of binoculars); *United States* v. *Missler*, 414 F.2d 1293 (4th Cir. 1969), cert. denied. 397 U.S. 913 (1970) (naked ear); *Hester* v. *United States*, 265 U.S. 57 (1923) (unaided eye).

Subsection 2511(2) provides a number of exceptions to the general prohibition of subsection 2511(1) against intercepting or disclosing oral or wire communications. Subparagraph (2)(a) is designed, *inter alia,* to enable telephone companies to attach electronic devices to a subscriber's telephone in order to gather evidence that he is evading telephone tolls by using a "blue box" that emits frequencies activating the company's long-distance mechanisms while circumventing its billing mechanism.[10]

Under this subparagraph, it is not illegal for an employee of a communications common carrier to intercept a wire communication in the normal course of his employment for the purpose of quality control or to protect the carrier's rights or property. Similarly, an officer or employee of the Federal Communications Commission acting within the scope of his duties who entercepts a communication for monitoring purposes is exempted.[11]

The most important practical exception is that in subparagraph (2)(c) removing from the statutory prohibition those instances in which the interception was done by a person acting under color of law with the consent of one or more parties to the conversation. The exception is based upon a series of Supreme Court decisions interpreting the Fourth Amendment protection against electronic surveillance of conversations as not applying when the surveillance occurs with the consent of a party to the conversation. The rationale underlying the decisions is that the risk of such electronic monitoring is qualitatively no different from the risk the monitored party assumed when he imparted the information to the consenting party that the latter would not inform the authorities; the act of electronically recording or transmitting the communication merely preserves the evidence in a more accurate form but does not alter the essential nature of the transaction as one of misplaced confidence in the listener. Accordingly, such consensual electronic surveillance does not impinge upon the right of privacy secured by the Constitution.[12]

Subparagraph (2)(d) contains a similar exception for persons not acting under color of law, with the consent of a party to the communication, but qualifies the exception with a provision rendering the exemption inapplicable where the interception "is for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act." The qualification to the consent exception was added primarily in order to punish monitoring "for insidious purposes such as blackmail (and) stealing business secrets." [13]

It should be observed, finally, that 18 U.S.C. 2520 affords a defense "to any civil or criminal action brought under this chapter or under any ther law" that the defendant relied in good faith "on a court order or legislative authorization."[14] The defense to a civil action aspect of this provision is carried forward in section 4103 of the code. The criminal defense aspect has been deleted since it states a classic form of common law defense of public authority or reliance on official misstatement of law, each of which is continued and specifically referred to in section 501 (see also the report discussing these defenses).

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[10] See *United States* v. *Clegg,* 509 F.2d 605 (5th Cir. 1975); *United States* v. *DeLeeuw,* 368 F. Supp. 426 (E.D. Wis. 1974).

[11] 18 U.S.C. 2511(2)(b).

[12] See *On Lee* v. *United States,* 343 U.S. 747 (1952); *Lopez* v. *United States,* 373 U.S. 427 (1963); *United States* v. *White,* 401 U.S. 745 (1971); see also *United States* v. *Osser,* 483 F.2d 727 (3d Cir.), cert. denied. 414 U.S. 1028 (1973); *Ansley* v. *Stynchcombe,* 480 F.2d 437 (5th Cir. 1973); *United States* v. *Santillo,* 507 F.2d 629 (3d Cir. 1975).

[13] See *Meredith* v. *Gavin,* 446 F.2d 794, 798 (8th Cir. 1971)

[14] *United States* v. *Butenko,* 494 F.2d 593 (3d Cir.) (*en banc*), cert. denied, 419 U.S. 881 (1974).

Originally enacted in 1934 as part of the Federal Communications Act, 47 U.S.C. 605 was amended in 1968 to conform to the Omnibus Crime Control and Safe Streets Act of that year. Prior to 1938 section 605 applied across the board to all wire and radio communications. In its present form, the statute provides:

> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate of foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof), knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

The penalty is set forth in 47 U.S.C. 501, which punishes by up to one year in prison whoever "willfully and knowingly" does any act prohibited by this chapter.[15] The culpability standard has been held not to require proof that the defendant knew he was violating the law, but only that he knew what he was doing and intended to do what he did.[16]

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[15] The penalty rises to a maximum of two years in prison for a subsequent offense.

The legislative history of the 1968 amendment to section 605 "makes it clear that Congress intended that the regulation of interception of wire communications would be governed solely by chapter 119 of title 18."[17] In addition it has been held that (as under 18 U.S.C. 2511) interception with the consent of one of the parties to a communication is not within the bar of the statute.[18] It is further established law that section 605 prohibits interception and divulgence of intrastate as well as interstate communications.[19]

Beyond these few areas, however, uncertainty reigns, particularly as to issues concerning the interrelationship of section 605 and chapter 119 of title 18. Thus, it is not settled whether section 605 applies to law enforcement officers; one court of appeals has held recently that the legislative history of the amended statute indicates that law enforcement officers were meant to be excluded from Section 605 and to be covered henceforth solely under chapter 119.[20]

Another hazy area surrounds the question whether section 605 prohibits either interception or divulgence, or only the combined act of interception and divulgence. There is some authority for the latter view, which has also been consistently maintained by the Department of Justice,[21] but the Supreme Court has expressly reserved the issue.[22]

Similarly beset with confusion is the concept of "divulgence." There is authority that "divulgence" does not include disclosure to a law enforcement officer, or among such officers.[23] But it is not clear whether section 605 is violated by an interception of a communication and a divulgence of its fruits, without divulging the existence, contents, substance, purport, effect, or meaning thereof.[24]

The use of a pen register has been held not to be a prohibited "interception" under section 605.[25] Similarly, the impersonation of the called party is not an "interception" since that term connotes a situation in which by surreptitious means a party overhears a conversation between two or more persons.[26]

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[16] See *United States* v. *Gris,* 247 F.2d 860, 864 (2d Cir. 1957): see also *Roberts* v. *State,* 453 P.2d 898 (sup. Ct. Alas.) cert. denied, 396 U.S. 1022 (1969). But compare *United States* v. *Simpson,* 561 F.2d 53, 61–62 (7th Cir. 1977).

[17] See *United States* v. *Lanza,* 341 F. Supp. 405, 422 (M.D. Fla. 1972); *Korman* v. *United States.* 486 F.2d 926, 932 (7th Cir. 1973).

[18] *E.g., Rathbun* v. *United States,* 355 U.S. 107 (1957); *Hudson* v. *United States,* 429 F.2d 1311 (5th Cir. 1970), cert, denied, 402 U.S. 965 (1971); *United States* v. *Bishton,* 463 F. 2d 887, 892 (D.C. Cir. 1972); compare *Lee* v. *Florida,* 392 U.S. 378 (1968).

[19] See *Wells* v. *United States,* 308 U.S. 321 (1939); *Lee* v. *Florida, supra* note 18 at 382 n.6.

[20] *United States* v. *Hall,* 488 F.2d 193, 195–196 (9th Cir. 1973). Previously, Section 605 evidently applied to law enforcement officers, although the Supreme Court in 1968 was unable to discover a reported instance of a prosecution of a law envorcement officer for violating Section 605 since its enactment. *Lee* v. *Florida, supra* note 18, at 386.

[21] See *Bufalino* v. *Michigan Bell Tel. Co.,* 404 F. 2d 1023, 1027 (6th Cir. 1968), cert. denied. 394 U.S. 987 (1969); *Carswell* v. *Southwestern Bell Tel. Co.,* 449 S.W. 2d 805 (Tex. Civ app. 1969); see also Memorandum for the United States in *Ivanov* v. *United States,* 494 F.2d 593 (3d Cir.) cert. denied. 419 U.S. 881 (1974).

[22] *Benanti* v. *United States,* 355 U.S. 96, 100 n.5 (1957).

[23] Cf. *united States* v. *McGuire,* 381, F.2d 306, 314–315 (2d Cir. 1967) cert, denied, 389 U.S. 1053 (1968; *United States* v. *Janelli.* 477 F.2d 999, 1001 (3d Cir. 1973). aff'd. 420 U.S. 770 (1975) (interpreting 18 U.S.C. 2510); *United States* v. *Zarkin,* 250 F. Supp. 728 (D.D.C. 1966); see also *United States* cv. Covello, 410 F.2d 536, 541–542 (2d Cir.) cert, denied 396 U.S. 879 (1969) (toll slips of telephone company showing numbers called and length of conversation not a prohibited "divulagence" under section 605); *Nolan* v. *United States,* 423 F.2d 1031, 1044–1045 (10th Cir.), cert. denied. 400 U.S. 848 (1970) (same).

[24] *Benanti* v. *United States, supra* note 22, at 100 n.5; Memorandum for the United States in *Ivanov* v. *united States, supra* note 21.

[25] See *United States* v. *New York Telephone Co.,* 434 U.S. 159 (1977). The law under 18 U.S.C. 2501(4) is the same. E.g., *United States* v. *Lanza, supra* note 17 at 421.

Section 605 has been held to contain an implied exception (similar to 18 U.S.C.2511(2)(a)) to enable telephone companies to monitor calls in order to detect toll frauds, and to disclose the existence and tenor of such calls to a law enforcement officer.[27]

3. The Offense

Subsection (a) of section 1521 provides that a person commits an offense if he "intentionally (1) intercepts a provate oral communication by means of an eavesdropping device without the prior consent of a party to the communication, or (2) discloses to another person, or uses, the contents of a provate oral communication, knowing that such contents were obtained by conduct described in paragraph (1)."

Although modified in form and condensed, this closely carries forward the offense, in 18 U.S.C. 2511 and 47 U.S.C. 605.

The term "intercept" is defined in section 1526(d) to mean "to acquire the contents of a communication in the course of its transmission to a party to the communication or before its receipt by the intended recipient, and includes the acquisition of such contents by simultaneous transmission or by recording."[28] With respect to the deletion of the phrase "through the use of electronic, mechanical, or other device" from the current definition, no change in scope is made since "by means of an eavesdropping device" is part of the description of the offense itself.

The term "eavesdropping device" is defined in section 1526(c) to parallel the substance of the definition of "electronic, mechanical, or other device" in 18 U.S.C. 2510(5). The specific exemption for hearing aids has been omitted as unnecessary and redundant. Moreover, part of the exception contained in 18 U.S.C. 2510(5)(a)(ii) has not been brought forward. That provision exempted from the definition an instrument "being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." The use of such an instrument by an investigative or law enforcement agent is fully covered in the proposed code through the general defenses referred to in chapter 5[29] thus rendering a separate statement of the exemption in this section superfluous. For example, although not specifically provided in this section, manifestly an interception by a law enforcement agent pursuant to subchapter A of chapter 31 would not violate this section, since the statutory authority for the conduct would clothe the agent with a defense either of exercise of public authority or of reliance on an official misstatement of law (if the warrant were to be subsequently held invalid).

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[26] E.g., *United States* v. *Pasha,* 332 F.2d 193, 197–198 (7th Cir.), cert. denied, 379 U.S. 839 (1946).

[27] See *United States* v. *Clegg, supra* note 9; *Bubis* v. *United States,* 384 F.2d 643, 647–648 (9th Cir. 1967).

[28] The word "record" is defined in section 1526(g) as meaning to "register sound by an electrical, mechanical, or other device in a manner that will permit its reproduction." The definition of "intercept" would reach, for example, a device that enabled a third party to listen to a conversation or part thereof, although not recording or transmitting it. It would not, however, cover a "jamming" device, not designed to capture the contents of a communication, but to prevent its transmission to another, nor would it cover a "pen register," as is explained *infra* in connection with the definition of "contents."

[29] See section 501.

The phrase "private oral communication" is defined in section 1526(f) as speech uttered by a person exhibiting an expectation, under circumstances reasonably justifying that expectation, that such speech is not subject to overhearing. This is taken virtually verbatim from the definition of "oral communication" in 18 U.S.C. 2510(2), and thus reflects the principles of *Katz* v. *United States, supra.*[30] The definition of "wire communication" in 18 U.S.C. 2510(1) has been eliminated, but no major change in present law is intended or will occur because under existing law the interception of even a wire communication must be made "aurally," so that the scope of present 18 U.S.C. 2511 extends only to oral communications made over wire, such as telephone calls, and such communications are within the definition of "private oral communication," above.[31]

The term "contents" is defined in section 1526(b) in nearly identical fashion to the definition of the same word in 18 U.S.C. 2510(8). The definition applies not only in this subchapter, but also in subchapter A of chapter 31, and should receive the same interpretation in both contexts. The phrase "in the communication itself" has been added to make it clearer that only the privacy of the actual communication itself is being protected. The language of the definition following that phrase does not add to or contradict it, but merely illustrates the kinds of information which are included in the term "contents" if the information is in the communication itself. The result is to maintain present law to the effect that, for example, a "pen register" is not within the coverage of this subchapter or that of subchapter A of chapter 31.[32]

The phrase "without the prior consent of a party to the communication" (which allows interception if any party to the communication consents, notwithstanding that others may not) is made an element of the offense, thus rendering it unnecessary to set forth as a defense the provisions of 18 U.S.C. 2511(2) (c) and (d) embodying similar exclusions. However, the Committee has consciously determined not to reenact the qualification to the consent exemption in subparagraph (d), *supra,* which applies when a communication "is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

The "any other injurious act" clause would appear to be too vague to withstand constitutional attack in a criminal case.[33] Moreover, a person, e.g., who recorded a confidential conversation with another for the purpose of blackmail, stealing trade secrets, or for the purpose of committing any Federal offense, will be guilty under the proposed Code (as he would not necessarily be under present law) of an attempt (section 1001) to commit the intended offense.

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[30] The Committee considers that a prison environment is such that inmates do not ordinarily have a reasonable expectation of privacy with respect to their conversation. See *Lanza* v. *New York,* 370 U.S. 139, 143–144 (1962). Moreover, a prison official who intercepted an oral communication by a prisoner pursuant to the authority of a statute, or of a regulation or rule thereunder, would properly have a defense under section 501 to a prosecution under this section.

[31] However, the deletion of the definition of "wire communication"and the application of the reasonable expectation of privacy concept to such communication does have the effect of overruling the decision in *United States* v. *Hall, supra* note 5, as to the potential liability of citizens who listen to ship-to-shore or other radio-telephone communications.

[32] See also *Smith* v. *Maryland,* 442 U.S. 735 (decided June 20, 1979). Note, however, that the use of a call register is governed by the provisions of subchapter B of chapter 31.

[33] Cf. *Meredith* v. *Gavin, supra* note 13.

More basically, however, the Committee does not consider that a consensual "interception," albeit for a criminal or tortious purpose, constitutes an offense against privacy. As the courts have uniformly determined, once "consent" is present—and that term is defined in section 111 essentially to include only voluntary and intelligent consent—there is no invasion of privacy in the recording or transmission of a conversation, but rather only an instance of misplaced confidence in the "intercepting" party.[34] Accordingly, while the Committee concurs that the motive underlying an interception may be reprehensible notwithstanding the presence of "consent," it would seem more appropriate not to punish the interception itself (where consent exists) as an offense against privacy, but to permit the conduct to be covered by the general criminal attempt section of the Code, and by the tort and criminal law of the States.

The conduct in paragraph (1) is intercepting a communication by means of an eavesdropping device, and in paragraph (2), disclosing, or uisng, the contents of such a communication.[35] The culpability standard is set at "intentionally," thereby requiring proof that the offender consciously desired to engage in the conduct.[36] This culpability level carries forward the judicial interpretation of the "willfully and knowingly" standard applicable under 47 U.S.C. 501 and 605,[37] and would similarly seem to be consistent (although there is no case law on the subject) with the "willfully" criterion under 18 U.S.C. 2510. As it has done throughout the proposed Code, the Committee has substituted a more precise, defined term for "willfully" in light of the vagueness of the latter and the diverse interpretations given it by the courts.[38]

The elements that the communication was a "private oral communication," that the interception was "without the prior consent of a party to the communication," and that the disclosure was to "another person" are existing circumstances. Since no culpability level is specifically prescribed herein, the applicable state of mind that must be shown is "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[39]

The final element in paragraph (2) that the contents were obtained by conduct described in paragraph (1) is an existing circumstance expressly assigned a culpable mental state of "knowing," thus requiring proof that the offender was aware of or believed that the circumstances existed.[40] By virtue of section 303(d)(1)(B), no state of mind attaches to the fact that the conduct was described in paragraph (1).

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[34] E.g., *United States* v. *White, supra* note 12.

[35] Paragraph (2) brings forward the offenses in 18 U.S.C. 2511(1)(c) and the third and second to last sentences in 47 U.S.C. 605.

[36] See section 302(a)(1).

[37] *United States* v. *Gris, supra* note 16 at 864.

[38] See generally the discussion relating to this issue in chapter 3 (Culpable States of Mind).

[39] See sections 303(b)(2) and 302(c)(1).

[40] See section 302(b)(2).

4. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the private oral communication was being transmitted over the facilities of a communications common carrier; and (1) the defendant was an agent of the carrier, acting in the usual course of his employment, who was engaged in (A) service observing for mechanical or service quality control checks or (B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft of the carrier's service; or (2) the defendant was acting in the usual course of his employment and was engaged in supervisory service observing.

This is similar to the defense contained in 18 U.S.C. 2511(2)(a)(i).[41] However, the Committee has narrowed the current defense with respect to interceptions for the purpose of protecting the rights or property of the carrier so as to permit such interception only where it relates to "the discovery of theft of the carrier's service."[42] For example, communications common carrier personnel would not be authorized to overhear their employees based upon a suspicion that they were planning the destruction of some equipment or an unlawful "wildcat" strike.

Official service observing is a quality control procedure used solely by communication common carriers to statistically measure the overall speed, accuracy and efficiency of a telecommunication equipment network and work force. This is done on a purely random sampling basis, results in the collection of only technical performance data, and in no way involves references to the specific work performed by individual employees.

Supervisory service observing is used by communication common carriers, public agencies, and business concerns to train and supervise individual employees in their performance of telephone service assignments. Such supervisory observing is expressly restricted to impersonal business calls which the employee handles on his employer's behalf and is predicated on the actual consent of the employee to accept such supervisory observing as a condition of employment.

The inclusion of both offical service observing and supervisory service observing as defenses to a prosecution under this section should not be regarded as, and is not intended to be, a statement by the Committee that either or both of these practices are beyond the scope of collective bargaining or review by Federal or State regulatory agencies. Official service observing has not generally been a subject of great controversy. Supervisory service observing, which directly relates to employer-employee relations, has been somewhat more controversial. The Committee believes that the use and regulation of these practices ought to be the proper subject for labor-management negotiations or regulatory agency consideration.

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[41] The term "communications common carrier" is defined in section 1526 as having the same meaning given that term in 47 U.S.C. 153(h). This is the identical definition in 18 U.S.C. 2510(10). The term "agent" is defined in section 111 to include, *inter alia*, an officer or employee. It should be noted that the defense in 18 U.S.C. 2511(2)(b) for officers or employees of the Federal Communications Commission acting in the normal course of their employment is preserved by virtue of the general defense recognized by case law of acting pursuant to public authority. See *United States* v. *Sugden*, 226 F.2d 281, 285 (9th Cir. 1955), aff'd, 351 U.S. 916 (1956).

[42] See e.g., *United States* v. *Goldstein*, 532 F.2d 1305 (9th Cir.), cert. denied, 429 U.S. 960 (1976), sustaining a telephone company interception reasonably indicated to detect theft of the company's service by means of a "blue box".

The Committee also wishes to make clear its intent that a defense of consent be available to a defendant, in a prosecution under paragraph (2) for disclosing or using the contents of a private oral communication, where although the defendant knew the communication had been intercepted in violation of paragraph (1), he had the consent of a party to the conversation to disclose it. Such a defense based on consent to the disclosure—which would not affect the ability of the government to prosecute and convict the intercepter under paragraph (1) where the interception is without the prior consent of a party to the communication—is clearly appropriate since it cannot be contended that a disclosure has infringed upon the privacy of communication where the person disclosing it had the consent of a party to do so. Of course the fact that the defense of consent here contemplated is not stated explicitly either in this section or in chapter 5 does not preclude its assertion or recognition by the courts.[43]

5. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction attaches to the offense herein. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2). This broad scope of jurisdiction generally carries forward current law under 18 U.S.C. 2511 and 47 U.S.C. 605[44] and is in accord with the findings of Congress expressed in section 801 of the Omnibus Crime Control and Safe Streets Act of 1968.[45] Such jurisdiction is in fact grounded upon the interstate and foreign commerce clause of the Constitution, necessitating control of intrastate communications as a means of exerting control over interstate and foreign communications.[46]

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[43] See section 501.

[44] The plenary jurisdiction in this section is in lieu of the very broad (but not quite plenary) jurisdiction basis in 18 U.S.C. 2511(1)(b)(i-v).

[45] Those findings are as follows:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

6. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This generally carries forward the present penalty level of the offense under 18 U.S.C. 2511 (five years) and reflects the comparative seriousness of the offense. This misdemeanor penalty in 47 U.S.C. 501 (applicable to section 605) was rejected as being too low to deter or appropriately punish the conduct prohibited by this section.

SECTION 1522. TRAFFICKING IN AN EAVESDROPPING DEVICE

1. In General and Present Federal Law

This section forbids trafficking in or advertising of eavesdropping devices and codifies 18 U.S.C. 2512. No major modification is intended.[47]

That statute punishes by up to five years in prison any person who, except as otherwise specifically provided in chapter 119 of title 18, "willfully":

> (a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;
>
> (b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or
>
> (c) places in any newspaper, magazine, handbill, or other publication any advertisement of—
>
>> (i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or
>>
>> (ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

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[46] See *Weiss* v. *United States,* 308 U.S. 321(1939). In *United States* v. *Burroughs,* 564, F.2d 1111 (4th Cir. 1977), the court concluded that Congress could constitutionally apply the prohibitions of 18 U.S.C. 2511(1)(a) to reach interceptions or oral communications by private persons (i.e., not persons acting under color of State or Federal law) without requiring proof of an effect on interstate or foreign commerce in each particular case. The court held, however, that under the current statute Congress had not "plainly and unmistakably" indicated an intent to dispense with the requirement of proof of a Federal nexus in individual cases. See *United States* v. *Bass,* 404 U.S. 336, 348 (1971); compare *Perez* v. *United States,* 402 U.S. 146 (1971). By providing plenary jurisdiction over the offense, the Committee overrules the result in *Burroughs.*

[47] The Committee, however, has servered out for separate treatment in section 1523 the offense in 18 U.S.C. 2512 relating to possession of an eavesdropping device.

> knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce.

There have been few prosecutions under this section.[48] One recent case construed the phrase "surreptitious interception" in 18 U.S.C. 2512(1)(c)(ii). The district court had interpreted this to preclude advertisements only where they promoted a use of an eavesdropping device that would be unlawful under 18 U.S.C. 2511, and hence held that it was not an offense under section 2512 to advertise an eavesdropping device to be used by a party or with the consent of a party to a conversation, since such uses fell within the exceptions in section 2511. The court of appeals reversed, finding that it was Congress's intent to punish the advertising of any device that may be used for "secret listening," irrespective of whether such use was lawful. The court, finding support for its conclusion in the legislative history, reasoned:[49]

> The words "surreptitious interception" connote, in plain and ordinary usage, "secret listening." The mere fact that a device may be used for interceptions that do not violate § 2511 does not mean that its manufacture and advertising are compatible with § 2512. Section 2512(1)(b) prohibits the manufacture, sale and possession of devices *primarily* useful for the purpose of secret interception, even though the devices may be used for other and lawful interceptions. The intent of Congress is discernible and sensible, and there is no reason to consider the doctrines that indicate that when plain meaning leads to an absurd result it does not signify applicable legislative intent. Similarly, there is no anomaly in Congress' apparent attempt, in the advertising prohibition of § 2512(1)(c)(ii), to reach promotion of a device for secret interception, even though the manufacture or possession of the device is not baned by § 2512(1)(b) as one "primarily" useful for secret interception. It may be unusual but it is not unprecedented for Congress to prohibit the advertising of a product even though it has not prohibited the product or its use *per se*. An example that looms large currently is the prohibition of advertising of cigarettes on radio and television.

In *United States* v. *Reed, supra,* the court sustained the application of 18 U.S.C. 2512(1)(b) to a case in which an eavesdropping device had been transported in interstate commerce prior to enactment of the statute, but had been subsequently purchased in an intrastate transaction by the defendant, who was in the private detective business. The court also noted that the legislative findings accompanying the statute[50] would constitutionally support its application to a purely intrastate sale or possession.

Section 2512(2) contains two exemptions from its coverage, as follows:

> (2) It shall not be unlawful under this section for—

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[48] See, e.g., *United States* v. *Schweils,* 569 F.2d 965 (5th Cir. 1978); *United States* v. *Novel,* 444 F.2d 114 (9th Cir. 1971); *United States* v. *Reed,* 489 F.2d 917 (6th Cir. 1974).

[49] *United States* v. *Bast,* 495 F.2d 138, 143 (D.C. Cir. 1974) (footnotes omitted).

[50] I.e., section 801 of the Omnibus Crime Control and Safe Streets Act of 1968, quoted in this report in connection with the discussion of section 1521.

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

These exemptions have not yet been the subject of litigation.

2. The Offense

Subsection (a) of section 1522 provides that a person commits an offense if he intentionally (1) produces, manufactures, imports, or traffics in an eavesdropping device, knowing that its design renders it primarily useful for surreptitious interception of private oral communications, or (2) advertises an eavesdropping device, knowing that (A) its design renders it primarily useful for surreptitious interception of private oral communications, or (B) such advertising promotes the use of such device for surreptitious interception of private oral communications.

The terms "eavesdropping device," "intercept," and "private oral communication" are defined in section 1526 and have been explained in relation to the preceding section. No substantive change in existing coverage has been effected in this regard.

The term "traffics" is defined in section 111 as meaning "(a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing." Thus, overall, this section is somewhat broader than 18 U.S.C. 2512(1)(b), which uses the verbs "manufactures, assembles, possesses,[51] or sells."

The Committee endorses the court of appeals' interpretation in *United States* v. *Bast, supra,* of the phrase "surreptitious interception" and intends that it apply also under this statute.

It should be noted that that the offense in paragraph (2) of this section uses the word "advertise" in lieu of the phrase "places in any newspaper, magazine, handbill, or other publication any advertisement," which appears in 18 U.S.C. 2512(1)(c). The word "advertises" is designed to be broadly construed so as to reach, for example, the case where a brochure is mailed out on request. In this regard, the subject bill may somewhat expand the interdiction in present law.[52]

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[51] As to possession, this section is not as expansive as current law. As previously noted, the basic possession offense is reflected in the following section, 1523.

[52] See *United States* v. *Bast, supra* note 49 at 144. The Committee's formulation in paragraph (2) also differs from 18 U.S.C. 2512(1)(c) in that the "knowing" standard applies to promoting the use offense whereas no culpability is required under existing law in this regard. The Committee considers the *scienter* requirement as necessary properly to define the conduct that should be prohibited particularly since the offense is punished as a serious felony.

The conduct in this offense is, in paragraph (1), producing, manufacturing, importing, or trafficking in a device and, in paragraph (2), advertising a device. The culpability level is designated as "intentionally," thus requiring proof that the defendant consciously desired to engage in the conduct.[53] This culpability standard would appear to be consistent with that under 18 U.S.C. 2512 (i.e., "willfully"), although there is as yet no case law on this issue.[54]

The element that the device is an "eavesdropping device" as defined in section 1526 is an existing circumstance. Since no culpability standard is specifically prescribed in this section, the applicable state of mind that must be proved is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[55]

The remaining elements (e.g., that the device's design renders it primarily useful for surreptitous interception of private oral communications) are also existing circumstances. The culpability level is set at "knowing," thereby requiring a showing that the defendant was aware or believed that the circumstances existed.[56]

3. Defense

Subsection (b) of section 1522 provides that it is a defense to a prosecution under this section that the defendant was (1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was acting for a purpose set forth in section 1521(b), or (2) a person acting within the scope of a Federal, State, or local government contract.

This carries forward without significant change the exemptions in 18 U.S.C. 2512(2).[57] The Committee observes that the term "federal . . . government" does not include a foreign government, so that a person who manufactured eavesdropping devices under a contract with a foreign government operating under a federal system, e.g., Switzerland, would not be protected hereunder.

4. Jurisdiction

There is Federal jurisdiction over an offense herein in three circumstances, as follows:

(1) the offense is committed within the special jurisdiction of the United States;

(2) the device is sent through the United States mail, or is moved across a state or United States boundary, in the commission of the offense[58]; or

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[53] See section 302(a)(1).

[54] Cf. *United States* v. *Bast, supra* note 49, at 144. Conceivably, the term "willfully" could be construed to mean merely consciously or deliberately (i.e., a "knowing" standard under the proposed Code), but the Committee has instead required a showing of a desire to perform the conduct.

[55] See section 303(c)(1).

[56] See section 302(b)(2). It should be mentioned that the Committee in accordance with a general policy decision discussed in relation to chapter 2 (Jurisdiction) has not perpetuated the feature of present 18 U.S.C. 2512(1) (b) and (c) requiring proof of knowledge as to the jurisdictional element. See sections 201(c) and 303(d)(2).

[57] The term "communications common carrier" is defined in section 1526 identically to its definition in chapter 119 of present title 18. See 18 U.S.C. 2510(10). The term "agent" is defined in section 111 to include, *inter alia*, an officer or employee. It should be noted that the aspect of 18 U.S.C. 2512(2)(b) establishing a defense for an officer, agent, or employee, of the United States, a State, or political subdivision acting in the normal course of the activities thereof is carried forward by the general defenses in section 501.

[58] The term "commission of the offense" is defined in section 111.

(3) the advertisement is sent through the United States mail, or is moved across a state or United States boundary, or is transmitted by a communications facility that operates in interstate or foreign commerce, in the commission of the offense.

The second and third of these in the main carry forward the jurisdictional provisions in 18 U.S.C. 2512.[59] The first branch extends current jurisdiction to include such places as Federal enclaves and various vessels on the high seas.[60] No sound reason exists for preserving the gap in this respect in present law.[61]

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This accords generally with the penalty under current law.

SECTION 1523. POSSESSING AN EAVESDROPPING DEVICE

1. In General and Present Federal Law

This offense carries forward in modified form, and with reduced grading, the "possession" offense in 18 U.S.C. 2512(1)(b). That statute punishes by up to five years in prison any person who willfully manufactures, assembles, sells, or possesses an electronic device knowing or having reason to know that its design renders it primarily useful for the surreptitious interception of wire or oral communications. Section 1522 of S. 1630 reaches the first three kinds of conduct, and also covers (through the definition of "traffic") possession of an eavesdropping device with intent to dispose of it as consideration for anything of value. However, section 1522 does not extend to the simple possession of an eavesdropping device. This section is designed to fulfill that function, while narrowing the offense so that it applies only to conduct that is clearly wrongful. The problem with the "possession" offense as drafted in present law is that, by requiring only knowledge or a negligent state of mind as to the fact that the design of the device renders it primarily useful for surreptitious interception, the law purports to punish persons whose possession of such a device is for a legitimate purpose other than that for which the device is "primarily" useful. The offense in this section is therefore constructed so as to require possession accompanied by an intent that the device be actually used in the course of an offense under section 1521 or 1522. As drafted, the offense in this section is similar to section 1715 (Possessing Burglar's Tools).

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[59] Although requiring that the jurisdictional circumstance (e.g., mailing) in fact have taken place appears to narrow the scope of the current statute. It should be noted that a manufacturer, for example, who knows that a prohibited eavesdropping device will be sent through the mail or in interstate commerce will be guilty under the Code of an attempt (section 1001) to violate this section. Thus in actuality no narrowing of present law in this respect will occur. Moreover, present law does not reach, as to advertising, the transmission by a communications facility that operates in interstate or foreign commerce, and thus does not cover, e.g., advertising as eavesdropping device over a radio or television network. The Committee deems the expansion of current jurisdiction to be clearly justified. Note that it is not necessary that the particular transmission be in interstate commerce, but only that the facility operate in interstate commerce for Federal coverage to exist.

[60] See secton 203, defining the special jurisdiction of the United States.

[61] Presumably, in Federal enclaves today the Federal government must prosecute eavesdropping offenses under the Assimilative Crimes Act, 18 U.S.C. 13, borrowing such State laws in this field as may exist.

2. The Offense

Subsection (a) provides that a person commits an offense if, with intent that it be used in the course of conduct constituting an offense under section 1521 or 1522, he possesses an eavesdropping device.

The term "eavesdropping device" is defined in section 1526 and has been discussed in connection with section 1521.

The conduct in this offense is possessing a device. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing", i.e., that the defendant was aware of the nature of his actions.[62]

The element that the device is an "eavesdropping device" is an existing circumstance. As no culpability level is set forth in this section, the applicable state of mind that must be established is, at a minimum, "reckless", i.e., that the offender was aware of but disregarded the substantial risk that the device was of the type covered.[63]

The element that the possession must be with intent that the device be used in the course of conduct constituting an offense under section 1521 or 1522[64] states the particular purpose for which it must be shown that the conduct was performed.

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the defendant was (1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was in possession of the device for a purpose set forth in section 1521(b), or (2) a person in possession of the eavesdropping device within the scope of a Federal, State, or local government contract. This defense is identical to the one in section 1522, and the discussion there should be consulted here.

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if a circumstance specified in section 1522(d) (1) or (2) exists or has occurred.

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This reflects a determination by the Committee that the conduct punished herein is of a more inchoate nature than that proscribed in section 1522 and hence is deserving of less severe treatment.

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[62] See sections 303(b)(1) and 302(b)(1).

[63] See sections 303(b)(2) and 302(c)(1).

[64] The term "constituting an offense" is defined in section 111. Note that no proof of a state of mind is required with respect to the fact that the conduct constituting an offense was punishable under section 1521 or 1522. See section 303(d)(1)(B).

SECTION 1524. INTERCEPTING CORRESPONDENCE

1. In General and Present Federal Law

This section is loosely derived from 18 U.S.C. 1702, but has been recast in order to parallel section 1521 dealing with interception of private oral communications.[65]

18 U.S.C. 1702 punishes by up to five years in prison:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same.

The statute is a peculiar amalgamation. On the one hand, it seeks to protect the property interest in mail, and so punishes its taking, embezzlement, or destruction. On the other hand, the statute is concerned with maintaining the privacy of the correspondence, and so punishes, by the final clause, the opening of mail. In addition, the privacy interest is evident in the specific intent that must be shown to accompany a "taking," i.e., "to obstruct the correspondence, or to pry into the business or secrets of another." [66]

This section is addressed only to the privacy aspects of 18 U.S.C. 1702. Theft (and related offenses) involving mail are punishable under section 1731 (Theft). Destruction of mail is covered under sections 1702 (Aggravated Property Destruction) and 1703 (Property Destruction).

18 U.S.C. 1702 has been construed (in the context of prosecutions for "taking") to extend Federal protection over mail matter from the time it enters the mails until it reaches the addressee or his authorized agent.[67] It has also been held that one may have an intent to obstruct the correspondence when mail is sent to a deceased person,[68] but not if the letter is addressed to a fictitious individual.[69] And it has been uniformly determined that the practice, long known to Congress, of a mail "cover" or "watch," whereby mail carriers record information from the outside of the envelope as to name or sender, return address, and the like, does not violate 18 U.S.C. 1702.[70]

2. The Offense

Subsection (a) of section 1524 provides that a person commits an offense if he intentionally (1) intercepts, opens, or reads private correspondence without the prior consent of the sender or the intended recipient, or (2) discloses to another person, or uses, the contents of private correspondence, knowing that such contents were obtained by conduct described in paragraph (1).

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[65] The National Commission proposed a similar statute. See Final Report, § 1564.

[66] See *United States* v. *Ashford,* 530 F.2d 792, 796-798 (8th Cir. 1976); *United States* v. *Brown,* 425 F.2d 1172, 1176 (9th Cir. 1970); *United States* v. *Grieco,* 187 F. Supp. 597 (S.D.N.Y. 1960).

[67] E.g., *Maxwell* v. *United States,* 235 F.2d 930, 932 (8th Cir.), cert. denied, 352 U.S. 943 (1956); *McCowan* v. *United States,* 376 F.2d 122, 124 (9th Cir.), cert. denied, 389 U.S. 839 (1967).

[68] *Ross* v. *United States,* 374 F.2d 97 (8th Cir.), cert. denied, 389 U.S. 882 (1967).

[69] *United States* v. *Grieco, supra* note 66 (decoy letter).

[70] See *Cohen* v. *United States,* 378 F.2d 751, 759-760 (9th Cir.), cert. denied, 380 U.S. 897 (1967), and cases cited therein; *United States* v. *Leonard,* 524 F.2d 1076, 1086-1087 (2d Cir. 1975).

This section is worded similarly to section 1521 (Eavesdropping) and some of the discussion there is applicable here. For example, the meaning of "intercept," which is defined in section 1526, is explained in connection with section 1521 and that explanation should be adverted to here.[71]

The term "private correspondence" is defined in section 1526(e) to mean a "communication, other than speech" (speech is covered under section 1521), "sent by a person exhibiting an expectation under circumstances reasonably justifying the expectation that such communication is not subject to being intercepted, opened, or read until received by the intended recipient, and includes mail other than a post card, postal card, newspaper, magazine, circular, or advertising matter." The Committee intends that the term include communication of data between computers and similar devices.

The definition is patterned after that of "private oral communication," discussed in relation to section 1521, which in turn is derived from 18 U.S.C. 2510(2) and *Katz* v. *United States.*[72] The exclusion of post cards, postal cards, newspapers, etc., is consistent with the thrust of this section to protect privacy; a communication by post card exposes the message to public scrutiny and thus cannot be said to embody a reasonable expectation that the communication will not be intercepted or read before reaching the intended recipient. Similarly, there is no intent to outlaw the mail "watch" which has uniformly been held not to violate either the Fourth Amendment or 18 U.S.C. 1702. Although information as to the identity of a party and the existence of a communication is within the definition of "contents" in section 1526, the term "private correspondence" should be read to exclude such information as the name and return address of the sender, appearing on the outside of an envelope, package, or other mail. As with post cards, such writings are knowingly exposed to public scrutiny and indeed are designed to be read by postal employees. Accordingly, as held in *United States* v. *Choate,*[73] it cannot be claimed that an individual has a justifiable expectation of privacy with respect to such information.

Another area in which there is no reasonable expectation of privacy with respect to the interception of correspondence is prisoners mail.[74] The Supreme Court and others have indicated that, because of the need to safeguard the prison institution, all prisoners' mail may be opened and inspected, although the conditions and type of inspection may vary depending, e.g., on whether the mail is to or from an attorney or court.[75] The Committee therefore does not intend to penalize such interception of mail by prison officials in this section. In any event, the Committee emphasizes that the common law defenses of exercise of public authority and reliance upon an official misstatement of law as provided in section 501 apply to all offenses including this one.[76] Thus, an official who intercepted prisoner correspondence in good faith and reasonable reliance on a statute, or a regulation or rule thereunder (such as has been published by the Federal Bureau of Prisons), would have a complete defense. Similarly, the same type of defenses would be available, for example, to an employee of a government intelligence agency who intercepts correspondence in the course of foreign intelligence gathering activity with a good faith reasonable belief that his conduct was lawful. *A fortiori*, the conduct is not an offense if it is in fact lawful, i.e., the regulations are in fact valid or the intelligence activity is in fact lawful.

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[71] However, despite the parallel structure and coverage of sections 1521 and 1524 the Committee has not thought it necessary to extend to the latter the procedural protections presently found in 18 U.S.C. 2515–2520. Electronic surveillance of private oral conversations by the government poses a uniquely serious threat to privacy qualitatively different from governmental interception of most other forms of communications. Fourth Amendment considerations will of course continue to govern any attempt by the authorities to "search and seize" private correspondence. See e.g., *United States* v. *Van Leeuwen,* 397 U.S. 249 (1970). And note should be taken of statutory restrictions such as that contained in 39 U.S.C. 3623, which provides for a class of "letters sealed against inspection" and states further that no letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the postal service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

The definition of "intercept" is such that this offense will not cover disclosure or unmailed copies of letters, or photocopies or originals of letters obtained after receipt by the addressees.

[72] *Supra* note 3.

[73] 576 F.2d 165, 173–182 (9th Cir. 1978), cert. denied, 439 U.S. 953 (1979).

The conduct in this offense is, in paragraph (1), intercepting, opening, or reading correspondence, and, in paragraph (2), disclosing or using the contents of correspondence. The culpability level is set at "intentional" thereby requiring proof that the defendant consciously desired to engage in the conduct.[77]

The elements that the conduct was "without the prior consent[78] of the sender or the intended recipient," that the correspondence was "private correspondence," and that the disclosure was to "another person" are existing circumstances. Since no culpability standard is specifically set forth, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[79]

The element in paragraph (2) that the contents were obtained by conduct described in paragraph (1) is also an existing circumstance. The culpability is designated as "knowing," thus requiring proof that the defendant at least was aware or believed that the circumstance existed.[80]

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the private correspondence was being transmitted over the facilities of a communications common carrier and (1) the defendant was an agent of the carrier, acting in the usual course of his employment, who was engaged in (A) service observing for mechanical or service quality control checks or (B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft of the carrier's service, or (2) the defendant was acting in the usual course of his employment and was engaged in supervisory service observing.

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[74] The disclosure of the contents of prisoners' correspondence, however, if not justified by a legitimate governmental interest, would raise different considerations.

[75] See *Procunier* v. *Martinez*, 416 U.S. 396, 412–414 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539, 574–577 (1974); *Taylor* v. *Sterrett*, 532 F.2d 462 (5th Cir. 1976).

[76] See the discussion in this report of the defenses of excercise of public authority and reliance upon an official misstatement of law.

[77] See section 302(a)(1).

[78] The word "consent" is defined in section 111 essentially to mean voluntary and intelligent assent.

[79] See sections 303(b)(2) and 302(c)(1).

[80] See section 302(b)(2). By virtue of section 303(d)(1)(B), no mental state need be established as to the fact that the conduct is as described in paragraph (1).

This defense was included at the suggestion of the Department of Commerce, in order to parallel the defense available under section 1521 to agents of a communications common carrier with respect to the interception of a private oral communication. The defense is warranted to avoid application of the section, e.g., to employees who read a mailgram in the normal course of their employment. The Committee does not intend that such persons be subject to the penal sanctions of this section. Existing law contains no such defense.

As under section 1521, the Committee intends also that an implicit defense be available to a prosecution under paragraph (2) when the disclosure or use is with the consent of the sender or intended recipient of the private correspondence, notwithstanding that the contents may have been unlawfully obtained under paragraph (1). Plainly, where there is consent to a disclosure or use of information in correspondence, no offense against privacy has been committed by such disclosure or use, even if the original interception of the correspondence was without consent and hence illegal.[81]

The Committee also intends that a defense be available, pursuant to section 501, when a public servant searches or opens mail pursuant to a warrant or statutory authority. As previously noted, 39 U.S.C. 3623(d) permits the opening of domestic or first class mail by Postal Service personnel pursuant to a search warrant or for the purpose of determining an address at which the letter can be delivered. In addition, 19 U.S.C. 482 and implementing regulations permit customs officials to open (but not to read) incoming international mail without a warrant when they have "reasonable cause to suspect" that the mail contains illegally imported merchandise. This authority, which the Committee believes is essential to guard against the smuggling of narcotics and other items subject to duty, such as diamonds, was recently sustained against constitutional challenge by the Supreme Court.[82] Any opening of mail pursuant to these (or other) statutes or judicial authority, even if the statute or judicial order were subsequently declared invalid, would properly shield the government agent from criminal liability under this section.[83]

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if the private correspondence is mail. This preserves the basic scope of the offense in current law. The Committee perceives no need to expand it to include other forms of communication, such as telegrams.

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[81] The subsequent consent to disclosure, however, would not absolve a person from liability for the initial interception, opening, or reading under paragraph (1).

[82] *United States* v. *Ramsey*, 431 U.S. 606 (1977).

[83] See the discussion of the defense of exercise of public authority and reliance on an official misstatement of law in connection with section 501.

5. *Grading*

An offense under this section is graded as a Class E felony (up to three years' imprisonment). Although retaining the offense at a felony level, the Committee has graded it one class below that of section 1521, since persons who commit the latter offense constitute a greater menace. The National Commission, while also recognizing the distinction, proposed to downgrade the subject offense to a misdemeanor.[84]

SECTION 1525. REVEALING PRIVATE INFORMATION SUBMITTED FOR A GOVERNMENT PURPOSE

1. *In General*

This section is designed to protect those members of the public who are required, for one reason or another, to make disclosures of confidential information to the government. It is directed at present or former Federal public servants who have had access to such information by virtue of their government employment, and who subsequently make improper revelations of the information. The National Commission proposed a similar provision.[85]

The Committee concurs with the Commission as to the need for such a general statute. The Federal government engages in extensive factfinding (e.g., the census) and regulation of business, and as a concomitant requires citizens to submit a considerable amount of private information to government agencies. Additionally, persons seeking certain government benefits for which they must make formal application (e.g., patents) are often required to submit confidential information. Many public servants have access to this information, and it is desirable to safeguard its confidentiality through penal sanctions. Such sanctions will help insure the confidence of the public, whose voluntary cooperation in providing information to the government is necessary to the efficient operation of many of its regulatory programs.[86]

2. *Present Federal Law*

The principal prohibition against disclosure of confidential information is presently contained in 18 U.S.C. 1905, which punishes by up to one year in prison:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm,

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[84] See Final Report, § 1564.

[85] See Final Report, 1371.

[86] See Working Papers, pp. 723–724.

> partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; . . . .

It has been held that this provision bars agencies from disclosing information which falls within its scope unless disclosure is independently authorized by law.[87] This statute is, however, largely limited to information relating to trade secrets and other business information and does not protect against the disclosure of other types of confidential information.

In addition to the foregoing enactment, Federal law both in and outside of title 18 includes a variety of provisions protecting against the disclosure of confidential information in relation to particular government programs or functions. The following listing is not all-encompassing, but is a fairly comprehensive summary of the areas covered.[88]

A. Protection of trade secrets

Confidential information, in the form of trade secrets, is given protection in the areas of insecticides (7 U.S.C. 135b), agricultural products (7 U.S.C. 472, 610, 1373, 2105, 2623), flammability standards for fabrics (15 U.S.C. 1193), fair packaging and labelling requirements (15 U.S.C. 1454), toy safety (15 U.S.C. 1263), motor vehicle safety (15 U.S.C. 1401-1402), food and drugs (21 U.S.C. 331, 458, 842, 1037), tax matters (26 U.S.C. 6104), occupational health and safety standards (29 U.S.C. 664), radiation standards for electronic equipment (42 U.S.C. 263i), air and water pollution control devices (42 U.S.C. 1857f-6, 33 U.S.C. 1160 and 1163), boating safety (46 U.S.C. 1463), and pipelines (49 U.S.C. 1681).

B. Government benefits

Where certain "benefits" are applied for, confidential information is protected in the areas of visas (2 U.S.C. 1202), claims made to the Veterans' Administration (38 U.S.C. 3301), application for assistance from the Community Relations Service (42 U.S.C. 2000g-2), and patents for atomic weapons (42 U.S.C. 2181).

C. Information required to be given to the government

Protection here includes the areas of registration of aliens (8 U.S.C. 1304), census information (13 U.S.C. 9, 214 (a five-year felony)), and tax returns (26 U.S.C. 7213(a)(1)).[89]

D. Miscellaneous

Other statutes protect crop information (18 U.S.C. 1902), information regarding future action of the Reconstruction Finance Corporation (18 U.S.C. 1904), information acquired by a bank examiner (18 U.S.C. 1906), information acquired by a farm credit examiner

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[87] *Chrysler Corp.* v. *Brown,* 99 S. Ct. 1705 (1979). This bill reenacts 18 U.S.C. 1905 in the title 18 Appendix.

[88] See also the more detailed list set forth in Working Papers, pp. 726-728.

[89] This offense, as amended by the Tax Reform Act of 1976 (P.L. 94-455), also penalizes the disclosure of "return information", defined in 26 U.S.C. 6103(b)(2), which may include information not required to be furnished by the taxpayer and indeed which may have been supplied to the government by someone other than the taxpayer.

(18 U.S.C. 1907), information acquired by a National Agricultural Credit examiner (18 U.S.C. 1908), and information under the Presidential Election Campaign Fund Act (26 U.S.C. 9012(g)).

It should be noted that existing laws also safeguard confidential information that relates to the national security (e.g., 18 U.S.C. 798) and prohibit speculation by Federal employees based on confidential information they have acquired during the course of their employment (e.g., 18 U.S.C. 1902–1904). These four statutes will be carried forward in the proposed Code, the former in subchapter C of chapter 11, and the latter in subchapter F of chapter 13.

3. The Offense

Subsection (a) of section 1525 provides that a person commits an offense if, in violation of a specific duty imposed upon him as a public servant or former public servant by a statute, or by a regulation, rule, or order issued pursuant thereto, he discloses information to which he has or had access only in his capacity as a public servant, that had been provided to the government by another person, other than a public servant acting in his official capacity, solely in order to comply with (1) a requirement of an application for a patent, copyright, license, employment, or benefit, or (2) a specific duty imposed by law upon such other person.

The scope of this section is in some respects broader and in some respects narrower than current law. It is clearly broader in its coverage of former public servants. In the view of the Committee, there is no sound reason why a former government employee should not be under the same penal restrictions as to disclosure of confidential information acquired in his official capacity as a present public servant; indeed protection of the confidentiality of information would seem to necessitate such coverage in order to prevent an evasion of the disclosure prohibition through a termination of employment, contract, or other service.[90]

The requirement of a "specific duty imposed . . . by a statute, or by a regulation, rule, or order issued pursuant thereto" is similar to the scope of 18 U.S.C. 1905. However, whereas that statute punishes a disclosure whenever it is "not authorized by law," the present section somewhat narrows the prohibition to instances in which disclosure would violate a specific duty imposed by law, thereby "allowing consideration of the properiety of the disclosure apart from the authority of law."[91] There is no intent by this formulation to modify current law to the effect that, where the provisions of another law, such as the Freedom of Information Act, authorize the disclosure of information, no offense under this section is committed by a disclosure in compliance therewith. A contrary interpretation would place Federal officials acting in good faith in an intolerable position and might unnecessarily deter them from giving full scope to the congressional demands for greater public access to government information.[92] Similarly, this section is not designed to place restrictions on the public's access to internally generated government documents. Such documents clearly fall ouside the scope of this section since they are not "provided to the government by another person, other than a public servant acting in his official capacity". Disclosure of such documents, therefore, would not violate this section (although it might, of course, violate other statutes or regulations protecting classified or confidential information).

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[90] Compare section 1356 (Speculating on Official Action or Information), where the statute applies for a one-year period after the defendant has left public service

[91] See Final Report, § 1371. Comment, p. 141; see also Working Papers, p. 724, Narrowing the prohibition in section 1525 does not alter the scope and effect of 18 U.S.C. 1905.

[92] Thus, the defense continued in section 501 of exercise of public authority is available under this section.

The types of information described in paragraphs (1) and (2) embrace all the enactments that now exist and are phrased in sufficiently generic terms so as automatically to include any other information designated as confidential by Congress in the future (or in a regulation, rule, or order issued pursuant to any such law). While avoiding a multiplicity of narrow criminal provisions outside of title 18, this approach thus recognizes that different agencies administering different programs may properly have disparate standards regarding the disclosure of confidential information.[93]

With respect to the breadth of this section, it should also be observed that the term "public servant" is expansively defined in section 111 to mean:

> an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government, and includes a person who has been elected, nominated, or appointed to be a public servant.

This definition reaches government contractors, as well as part-time employees or consultants.

The conduct in this offense is disclosing information. Since no culpability level is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[94]

The remaining elements are all existing circumstances. Since no culpability standard is specifically set forth in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[95]

4. Bar to Prosecution

Subsection (b) of section 1525, provides that it is a bar to a prosecution under this section that the disclosure was a report of a violation or potential violation of law and was made to law enforcement officials authorized to investigate or prosecute such violation.[96] This offense was not intended to be used as a shield to prevent individual officials from cooperating concerning investigation of criminal activities and this defense makes it clear.

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[93] Unlike the National Commission, the Committee has not attempted to define "confidential information" and anticipates that the term will acquire content from the various provisions of law, largely outside title 18, defining specific kinds of such information.

[94] See section 303(b)(1) and 302(b)(1).

[95] See sections 303(b)(2) and 302(c)(1).

[96] Such an amendment was added on the Floor of the Senate to S. 1437 in the 95th Congress to provide a defense to prosecution. A similar amendment was offered in the 96th Congress which also included a defense relating to disclosure under the Freedom of Information Act (124 Cong. Rec. S. 17 (January 19, 1978, daily ed.)). That part of the defense has been deleted in the reported bill as covered by the common law defense of exercise of public authority, discussed *supra* in relation to section 501.

5. Jurisdiction

There is Federal jurisdiction over an offense herein if the public servant acquired the information as a Federal public servant.[97] This broad scope of jurisdiction is appropriate in order to further the interests sought to be promoted by this section of safeguarding confidential information supplied to the Federal government and increasing public confidence in governmental integrity.

6. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This accords with the penalty found in the principal anti-disclosure offenses in current law. Although other provisions carry different penalties (including some graded as felonies), the Committee considers that the one-year penalty is adequate to deter violations and is appropriate.[98]

SECTION 1526. DEFINITIONS FOR SUBCHAPTER C

This section contains definitions of several words and phrases used throughout this subchapter. These definitions have been explained in connection with the sections to which they apply, and there is no need for any further discussion here.

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[97] The definition of "Federal public servant" excludes District of Columbia public servants. See the definition of "public servant" in section 111.

[98] See Working Papers, p. 725.

CHAPTER 16.—OFFENSES AGAINST THE PERSON

There are five separate categories of offenses against the person covered in this chapter. Homicide offenses are covered in subchapter A; assault offenses in subchapter B; kidnapping and related offenses in subchapter C; hijacking offenses in subchapter D; and sex offenses in subchapter E.

SUBCHAPTER A.—HOMICIDE OFFENSES

(Sections 1601-1603)

This subchapter deals with homicide and includes the offenses of murder (section 1601), manslaughter (section 1602), and negligent homicide (section 1603). The most significant change from current Federal law is the consolidation of first and second degree murder, which was suggested by the National Commission. The consolidation permits the elimination of vague terms such as premeditation, deliberation, and malice aforethought, and allows a more flexible approach to punishment.[1]

At common law, murder was the killing of a human being with "malice aforethought," a term of art encompassing killings done intentionally, knowingly, recklessly, or during the commission of a felony.[2] The offense carried a mandatory death sentence. In this country however, murder was divided into degrees in order to limit the application of the death penalty.[3] The States today generally define first degree murder as a homicide committed either with premeditation and deliberation or during the commission of various felonies; all other murders are in the second degree. Almost every State allows a jury to find premeditation, deliberation, and even "malice aforethought" whenever the defendant had time to reflect and did reflect on the act before it occurred; any interval of time has been held sufficient for reflection, including mere seconds.[4] Because of this, there is no clear line to distinguish the degrees of murder and, in practice, the jury has wide discretion in fixing the degree of the offender's crime.

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[1] See Working Papers, pp. 823-825.

[2] See generally Wechsler and Michael, *A Rationale of the Law of Homicide; I.* 37 Col. L. Rev. 701, 703 (1937).

[3] The first such statute was passed in Pennsylvania, Laws 1794, c. 267, § 1, 2. Accord, Virginia 2 Stat. At Large (Shepherd, 1796), pp. 5-6, § 1, 2.

[4] See Perkins, *Criminal Law*, pp. 34-35 (2d ed. 1969).

The other type of homicide at common law was manslaughter, of which there were two classes: voluntary and involuntary. According to the most common definition, voluntary manslaughter was an act of homicide that would have been murder except that the defendant acted in the sudden heat of passion caused by adequate provocation. Arbitrary rules were evolved by the courts to confine the meaning of adequate provocation within strict boundaries. The most common of these are that mere words are not sufficient provocation and that the victim, as opposed to third parties, must commit some action against the defendant.[5] A second kind of voluntary manslaughter found in some States is called the misdemeanor-manslaughter rule, under which any killing, intentional or otherwise, during the commission of a misdemeanor is manslaughter.[6] Involuntary manslaughter, by contrast, has been defined as a killing where the defendant committed the act unintentionally but had a culpable state of mind. The exact state of mind has been nebulous, varying between recklessness and negligence.

A third type of homicide, unknown at common law but found in many States, in negligent homicide. Some negligent homicide statutes cover all kinds of killings, but others are limited to those caused by the operation of vehicles.[7]

SECTION 1601. MURDER

1. In General and Present Federal Law

This section consolidates a number of present homicide statutes, most notably 18 U.S.C. 1111. As previously indicated, the distinction between first and second degree murder has been abolished. The present offense covers three forms of homicide offenses all categorized as murder: (1) intentionally causing another person's death; (2) recklessly causing another person's death under circumstances in fact manifesting an extreme indifference to human life; and (3) causing another person's death in the course of the commission of certain specified Federal felonies, where the victim is not one of the participants in the underlying offense.

18 U.S.C. 1111 is the basic Federal homicide statute applicable within the special maritime and territorial jurisdiction of the United States.[8] It follows the common law, defining murder as any killing with "malice aforethought," and dividing it into two degrees. First degree murder is:

> Every murder perpetrated by poison, lying in wait or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premediated design unlawfully and maliciously to effect the death of any human being other than him who is killed . . . .

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[5] See generally *id.* at 53-64.

[6] *Id.* at 73-79.

[7] See *id.* at 79-82.

[8] See 18 U.S.C. 7. This does not include the District of Columbia (*Johnson* v. *United States*, 225 U.S. 405 (1912)), which has its own homicide laws. See 22 D.C. Code 2401-2405.

All other murders are in the second degree. The penalty for first degree murder is death unless the jury qualifies its verdict by adding thereto "without capital punishment," in which case life imprisonment is mandatory.[9]

Under 18 U.S.C. 1111, malice aforethought is an essential aspect of both first and scond degree murder, but premeditation is an element only of first degree murder, and it is generally that which distinguishes the two offenses.[10]

18 U.S.C. 1111 explicitly adopts a doctrine similar to "transferred intent" for murder by defining as murder a killing "perpetrated from a premediated design unlawfully and maliciously to effect the death of *any human being other than him who is killed.*" (Emphasis added.) Thus, if a person who intends to kill A accidentally kills B, he would be guilty of murder under section 1111 irrespective of whether B's death was foreseeable (e.g., if B were standing, unknown to A, in another room and was killed by a shot that missed A).[11] It should also be noted that under the felony-murder rule of this statute, a person who plays no role in a slaying may nevertheless be convicted of being an accomplice to murder, if, for example, with knowledge of the fact that the victim has been killed in the course of robbery, he acts as the willing driver of the getaway car.[12]

In addition to 18 U.S.C. 1111, there are a number of more specific Federal enactments that punish homicide by incorporating the definition of murder in 18 U.S.C. 1111.

18 U.S.C. 1114 provides that whoever "kills" any person falling within enumerated categories of Federal public servants (including judges, law enforcement officers, and employees of any correctional or penal institution), while engaged in the performance of his official duties, shall be punished as provided in 18 U.S.C. 1111 and 1112.[13] The reference to punishment in effect renders applicable the substantive definitions of first and second degree murder in 18 U.S.C. 1111.[14]

18 U.S.C. 1116(a) provides that whoever kills a "foreign official," "official guest," or "internationally protected person" shall be punished as set forth in 18 U.S.C. 1111 and 1112, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

The terms "foreign official," "official guest," "internationally protected person," and other terms used in the definitions of those terms (e.g., "family," "foreign government," and "international organization") are defined in 18 U.S.C. 1116(b).

18 U.S.C. 1153, the so-called Major Crimes Act, provides that any Indian who commits one of fourteen designated offenses (including

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[9] The death sentence has been held invalid under *Furman* v. *Georgia*, 408 U.S. 238 (1972), in light of the Supreme Court's construction of the statute as leaving the decision whether to impose the death penalty to the jury's unbridled discretion. See *United States* v. *Kaiser*, 545 F.2d 467 (5th Cir. 1977); *Andres* v. *United States*, 333 U.S. 740, 742–744 (1948).

[10] See *Beardslee* v. *United States*, 387 F.2d 280, 290–292 (8th Cir. 1967).

[11] See Working Papers, pp. 132–133, 825.

[12] See *Long* v. *United States*, 360 F.2d 829, 835 (D.C. Cir. 1966); Working Papers, p. 826.

[13] 18 U.S.C. 1112 punishes manslaughter committed in the special maritime and territorial jurisdiction of the United States and is discussed in connection with the following section. 18 U.S.C. 1113 punishers attempted murder and manslaughter and is carried forward by application of the general attempt provision under section 1001 of the proposed Code.

[14] See *Shockley* v. *United States*, 166 F.2d 704, 715 (9th Cir.), cert. denied, 334 U.S. 850 (1948).

murder and manslaughter) against another person in Indian country shall be subject to the same laws and penalties as all other persons committing the above offenses within the exclusive jurisdiction of the United States. In effect, this too incorporates the provisions of 18 U.S.C. 1111.[15]

18 U.S.C. 1751 states that whoever, *inter alia,* "kills" the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the Presidency, the Vice President-elect, or any individual who is acting as President under the laws and Constitution of the United States, shall be punished as provided in 18 U.S.C. 1111 and 1112.

18 U.S.C. 351, enacted in 1971, is a parallel statute to section 1751 providing coverage for members of Congress and members of Congress-elect.

49 U.S.C. 1472(k), enacted in 1970, states that whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in 18 U.S.C. 7, would be in violation of, *inter alia,* 18 U.S.C. 1111 and 1112, shall be punished as provided therein.

In addition to the above statutes, there are a number of other Federal enactments that provide increased penalties for homicides occurring in the course of other Federal offenses. These statutes can be divided into several broad categories:

(i) *Transportation in interstate, water, and air commerce*

18 U.S.C. 34. This section applies to destruction of aircraft, motor vehicles employed in interstate commerce, and their respective terminals and facilities. If death results from the commission of the offense the penalty is increased to death or life imprisonment.

18 U.S.C. 832(a). This section covers the transportation of explosives and other dangerous materials on carriers of passengers in interstate commerce. If death or bodily injury results, the penalty is increased to imprisonment for up to ten years.

18 U.S.C. 833. This statute penalizes the failure to mark packages shipped in interstate commerce containing explosives and other dangerous articles. If death or bodily injury results, the penalty is augmented to a maximum of ten years' imprisonment.

18 U.S.C. 834. This statute penalizes the violation of Interstate Commerce Commission regulations concerning transportation of explosives and other dangerous articles. The sentence is up to ten years in prison if death or bodily injury results.

18 U.S.C. 837(b). This section penalizes transporting explosives in interstate commerce with intent to destroy specified types of buildings. The penalty is increased to life imprisonment if death results.

18 U.S.C. 844(d). This statute punishes transporting explosives in interstate commerce with intent to injure any person or destroy any building. If death results, the penalty is death or life imprisonment.

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[15] 18 U.S.C. 1152 extends the general laws of the United States (including 18 U.S.C. 1111 and 1112) to offenses committed in Indian country by non-Indians against Indians. But see *New York ex rel. Ray* v. *Martin,* 326 U.S. 496 (1946), holding that crimes by non-Indians against non-Indians are not within the scope of 18 U.S.C. 1152 and hence must be prosecuted by the States.

18 U.S.C. 844(i). This statute provides, if death results, a maximum penalty of death or life imprisonment for the use of explosives to damage facilities and property used in interstate commerce or in activities affecting interstate commerce.

18 U.S.C. 1992. This section punishes wrecking trains, terminals, and facilities. If death results, the maximum sentence is death or life imprisonment.

46 U.S.C. 170(15). This statute punishes by up to ten years in prison the violation of regulations concerning the carrying of explosives on vessels, if death or bodily injury results.

49 U.S.C. 1472(h). This statute punishes by up to ten years in prison the violation of regulations concerning the carrying of explosives on aircraft, if death or bodily injury results.

There are no reported homicide prosecutions under the preceding statutes.

(ii) *Use of mails*

18 U.S.C. 1716. This statute makes it an offense to use the mails to send to anyone explosives, poison, or other dangerous articles. The penalty is increased to death or life imprisonment if death results.

(iii) *Civil rights*

18 U.S.C. 245. Under this provision, if death results during an interference with designated federally protected activities, the penalty is increased to life imprisonment.

42 U.S.C. 3631. Under this statute, if death results from injuring or intimidating any person exercising rights under the Fair Housing Law, the penalty is increased to life imprisonment.

(iv) *Other federal offenses*

18 U.S.C. 2113(e). This section punishes robbery and related offenses against a federally insured bank or financial institution. The penalty is increased to death or a minimum of ten years in prison if any victim of the robbery is killed or kidnapped.[16]

18 U.S.C. 844(f). This provision punishes the use of explosives to damage United States property. If death results from the acts, the offender is made subject to death or life imprisonment as provided in 18 U.S.C. 34.

2. The Offense

Subsection (a) of section 1601 provides that a person commits an offense if (1) he engages in conduct by which he intentionally causes the death of another person, (2) he engages in conduct by which he causes the death of another person under circumstances in fact manifesting extreme indifference to human life, or (3) in fact, during the commission of an offense described in sections 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1121 (Espionage), 1313 (Escape), 1601(a)(1) or (2) (Murder), 1611 (Maiming), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1641 (Aggravated Rape), 1701 (Arson), 1711 (Burglary), or 1721 (Robbery), that he commits either alone or with one or more other participants, he or another person engages in conduct that in fact causes the death of a person other than one of the participants in such underlying offense.

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[16] The death penalty, as provided for in 18 U.S.C. 2113(e), has been declared invalid. See *Pope v. United States*, 392 U.S. 651 (1968).

The above formulation of the murder offenses basically follows the recommendation of the National Commission[17] and merges the offenses of first and second degree murder. The line between first and second degree murder—originally created as a device to limit the application of the death penalty—has become blurred by judicial decision, principally as a result of the tendency of courts to construe the element of "premeditation," which formally distinguishes the two offenses under current law, as being present in first degree murder if the design to kill preceded, however briefly, the actual killing.[18] In addition, even if the test of premeditation were applied so as to dicriminate more clearly between spur-of-the-moment killings and those that are planned, it seems evident that using that factor as a basis for differentiating between degrees of murder is unsatisfactory since some impulsive killings (e.g., the wanton shooting of a stranger) are more heinous than certain types of premeditated taking of human life (e.g., the mercy killing of a loved one slowly dying of a painful and incurable disease).[19]

The Committee has also eliminated the concept of "malice" or "malice aforethought" in murder. Although originally meaning something similar to a deliberate and premeditated design to take life, the concept of "malice" developed over centuries of decisions to include an intent not only to kill but to inflict serious bodily harm.[20] As such, "malice" today is a rather amorphous requirement best replaced, as it has been in many contemporary State penal codes, by a more modern and precise culpability scheme.

Paragraph (1) sets forth the basic murder offense. The conduct element consists of engaging in any conduct. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[21]

The element that the conduct causes the death of another person is a result of conduct. The culpability level for this element is specifically set at "intentionally", thus requiring proof that it was the offender's conscious objective or desire to cause the person's death.[22]

In paragraph (2) the conduct also consists of engaging in any conduct. Since no culpability standard is specifically set forth, the applicable state of mind that must be shown is at least "knowing," i.e., that the actor was aware of the nature of his behavior.[23]

The element that the conduct causes the death of another person is a result of conduct. Since no culpability level is specifically designated, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the death of another person might ensue, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[24]

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[17] See Final Report, § 1601.

[18] See Working Papers, p. 823.

[19] See Working Papers, p. 824; cf. Model Penal Code, Comment, p. 68 (Tent. Draft No. 9, 1959).

[20] See Working Papers, pp. 824-825; Perkins, *supra*, note 4, at 35-36.

[21] See sections 303(b)(1) and 302(b)(1).

[22] See section 302(a)(2).

[23] See sections 303(b)(1) and 302(b)(1).

The element that the conduct is performed under circumstances manifesting extreme indifference to human life, which distinguishes this offense from manslaughter as set forth in section 1602(a)(1), is an existing circumstance. However, since it is preceded by the phrase "in fact," no state of mind need be proved as to this element.[25]

Proof of an intent to kill, such as by firing a weapon at an individual, will clearly be sufficient to evidence an actor's extreme indifference to human life.[26]

Paragraph (3) carries forward, in modified form, the doctrine of felony-murder.[27] It is derived from New York law,[28] which in turn was followed by the National Commission. The National Commission, however, combined in one subsection the definition of the felony-murder offense and the affirmative defense that mitigates it. The Committee has instead separated these provisions so that the offense is defined here in paragraph (3) and the affirmative defense that applies to it is set forth in subsection (c).

At common law the "malice" necessary for murder could be found from the fictional intent to kill deemed implicit in the fact that the offender was engaged in robbery, rape, burglary, arson, or other common law felony. Since the common law felonies were themselves subject to capital punishment, the impact of the felony-murder rule was slight. With modern distinctions in penalties, however, the rule has permitted more severe sentences for certain unintended and even accidental killings in the course of crimes which themselves entailed considerable risk of physical violence.[29]

The doctrine has become somewhat controversial in recent years. Some have argued that it should be abolished on the ground that to punish the perpetrator, e.g., of a robbery, for an unforeseeable death occurring in its commission, perhaps even involving a confederate, is wholly arbitrary.[30] Others favor retention of the doctrine on the ground that it serves an important public interest by deterring criminals from carrying weapons during the commission of felonies and thereby preventing serious injuries to innocent victims.

The Committee, like the National Commission, has taken a middle position. Under paragraph (3) herein, the common law doctrine will be retained in part, but its application will be limited to a relatively few enumerated felonies not involving victims who are participants in the offense,[31] and even in these circumstances, the inherent harshness of the rule will be tempered by the existence of an affirmative defense where the victim's death was not reasonably foreseeable. By contrast, present Federal law under 18 U.S.C. 1111 holds all accomplices liable for felony-murder, irrespective of whether the death of the victim was foreseeable, and apparently includes liability for the killing of a fellow participant in the offense. However, the statute is narrower than the present proposal in listing only arson, rape, burglary, or robbery as the underlying offenses that will support an application of the felony murder concept.[32] To the offenses presently contained in 18 U.S.C. 1111 the Committee has added ten others[33] considered to pose an equivalent if not greater danger of death to innocent persons.

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[24] See sections 303(b)(3) and 302(c)(2).

[25] See section 303(a)(1).

[26] It is also intended that such indifference be deemed manifested by such acts as setting a building on fire without ascertaining whether there were any occupants or by shooting into a structure in which it was apparent that persons could be present.

[27] This doctrine exists both in common law and in current Federal statutes. It is clearly constitutional. See. e.g., *Westberry* v. *Mullaney,* 406 F. Supp. 407, 417, n. 11 (D.Me. 1976), and cases therein cited.

[28] See McKinney's N.Y. Penal Law, § 125.25 (1971).

[29] See Working Papers, p. 825.

[30] See Working Papers pp. 825–26; some State codes have abolished the rule or severely limited its application. See, e.g., Ky. Rev. Stat. § 434 A.1-020 (1974); Wis. Stat. Ann. § 940.1 (1974); Colo. Rev. Stat. § 40-3-102 (1971); Minn. Stat. Ann. § 609.185 (1963); Ore. Rev. Stat. § 163.115(c) (1953).

[31] See Working Papers, p. 827.

The conduct in paragraph (3) consists of two distinct elements. The first is that the defendant "commits" one or more of the fourteen offenses there enumerated, acting either alone or with one or more participants. It should be noted, in discussing this element, that the concept of committing an offense specifically includes the attempted commission of the offense, the consummation of the offense, and any immediate flight from the commission of the offense.[34]

The second conduct element relates to how the victim's death is caused. Like the conduct in paragraphs (1) and (2), it consists of the defendant or any other person engaging in any conduct which causes the death of a person other than a participant in the underlying offense (e.g., the defendant brandishing a weapon or making a verbal threat in the course of a robbery which causes the victim to have a stroke and die, or a law enforcement officer shooting at the defendant as he flees and accidentally killing an innocent bystander).[35] Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown, is, at a minimum, "knowing," i.e., that the person performing the conduct was aware of the nature of his action.[36]

The element that the conduct cause the death of a person other than one of the participants in the underlying offense is a result of conduct; and the element that it occurs "during the commission" of one of the offenses enumerated in this paragraph is an existing circumstance. Since each of these elements is preceded by the phrase "in fact," no state of mind need be established with respect to them.[37]

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[32] See Working Papers, pp. 826–827.

[33] I.e., treason, armed rebellion or insurrection, sabotage, espionage, escape, murder, maiming, kidnapping, aggravated criminal restraint, and aircraft hijacking. The New York City Bar Association's Special Committee specifically encouraged the inclusion of aircraft hijacking in this list. Hearings, p. 7746.

[34] See the definition of "commission of an offense" and its variants in section 111.

[35] The National Commission restricted liability to cases where the death was directly caused by the defendant or a participant in the underlying offense. There seemed no reason, however, not to include instances where the death is brought about by an innocent party, given that lack of foreseeability of the result renders the defendant immune from conviction for murder. In some instances the offense may be so fraught with risk of death (e.g., attempted sabotage of a heavily guarded warship) at the hands of a non-participant that a risk of death to an innocent victim by third party is a foreseeably consequence of the criminal venture.

[36] See sections 303(b)(1) and 302(b)(1).

[37] See section 303(a)(2).

3. Defense

Subsection (b) provides that it is a defense to a prosecution under subsection (a)(1) that the death was caused under circumstances, for which the defendant was not responsible, that (1) caused the defendant to lose his self-control, and (2) that would be likely to cause an ordinary person to lose his self-control to at least the same extent.

As will be seen in connection with the following section, the offense of manslaughter under section 1602(a)(2) is defined as conduct amounting to murder under section 1601(a)(1) except for the existence of circumstances constituting the defense that is here provided. This defense thus distinguishes murder from manslaughter under the proposed Code. It relies, in effect on the common law doctrine of adequate provocation to reduce the level of homicide from murder to manslaughter where the accused acted knowingly to cause another's death but did so because of a loss of self-control induced by the surrounding circumstances, for which he was not responsible. The defense is not made available, however, where the defendant was a person of unusual irascibility or sensitivity to provocation. Rather, the reasonableness of his loss of control is an implicit element of the defense and is tested by the standard, set forth in subparagraph (2), of whether an ordinary person would have reacted to the circumstances so as to lose his control to at least the same degree. It is important to note that such a passionate reaction[38] may be directed against an innocent party and is not limited to retaliation against the provoker.[39] Indeed, an attack upon a third party would arguably be a strong indication that the accused actually lost his self-control.[40]

The Committee intends that the question of what constitutes adequate provocation in the context of this defense be determined by the finder of the facts on the basis of an evaluation of all the circumstances without encumbrance by artificial doctrines, invoked in the past by some courts, such as that words alone may never be sufficient provocation to reduce murder to manslaughter.[41]

Once the defense is sufficiently raised, the government will bear the burden of disproving it beyond a reasonable doubt. Although the questions whether the defendant lost his self-control and why are often peculiarly within his knowledge so as to make it difficult at times for the government to negative an assertion of this defense beyond a reasonable doubt, the Committee considers that making the defense "affirmative" would, although not unconstitutional,[42] tend to place an undue strain on the defendant's right to testify, in view of the fact that evidence establishing the defense to murder in this section may substantially contribute to a finding of a guilt under section 1602 (Manslaughter).

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[38] The reaction is not limited to rage or anger and may include other passionate states of mind such as fear or terror. *See Stevenson* v. *United States,* 162 U.S. 313. 320 (1896).

[39] See Working Papers, pp. 828–829.

[40] See O'Regan, *Indirect Provocation and Misdirected Retaliation,* 1968 Crim. L. Rev. 319, 323.

[41] *E.g., Allen* v. *United States,* 164 U.S. 492, 497 (1896); *United States* v. *Lewis,* 111 F. 630 (W.D. Tex. 1901); See also Perkins *supra* note 4, at 54–69. That the "mere words" doctrine is of dubious merit is indicated, among other things, by an exception that has been carved out for so-called "informational" words (e.g., that the declarant just raped the defendant's daughter), as opposed to "insulting" words. See Perkins, *supra* at 62.

[42] See *Patterson* v. *New York,* 432 U.S. 197 (1977).

4. Affirmative Defense

Subsection (c) provides that it is an affirmative defense to a prosecution under subsection (a)(3) that the death was not a reasonably foreseeable consequence of either the underlying offense or the particular circumstances under which the underlying offense was committed.

This provision is designed to mollify the traditional effect of the felony-murder rule by removing liability for a death caused in the course of committing a felony (of the enumerated kinds) where the death was not reasonably foreseeable. In the opinion of the Committee, where the death is shown not to have been reasonably foreseeable, the wrongfulness of the defendant's conduct in participating in a felony and to that extent causing the ensuing death is not sufficient to justify liability for homicide. In this respect, the affirmative defense here proposed will place the law of felony-murder on a somewhat comparable basis with present principles regarding liability in conspiracy for the acts of a co-conspirator, where the doctrine has always required that the act be a reasonably foreseeable consequence of the unlawful agreement.[43] Unlike in conspiracy, however, where the sole focus is on the defendant's liability for the acts of his co-participants, the affirmative defense afforded here to murder is available even if the defendant himself, rather than an accomplice, caused the death.[44]

The defense suggested by the National Commission (which was drawn almost verbatim from New York law) focused in part on the defendant's reasonable belief that no other participant was armed or intended to engage in conduct likely to result in death or serious bodily injury.[45] The Committee, however, has drafted the defense so that it concentrates on the objective foreseeability of the death resulting from the manner in which the offense was committed. The Committee's proposed defense is therefore directed only to the relatively bizarre instance where the causal connection between the offense and the death is attenuated.

The defense is made "affirmative," thus requiring the defendant to bear the burden of proving all of the elements thereof by a preponderance of the vidence.[46] This conforms to the recommendations of the National Commission and to the New York law.[47] The Committee considered it proper to place upon the accused, in a case where a death has resulted from his participation in a felony the burden of establishing that the death was not a reasonably foreseeable consequence of his conduct.

5. Jurisdiction

There is Federal jurisdiction over an offense described in this section in six basic circumstances. The first is if the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 and includes the special maritime, special territorial, and special aircraft jurisdictions. These in turn are defined in terms virtually identical to 18 U.S.C. 7 and 49 U.S.C. 1301(32), which represent the current jurisdictional extent of the murder offenses described in 18 U.S.C. 1111 and 49 U.S.C. 1472(k).

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[43] See *Pinkerton* v. *United States,* 328 U.S. 640, 647–648 (1946). The so-called "*Pinkerton*" rule is carried forward in the proposed Code in section 401(c).

[44] However, as a practical matter, it seems clear that the defense will be invoked most often with respect to a death brought about by another person during the commission of the crime.

[45] See Final Report, § 1601(c).

[46] See the definition of "affirmative defense" in section 111. Shifting the burden of proof to the defendant in this context is constitutional. *Patterson* v. *New York, supra* note 42, at n. 15.

[47] See Final Report § 1601; the use of the affirmative defense approach was endorsed by the New York City Bar Association's Special Committee on the Proposed New Federal Criminal Code. Hearings, p. 7746.

The second circumstance exists if the offense is committed against: (A) a United States official; (B) a Federal public servant who is engaged in the performance of his official duties and who is a juror, a law enforcement officer,[48] an employee of an official detention facility, an employee of the United States Probation System or a person designated for coverage under this section in regulations issued by the Attorney General; (C) an inspector who performs inspections related to an activity or facility licensed by the Nuclear Regulatory Commission and carried out to satisfy requirements under the Atomic Energy Act of 1954 or other Federal law governing the safety and utilization facilities required to be licensed under section 103 or 104 of that Act, or the safety of radioactive materials, while such person is engaged in the performance of his inspection duties or because of the performance of such duties; (D) a foreign dignitary, or a member of his immediate family, who is in the United States; (E) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official, (F) an official guest of the United States, or (G) an internationally protected person, or (H) a person under the protection of the United States Secret Service pursuant to the provisions of section 3021.

The term "United States official" used on subparagraph (A) is defined in section 111 to mean a Federal public servant who is the president, the President-elect, the Vice President, the Vice President-elect, a Member of Congress, a member of Congress-elect, a judge, a member of the executive branch who is the head of a department listed in section 101 of title 5 of the United States Code, or the second ranking official in such a department, or a person employed in the Executive Office of the President or in the Office of the Vice President authorized to receive an annual rate of pay equal to that which applies for positions at level II of the Executive Schedule. This definition embraces the categories of persons for whom Federal homicide coverage exists under 18 U.S.C. 351 and 1751. To such existing coverage the Committee has added judges, members of the Cabinet and their deputies, and certain high ranking officials of the Office of the President and the Vice President, since these officials are also properly within the scope of Federal protection against murder.[49]

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[48] See *United States* v. *Reid*, 517 F.2d 953, 960-964 (2d Cir. 1975).

[49] Judges are currently covered in 18 U.S.C. 1114, which requires, however, proof of a nexus between the killing and the performance of official duties. The Committee determined to add judges as well as Cabinet officers and their deputies and the enumerated small group of high-level White House employees to the category of United States officials to be covered against various crimes of violence without a showing of such a nexus, on the basis of the recommendation of the Attorney General's Task Force on Violent Crime (see Task Force Final Report, p. 34, Aug. 17, 1981) and the Attorney General in testimony before the Committee on the subject of violent crime (October 23, 1981).

Subparagraph (B) is a moderate extension of the present scope of 18 U.S.C. 1114. The terms "juror", "law enforcement officer", and "official detention" are defined in section 111. To provide a workable mechanism for extending Federal murder protection to miscellaneous additional classes of persons whose occupational responsibilities may place them in positions of danger—and for keeping such coverage current with changing needs—the Committees has provided that the Attorney General may designate in regulations other classes of persons for such coverage.[50] It should be noted that all categories of persons included in subparagraph (B) are covered only if the killing occurs while they are engaged in the performance of their official duties.[51]

Subparagraph (C) brings forward the provisions of section 202 of Public Law 96-295, relating to killings and assaults upon nuclear inspectors.

Subparagraphs (D), (E), (F), and (G) together carry forward the jurisdictional reach of 18 U.S.C. 1116. The terms "foreign official", "foreign dignitary", "internationally protected person", "official guest of the United States", and "immediate family" are defined in section 111 and have virtually the identical meaning as the comparable terms defined in 18 U.S.C. 1116(b).

Subparagraph (H) is new and was suggested by the Department of the Treasury, on the rationale that there should be jurisdiction over crimes of violence committed against Secret Service protectees since the congressional determination to authorize such protection logically serves to denote the existence of a corresponding Federal interest in vindicating such crimes. The Committee agrees and has included such jurisdiction here, and in the following two subchapters dealing with assault and kidnapping types of offenses.

The third circumstance occurs if the offense is committed by transmitting through the United States mail a dangerous weapon.[52] This carries forward the jurisdictional reach of 18 U.S.C. 1716. The term "dangerous weapon" is defined in section 111 and includes an explosive and a destructive device.

The fourth circumstance arises if the offense is committed as consideration for the receipt of anything of value, or of a promise to pay anything of value, and (A) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense, or (B) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

The jurisdictional base is new and is designed to create Federal cognizance over certain murder-for-hire offenses, particularly those associated with organized crime. The proposal has the strong support of the Department of Justice. Although no comprehensive or precise data on contract murders are available, the number of such crimes that occur in our society each year is substantial. The F.B.I. has advised the Committee that in Chicago alone between 1974 and the present more than fifty murders have occurred having organized crime overtones. Moreover, murder-for-hire offenses associated with organized crime unfortunately enjoy a comparatively low solution rate. The Committee shares the belief of the Department of Justice that the creation of Federal jurisdiction in this area may help bring about a significant improvement in this area, since the F.B.I. often has the unique ability, through its knowledge of organized crime groups and its nationwide jurisdiction, to solve organized crime related murders.

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[50] See also section 1611(c)(2)(B) (Maiming). Categories of persons covered by present 18 U.S.C. 1114 illustrate the types of jobs contemplated for protection under regulations.

[51] If such a person is killed while engaged in personal matters, and the killing occurs in retaliation for an official action taken by such person or because of such person's status as a public servant, coverage under section 1601 would exist by virtue of the ancillary jurisdiction provision in subsection (d)(4) which permits prosecution of a murder occurring in the course of an offense under section 1358 (Retaliating against a Public Servant).

[52] This basis for Federal jurisdiction was incorporated at the suggestion of the New York City Bar Association's Special Committee. Hearings, p. 7747.

The jurisdictional base included in this section is patterned upon the Travel Act (18 U.S.C. 1952) as incorporated by the Committee in the arson (section 1701(c)(8) and (9)) and gambling (section 1841(f)(2)) areas, among others. The second branch of the base, involving interstate movement of a "person," is intended to include situations in which it is the victim who travels.[53] The key term "anything of value" is defined in section 111 to mean any direct or indirect gain or advantage, or anything that might reasonably be regarded as a direct or indirect gain or advantage by the beneficiary, including a direct or indirect gain or advantage to any other person, but does not include bona fide salary, wages, fees, or other compensation paid in the usual course of business. This will clearly enable coverage of murders performed by paid "hit men" or contract killers since the exclusion of "bona fide salary, wages, fees, or other compensation paid in the usual course of business" is not intended to apply to compensation paid for criminal acts. Moreover, even if a murder is committed by a member of an organized crime group for no immediate compensation, the concept of "anything of value" will reach the conduct if it can be shown that the murder was committed in the reasonable expectation of enhancing the person's prospects for promotion or other economic advantage within the organization.

The fifth circumstance is if the offense is committed on a railroad vehicle operating in interstate or foreign commerce. This also is new since, although Federal law currently covers a death occurring in the course of wrecking a train, it does not extend to murders committed on trains moving in interstate or foreign commerce that are not linked to a train wrecking offense. The rationale for the creation of Federal jurisdiction here (as well as in the assault subchapter) is that the interstate movement of the railroad conveyance may make the determination of local jurisdiction over the offense difficult and cloud the prospects for a successful investigation and prosecution of the crime. Similarly, by virtue of paragraph (e)(1), Federal jurisdiction will apply to murders committed aboard aircraft while in flight.

The problem of vandalism on the nation's railroads continues to grow worse each year. There are estimates of approximately 40,000 incidents of vandalism each year on the railroads. Many passengers and employees have been killed or seriously injured over the years because of persons shooting at trains, or throwing lethal objects at trains. Moreover, property losses from these acts cost the railroads millions annually.

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[53] Compare *Rewis* v. *United States*, 401 U.S. 808 (1971).

There are three Federal statutes covering this problem in a very limited way. Section 2181 of Title 15 of the U.S. Code proscribes acts of willful destruction or injury to property moving in interstate commerce. Section 1991 of Title 18 makes it a crime to enter a train to commit unlawful violence and section 1992 relates to the prohibition of wrecking a train. None of these statutes meets the major problem of persons shooting and throwing objects at trains along railroad rights-of-way. Many States have laws covering this problem. Unfortunately the States have been ineffective in enforcing these laws against railroad vandals. Based upon the available statistics only 10 percent of the vandals are arrested at the State level for shooting or stoning of trains. The Committee does not suggest that making such acts a Federal crime will eliminate the problem. However, it does feel that the Federal presence with additional enforcement machinery will reduce the gravity of it.

This is not a new subject before Congress. Similar legislation has been pending before this Committee for many years. The Committee reported out a bill in 1967 which passed the Senate. It would have accomplished substantially the same thing as contained in this section. The House took no action on the measure. In connection with the above-mentioned bill this Committee observed in 1967 that:

> Incidents of stoning and shooting at trains, as well as other acts of vandalism, are becoming more numerous in all parts of the country. Despite the efforts of the railroads and local authorities, the situation is growing worse. Although there has been an increase in the number of persons apprehended for vandalizing trains, the number of trains vandalized and the number of persons injured as a result thereof has increased. (S. Rept. 90–629, October 11, 1967, p. 1)

Since then nothing has changed for the better. In fact, the acts of vandalism continue to increase.

This section is not intended to preempt State and local laws covering vandalism on the nation's railroads. There will be concurrent jurisdiction over this important matter.

The sixth circumstance exists if the offense occurs during the commission [54] of one or more enumerated offenses. This represents an application of the concept of ancillary jurisdiction discussed in connection with chapter 2. Instead of adopting the technique utilized in haphazard fashion in current law of increasing the penalty for a death occurring in the course of certain Federal offenses (e.g., bank robbery under 18 U.S.C. 2113), the offense of murder occurring in such circumstances is made subject to Federal prosecution as a separate offense. This has the advantage of, among other things, permitting more rational grading of offenses and imposition of sentences. It also enables an offender to be tried and punished for his entire course of conduct rather than for only the underlying offense. The twenty-nine offenses enumerated in this paragraph as affording a basis for the assertion of ancillary jurisdiction are identical to those contained in section 1611 (Maiming) and were selected because of the likelihood of a murder being perpetrated in the course of their commission. The fact of committing one or more of the enumerated offenses (e.g., interfering with civil rights, kidnapping, or sabotage) is deemed to provide a sufficient Federal nexus and interest for Federal jurisdiction to be asserted over any concomitant murder offense.[55]

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[54] See the definition of "commission of an offense" in section 111.

In addition, it should be noted that by operation of sections 201(b)(1)(B) and 204, extraterritorial jurisdiction exists as to a number of the foregoing situations (e.g., where the victim is a United States official or a Federal public servant outside the United States for the purpose of performing his official duties (section 204(a)(1), (2)), or is an internationally protected person (section 204(j)). See also section 204(h) and (i).

6. Grading

An offense under this section is graded as a Class A felony, carrying a maximum life sentence.

SECTION 1602. MANSLAUGHTER

1. In General

This section defines the offenses of manslaughter, which currently exist in Federal law in two degrees: voluntary and involuntary. The offense of voluntary manslaughter is defined by reference to the definition of murder in section 1601(a)(1), when committed under circumstances under which the defense of loss of self-control, set forth in section 1601(b), applies. Thus, the current doctrine of adequate "provocation" (explained in connection with the preceding section) has been expanded to eliminate various judicially created restrictions on what may cause provocation. In addition, the somewhat misleading concept of "passion" in existing manslaughter law has been replaced by terminology, believed to be more accurate, describing a loss of "self-control."

As to involuntary manslaughter, the most significant change from existing law is the division of the offense into two categories. The one in this section, which requires a "reckless" state of mind with respect to the result that death may be caused by the defendant's conduct, is punished to the same degree as voluntary manslaughter. It is distinguished from murder as defined in section 1601(a)(2) by the lack of a requirement that the defendant's actions be found to have manifested "extreme indifference to human life." The other category of manslaughter is defined as negligent homicide in section 1603 and requires only a "negligent" state of mind as to the result that death of another person may occur from the offender's conduct.

The basic divisions of the manslaughter offense are derived from the recommendations of the National Commission.[56]

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[55] This conclusion was supported by the New York City Bar Association's Special Committee. Hearings, p. 7747.

[56] See Final Report, § 1602.

2. Present Federal Law

The basic Federal manslaughter statues is 18 U.S.C. 1112, which in its format parallels 18 U.S.C. 1111. The section provides that manslaughter is the—

> unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary—Upon a sudden quarrel or heat of passion;
>
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

The section punishes whoever, with the special maritime and territorial jurisdiction of the United States, commits voluntary manslaughter by up to ten years in prison. Involuntary manslaughter is subject to a maximum prison term of three years.

In contrast to murder as defined in 18 U.S.C. 1111, voluntary manslaughter has been held to require neither premeditation nor malice.[57] As at common law, it is an intentional killing committed while in a sudden heat of passion due to adequate provocation.[58]

With respect to involuntary manslaughter, 18 U.S.C. 1112 appears on its face to adopt the common law misdemeanor-manslaughter rule, analogous to the felony-murder rule, according to which any killing in the course of an unlawful act is manslaughter.[59] However, in *United States* v. *Pardee,*[60] the court held that a conviction could not be had for involuntary manslaughter resulting from the violation of a traffic regulation (in which the defendant turned his automobile to the north while in the southbound roadway), unless the jury found that the act of wrong-way driving was the result of more than simple negligence, that it amounted to wanton or reckless disregard for human life, and that it included an awareness of the risks of the peril caused to others by his conduct.[61]

A number of other Federal statutes of more limited jurisdictional scope incorporate the substantive definition of manslaughter in 18 U.S.C. 1112. Most of these statutes also assimilate the definition of the Federal murder statute, 18 U.S.C. 1111, and accordingly have been referred to in connection with the preceding section. These provisions include: 18 U.S.C. 1114 (killing of Federal public servants); 18 U.S.C. 1116 (killing of a foreign official, official guest); 18 U.S.C. 1152 and 1153 (killing of an Indian by a non-Indian in Indian country and killing of any person by an Indian in such place); 18 U.S.C. 1751 and 351 (killing of the President, a person in immediate line of succession to the Presidency, or a member or member-elect of Congress); and 49 U.S.C. 1472(k) (killing of any person within the special aircraft jurisdiction of the United States). In addition to the foregoing, 18 U.S.C. 1115 punished by up to ten years in prison every captain, engineer, pilot, or employee on any vessel "by whose misconduct, negligence, or inattention to his duties on such vessel the life of any other person is destroyed." The statute, which appears to involve a type of misdemeanor-manslaughter offense, is seldom utilized today.[62]

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[57] See *Beardslee* v. *United States, supra* note 10.

[58] See *Wakaksan* v. *United States,* 367 F.2d 639 (8th Cir. 1966); Perkins, *supra* note 4 at 51-70.

[59] See Working Papers, p. 830: Perkins, *supra* note 4 at 73-77.

[60] 368 F.2d 368 (4th Cir. 1966).

[61] *Id.* at 373-374. See also *United States* v. *Escamilla,* 467 F.2d 341 (4th Cir. 1972).

3. The Offense

Subsection (a) provides that a person commits an offense if (1) he engages in conduct by which he causes the death of another person, or (2) he engages in conduct by which he intentionally causes the death of another person under circumstances that would constitute an offense under section 1601(a)(1) except for the existence of circumstances in fact constituting a defense under section 1601(b).

Paragraph (1) is a lesser included offense of murder under section 1601(a)(2), which requires in addition that the conduct occur under circumstances manifesting extreme indifference to human life. The conduct in this offense consists of engaging in any conduct. Since no culpability standard is specifically set forth in this paragraph, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[63] The element that the conduct caused the death of another person[64] is a result of conduct. Since no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e. that the offender was aware of but disregarded the substantial risk that such a death might ensue.[65] The misdemeanor-manslaughter rule, rejected under existing Federal law,[66] has been abandoned. This is in accordance with the recommendation of the National Commission,[67] as well as the views of legal commentators. As stated by Perkins in his treatise on Criminal Law:[68]

> The misdemeanor-manslaughter rule may result in an unreasonably extreme extension of liability. If one has unlawfully applied force to the person of another, he should be convicted of battery, but if death has resulted so unexpectedly that no reasonable person would have foreseen it, the homicide should be excused.

Paragraph (2) is a lesser included offense of murder under section 1601(a)(1). The elements of the offense are the same as under that section, when considered with the defense of loss of self-control contained in section 1601(b). Accordingly, the discussion of those provisions should be consulted here. Like the offense in paragraph (1) of this subsection, the culpability here with respect to the result of death is set at "intentionally," thus requiring proof that it was the offender's conscious objective or desire to cause the death of the victim.[69] The offense is reduced in severity from murder, however, because of the further requirement that it occur under circumstances, for which the defendant was not responsible, that caused him to lose his self-control and that would have caused an ordinary person to lose his self-control to at least the same extent. This formulation of the traditional "heat of passion" test has been discussed above.

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[62] Virtually the only reported cases in recent years under this statute are *United States* v. *Allied Towing Corp.*, 602 F.2d (4th Cir. 1979), and *Hoopengarner* v. *United States*, 270 F.2d 465 (6th Cir. 1959).

[63] See sections 303(b)(1) and 302(c)(1).

[64] The term "person" is defined in section 111 and was discussed in relation to section 1601.

[65] See sections 302(b)(3) and 302(c)(2).

[66] See *United States* v. *Pardee, supra* note 60.

[67] See Final Report, § 1602. Comment, p. 175; Working Papers, p. 830.

[68] See Perkins, *supra* note 4 at 78–79.

[69] See section 302(a)(1).

The elements in this offense that the circumstances would constitute an offense under section 1601(a)(1), except for the existence of circumstances in fact constituting a defense under section 1601(b) are existing circumstances. However, by the operation of sections 303(a)(1) and (d)(1) of the proposed Code, no mental state need be proved as to these elements.

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if a circumstance described in section 1601(e), other than a circumstance described in section 1601(e)(4), exists or has occurred. The jurisdictional provisions of section 1601(e) have been explained in detail in connection with the previous section and that discussion is incorporated here. The reason for the non-applicability of the jurisdictional base in section 1601(e)(4), relating to killings performed as consideration for anything of value, is to make it clear that this provision would not provide a new form of Federal jurisdiction to prosecute manufacturers on a theory akin to that unsuccessfully employed in the recent State prosecution of the so-called "Ford Pinto" case. In view of the exclusion of salary, wages, and other compensation paid in the usual course of business from the definition of "anything of value," it is difficult to see how such a theory could be spun under this provision. Nevertheless, the Committee has deleted the applicability of section 1601(e)(4) out of an abundance of caution, considering that the non-applicability to this offense does not seriously inhibit the legitimate intended utilization of the jurisdiction over killings for profit in organized crime type of situations.

5. Grading

An offense described in this section is graded as a Class C felony (up to twelve years in prison).[70]

Unlike current Federal law, which in many instances increases the penalty if certain victims (e.g., the President) are killed, the Committee has graded the offenses of homicide uniformly and without regard to the identity or status of the victim. Where the victim is a Federal public servant, the homicide may well impinge upon other Federal interests and constitute additional crimes for which the offender is liable (e.g., section 1302 (Obstructing a Government Function by Physical Interference)).

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[70] Compare Final Report, § 1602, which graded the offense as a Class B felony, carrying a maximum fifteen-year period of imprisonment under the Commission's sentencing scheme, Final Report, § 3201.

SECTION 1603. NEGLIGENT HOMICIDE

1. In General and Present Federal Law

This section in essence brings forward the conduct embraced in 18 U.S.C. 1112 under the phrase "without due caution and circumspection."[71] As noted in connection with the discussion of that statute in the preceding section, although the language suggests a tort liability standard of negligence, it has been interpreted to require gross negligence involving a wanton or reckless disregard of human life.[72] A similar culpability standard, clearly distinct from tort liability concepts of negligence, is required under this section, thus following current law. The formulation in this section is derived almost verbatim from the recommendations of the National Commission, and the inclusion of such a general negligent homicide offense (as opposed to a provision limited to vehicular homicide) is consistent with the law in several States as well as the suggestion of the Model Penal Code.[73]

2. The Offense

Subsection (a) of section 1603 provides that a person commits an offense if he engages in conduct by which he "negligently causes the death of another person."

The conduct in this offense consists of engaging in any conduct. Since no culpability standard is specifically set forth, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[74]

The element that the death of another person is caused is a result of conduct. The culpability level is designated as "negligently," thus requiring proof that the offender ought to have been aware of a risk that the result would occur, and the risk must have been of such a nature that the failure to perceive it was a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[75]

This culpability standard retains the requirement of current law that the type of negligence that will suffice for homicide liability is only gross negligence. The standard in this section differs from that (i.e., recklessness) in section 1602, punishing manslaughter, by reason of the fact that in order to show recklessness, the prosecution must show that the offender was aware of, yet disregarded, the substantial risk of death to another person, whereas here the offender only need be shown not to have perceived the risk.[76]

Even though, under this section, considerably more than the negligence required for civil liability must be established, the Committee has not chosen to generalize from this offense and impose penal sanctions for injuries less severe than death resulting from negligence. As under current law, a victim's remedy for bodily injury caused by the "negligent"[77] operation of a vehicle will lie under the civil law.[78]

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[71] Some other, more specific Federal statutes that would be carried forward, at least in part, by this section are mentioned in the National Commisison's Working Papers, p. 830.

[72] See *United States* v. *Pardee, supra* note 60.

[73] See Perkins, *supra* note 4 at 79–82.

[74] See sections 303(b)(1) and 302(b)(1).

[75] See section 302(d)(2).

[76] A similar distinction between negligence and recklessness was drawn by the National Commission. See Final Report, § 302.

3. Jurisdiction

There is a Federal jurisdiction over an offense in this section if a circumstance described in section 1601(e), other than a circumstance described in section 1601(e)(4), exists or has occurred. The jurisdictional provisions in section 1601(e) have been discussed in connection with that section and the exclusion of section 1601(e)(4) has been discussed in relation to section 1602. Both of those discussions should be consulted here.

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). Although this represents an increase from the three-year maximum for involuntary manslaughter under 18 U.S.C. 1112, other Federal statutes punishing negligent homicide provide for a ten-year maximum sentence.[79] The six year penalty is thus within the present punishment range for this offense and creates a rational distinction in grading when compared with manslaughter, which is graded as a Class C felony.[80]

SUBCHAPTER B.—ASSAULT OFFENSES

(Sections 1611-1617)

The offenses included within this subchapter are: Maiming (1611); Aggravated Battery (1612); Battery (1613); Menacing (1614); Terrorizing (1615); and Communicating a Threat (1616). Section 1617 contains a general definition and a defense applicable to certain of the offenses in this subchapter.

These offenses are all codifications of the common law crimes of assault and battery which currently appear in numerous statutes throughout the United States Code.[1] At common law, actually striking or unlawfully touching another person was necessary to constitute a "battery." An attempt to commit the "battery" was deemed an "assault." However, "assault" under Federal law has traditionally included not only an attempt to inflict corporal injury on another by force but also "putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm."[2] Thus if one points a gun at another he has committed an assault, whether or not the gun was loaded. When he wounds the other person or strikes him with the gun, he has committed a battery. The first three sections of this subchapter deal with common law "battery" offenses. The next three sections involve "assaults."

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[77] I.e., as defined in section 302(d)(2).

[78] It should be noted that there can be no attempt to commit negligent homicide since the crime of attempt under section 1001 requires that the conduct evince an "intent that the crime be completed"—a standard logically incompatible with an offense involving failure to perceive a risk.

[79] See Working Papers, p. 830.

[80] By contrast 18 U.S.C. 1112, penalizes involuntary manslaughter and negligent homicide identically.

[1] The following sections—17 U.S.C. 60, 86; 18 U.S.C. 32, 33, 111-114, 241, 245, 372, 593, 594, 837, 913, 1153, 1501, 1503, 1505, 1509, 1655, 1751, 1859, 1860, 1951, 1952, 1991, 1992, 2113, 2116, 2191, 2193, 2274, 2275; 46 U.S.C. 701; and 49 U.S.C. 1472—all contain assault-type provisions which will be consolidated, in part or in whole, into the seven sections contained herein. See Working Papers, pp. 839-840.

The most noticeable feature of this subchapter is that the sections primarily focus on the nature of the actual injury caused or threatened rather than on the defendant's intent (except in the communicating a threat section) or the office of the victim.[3] For example, in section 1615 a person is guilty of terrorizing if he communicates a threat and "thereby *causes* any person to be in sustained fear . . ." (Emphasis added.) Merely communicating a threat with intent to cause another person to be in fear would not be an offense under this section. By directing the assault provisions toward results, the prosecution is given the added burden in many cases of proving, within relatively broad categories, the extent of injury caused to, or the state of mind of, the victim. However, since it is injuries, both physical and mental, to victims which this subchapter seeks to proscribe, such a burden seems reasonable and indeed is consistent with the thrust of the provisions.

Because of this subchapter's emphasis on results, the fact that the defendant possessed a dangerous weapon during, for example, the commission of an assault does not increase the penalties or seriousness of the assault charged within this subchapter.[4] Rather such use of a weapon would be conduct constituting a violation of section 1823 or might be evidence sufficient to establish an attempt to commit a higher level battery.

SECTION 1611. MAIMING

1. In General and Present Federal Law

This section is designed to punish all intentionally caused serious bodily injuries where the injury is permanent or likely to be permanent. Although maiming could be combined with the following section on aggravated battery, the Committee believes that separate treatment is warranted to distinguish the offense of ordinary battery resulting in serious bodily injury from the more heinous conduct of an intentional infliction of serious and permanent bodily injury. A substantial body of opinion in the National Commission favored this approach,[5] which is consistent with present Federal law and was followed in S. 1, as introduced in the 93d Congress.[6]

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[2] *Ladner* v. *United States*, 358 U.S. 169, 177 (1958); see also *Guarro* v. *United States*, 237 F.2d 578, 580 (D.C. Cir. 1956).

[3] Many current statutes are not so result oriented. Thus in 18 U.S.C. 111 (assault on a federal officer) the penalty is the same whether or not bodily injury is inflicted. The behavior of the defendant, rather than the result of his conduct, constitutes the gravamen of the offense.

[4] Several current statutes, by contrast, e.g., 18 U.S.C. 111, provide for a substantial increase in the maximum penalty if a dangerous weapon is used, without regard to the injury to the victim.

[5] See Final Report, § 1612, Comment , p. 178. The Association of the Bar of the City of New York also expressed the view that a maining provision, graded at a higher level than aggravated assault, was desirable. See Hearings, p 3541. The American Bar Association's Committee on Reform of Federal Criminal Laws made a similar recommendation. See Hearings, p. 5809.

[6] See section 2-7C1.

The offense of maiming is currently punishable under 18 U.S.C. 114. That statute makes it a crime punishable by up to seven years is prison for whoever, in the special maritime and territorial jurisdiction of the United States, "with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb of any member of any person," or "throws or pours upon another person, any scalding water, corrosive acid, or caustic substance." Only one recent reported case apparently exists involving this statute.[7]

2. The Offense

Section 1611 expands and recasts the provisions of 18 U.S.C. 114 so as to cover all permanent (or likely to be permanent) serious bodily injuries. This expansion is appropriate since the current statute is based upon the old common law crime of "mayhem," which punished one for depriving another of his ability to "defend himself or annoy his adversary." [8] This in turn related to his ability to bear arms at the behest of the king. Such consideration being no longer significant, any serious permanent injury should be encompassed even if it does not impair the victim's ability to defend himself. Furthermore, there seems no reason to limit the coverage of the statute to the particular means of cutting, biting, slitting, or throwing of corrosive substances. Accordingly, this section is drafted so as to apply whenever the injury to the victim is sufficiently serious, regardless of how caused.

Subsection (a) provides that a person commits an offense if "by physical force, he intentionally causes serious bodily injury, that is permanent or likely to be permanent, to another person."

The element of physical force may include any force proximately caused by the actor. Thus driving a car into or pushing of boulder onto a victim constitutes physical force within the meaning of this section, as well as direct striking, cutting, shooting, etc. However, mere verbal assaults, however damaging, are not within the scope of this section.[9]

The term "serious bodily injury" is defined in section 111 as bodily injury which "involves (a) death or a substantial risk of death; (b) unconsciousness; (c) extreme physical pain; (d) protracted and obvious disfigurement; or (e) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." Usually this element will be obvious, as in the case of several limb or other traditional "maiming" injuries. In certain cases, however, such as spinal or brain damage, it may be necessary for the government to present expert testimony as to the degree of seriousness. The requirement that bodily injury result, both in this section and the succeeding two sections proscribing battery, is intended to exclude from coverage the common law crime of assault involving the touching of another for sexual purposes, e.g., a homosexual advance or "stolen" kiss. Such conduct should be dealt with in the area of sexual offenses, rather than crimes involving personal injury.[10]

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[7] *United States* v. *Stone*, 472 F.2d 909, 915 (5th Cir. 1973).

[8] See Perkins, *Criminal Law*, pp. 184-189.

[9] See the discussion, which is generally here, of the phrase "physical interference or obstacle" in section 1302 (Obstructing a Government Function by Physical Interference); cf. *District of Columbia* v. *Little*, 339 U.S. 1 (1950).

Similarly to the requirement of seriousness, the element that the injury must be "permanent or likely to be permanent" will be obvious in some cases, while in others expert testimony will be required. Permanence should not, however, be confused with "protracted" in the definition of "serious bodily injury." A broken arm may be a protracted injury, but it is not permanent. Likewise, the fact that the victim may suffer permanent side-effects from an injury, such as pain in a broken arm whenever it rains, does not render a serious injury permanent unless the permanent side-effects are serious as well.

The conduct in this section is in part implicitly stated, i.e., it involves engaging in conduct by physical force. As no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," that is, that the offender was aware that he was using physical force.[11]

The element that the conduct caused serious bodily injury to another person is a result of conduct. The culpability level is prescribed as "intentional," thus requiring proof that the offender consciously desired to effect to objective.[12]

The element that the injury caused is permanent or likely to be permanent is an existing circumstance. Since no culpability standard is specifically provided, the applicable state of mind that must be proved is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the injury inflicted would be or would likely be permanent.[13]

3. Affirmative Defense

Although the Committee, like the National Commission, has rejected the notion of attempting to define a general defense of consent,[14] it is necessary to include a specific defense of consent for crimes involving infliction of bodily harm upon others, since even intentional causing of injury, as in surgery, clearly may be performed without criminal liability.[15]

The defense of consent applicable to certain offenses[16] in this subchapter is contained in section 1617. Subsection (b) of that section provides that it is an affirmative defense to a prosecution under this section (as well as section 1612) that the conduct charged was consented to by the person injured and that the injury and conduct charged were (1) reasonably foreseeable hazards of joint participation by the actor and another person in a lawful athletic contest or competitive sport or (2) reasonably foreseeable hazards of (i) an occupation, business, or profession, or (ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods, and, in either case, the injured party had been made aware of the risks involved prior to giving consent. The National Commission adopted a similar formulation.[17]

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[10] See Working Papers, pp. 834–836.

[11] See sections 203(b)(1) and 302(b)(1).

[12] See section 302(a)(2)

[13] See sections 303(b)(2) and 302(c)(1).

[14] Many of the reasons supporting this decision are set forth in the Working Papers, pp. 849–850.

[15] See Final Report, § 1619. Comment, p. 183.

[16] The defense is not applicable to an offense under sections 1615 (Terrorizing) or 1616 (Communicating a Threat). Those offenses do not involve the infliction of bodily harm or endangerment of human life or safety.

In order for the consent contemplated by this provision to be effective, it must have been voluntarily and intelligently given. For example, the consent of a legally incompetent person or one under the influence of alcohol or narcotics would not be a valid consent. Similarly, consent obtained by force, threat, intimidation, or deception would not be sufficient to establish the defense herein. Because of the variety of factual circumstances in which the issue of validity of consent may arise, however, the Committee has determined not to attempt to describe the appropriate standard for assessing such validity beyond the statement that the consent must be voluntarily and intelligently given, and to permit that judgment to be made by the trier of fact.[18]

An example of one instance where the defense would be available in the case of an injury that would otherwise constitute an offense is provided by the prizefight. An injury sustained in the course of such a lawful contest is a reasonably foreseeable hazard of such activity, and it is clear that the participants would have "been made aware of the risks involved prior to giving consent." Thus, awareness need not be evidenced by an express warning of the risks; it is sufficient if, from all the circumstances, the victim's awareness can be inferred. Likewise, the consent need not be express but may be implicit. In the example given, for instance, it would not be necessary to show that the victim had explicitly consented (whether orally or in writing) to "the conduct charged."

The defense is denominated as "affirmative," thus requiring that the defendant bear the burden of proving the elements thereof by a preponderance of the evidence.[19]

4. Jurisdiction

There is Federal jurisdiction over an offense described in this section in five basic situations. The first is where the offense is committed within the special jurisdiction of the United States. This essentially carries forward the jurisdictional reach of 18 U.S.C. 114, since section 203 defines the special jurisdiction of the United States, in terms very similar to the special maritime and territorial jurisdiction under 18 U.S.C. 7, to include principally Federal enclaves, various vessels on the high seas or Great Lakes, and certain types of aircraft while in flight.

The remaining jurisdictional branches under this section represent an extension of present Federal jurisdiction over the crime of maiming. There seems no reason to give any lesser scope to the maiming offense than is afforded to other, less serious assaultive or threat-type offenses, which extend, both under present law and in this proposed Code, to a wide range of public and foreign officials,[20] and which also proscribe the use of Federal facilities or travel in interstate commerce in accomplishing the crime.[21] The jurisdictional purview of this section is accordingly designed to protect these additional, legitimate Federal interests.

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[17] See Final Report, § 1619.

[18] Compare Final Report, § 1619(2).

[19] See section 111.

[20] See, e.g., 18 U.S.C. 111, 112.

The second jurisdictional branch of this section establishes Federal jurisdiction where the offense is committed against a United States official or various enumerated classes of Federal public servants (e.g., juror, and law enforcement officer) while engaged in the performance of their official duties, against a foreign dignitary or a member of his immediate family while in the United States, against a foreign official in the United States on official business, or a member of his immediate family whose presence is connected with the presence of such foreign official, against an official guest of the United States or an international protected person, or against a person under the protection of the United States Secret Service pursuant to the provisions of section 3021.[22]

The third basis for jurisdiction exists when the offense is committed by transmitting through the mail a dangerous weapon.[23]

The fourth predicate is if the offense is committed as consideration for the receipt of anything of value or of a promise to pay anything of value, and either the mail or a facility in interstate or foreign commerce is used in various enumerated stages of the offense, or a movement of a person across a State or United States boundary occurs in one of those same stages. This base is identical to one contained in section 1601 (Murder), and the discussion there should be consulted here.

The fifth jurisdictional circumstance is if the offense is committed on a railroad vehicle operating in interstate or foreign commerce. An identical base appears in section 1601 (Murder) and the discussion there is applicable here.

The sixth jurisdictional branch has no counterpart in existing Federal law and extends Federal jurisdiction to a maiming which occurs during the commission of other, listed Federal offenses (e.g., kidnapping (section 1621), interfering with civil rights (section 1501), arson (section 1701), and extortion (section 1722)). Currently, if an assault or murder occurs in the course of an interstate kidnapping, there is no Federal jurisdiction to punish the assault. That charge must be prosecuted separately in a State court. Under the proposed jurisdictional formulation, which is similar to that already in existence in the District of Columbia,[24] maiming and other assaultive offenses under this subchapter committed in the course of an enumerated Federal crime can all be charged together and a punishment tailored to the defendant's total course of conduct.[25]

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[21] See offenses tabulated in Working Papers, pp. 839-840.

[22] This jurisdictional branch is identical to that applicable to section 1601 (Murder) and the discussion there should be consulted. With respect to the "official duties of law enforcement officers," the Committee, as in the previous subchapter, endorses the result in *United States* v. *Reid*, 517 F.2d 953, 960-964 (2d Cir. 1975), which held that Federal officers are acting within the scope of their official duties when, upon observing the commission of a State crime, they take reasonable action to apprehend the offender.

[23] Compare 18 U.S.C. 1716, 844. The term "dangerous weapon" is defined in section 111.

[24] See 11 D.C. Code 502(3); 23 D.C. Code 311(b).

[25] Of course, such Federal punishment of the conduct would not prevent a State from also prosecuting the offense; see *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959); but as a practical matter such punishment would be unlikely.

The relationship of the maiming offense to the other Federal offense committed is deemed, along with the policy considerations discussed, to furnish an adequate basis for the assertion of Federal cognizance over the former offense.[26] In addition, extraterritorial jurisdiction exists in several of the situations described above.[27]

5. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison). This is greater than the penalty authorized in 18 U.S.C. 114 and reflects the Committee's judgment that such crippling injuries as a result of intentional misuse of physical force deserve severe punishment.

As is the case throughout this subchapter, no special grading is afforded based on the status of the victim. To do so would be inconsistent with the result-oriented approach adopted herein in contrast to existing law.[28] The proposed Code rather relies on the concept of pyramiding Federal offenses as the Federal interests affected by the defendant's conduct multiply. For example, a maiming (or battery of any kind or threat) against the President, if done to influence his official action or retaliate against him on account of an official action taken, would plainly interfere with other Federal interests and hence would be punishable under other sections in addition to this one, i.e., sections 1357 and 1358.

SECTION 1612. AGGRAVATED BATTERY

1. In General and Present Federal Law

This offense is a lesser included offense of maiming (section 1611), differing only in requiring a lesser culpability and in eliminating the element of permanence of the injury. Since this offense involves a completed touching of another, it is termed a battery rather than an assault, in accord with the common law distinction discussed in connection with the prior section.

As previously discussed, a number of Federal statutes punish assaultive conduct. Almost all, however, are worded so as to focus on the defendant's intent and the status of the victim, rather than on the result brought about by the "assault".[29] One exception is a provision very similar to this proposed section in 18 U.S.C. 113(f), which punishes by up to ten years in prison whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of "assault resulting in serious bodily injury."[30]

2. The Offense

Subsection (a) provides that a person commits an offense if by physical force he causes serious bodily injury to another person.

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[26] See Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 Yale L.J. 1209 (1972), and the discussion of ancillary jurisdiction in connection with chapter 2 in this report.

[27] See sections 201(b)(1)(B) and 204 and the discussion of extraterritorial jurisdiction with respect to section 1601 (Murder).

[28] Compare, e.g., 18 U.S.C. 1751, punishing assault on the President by up to ten years in prison.

[29] See, e.g., 18 U.S.C. 111 (assault upon law enforcement officers, judges, and other persons named in 18 U.S.C. 1114); 18 U.S.C. 112 (assault upon foreign officials, official guests, or internationally protected persons); 18 U.S.C. 351(e) and 1751(e) (assault upon a member of Congress or the President).

[30] See also 18 U.S.C. 1153 containing an identical offense applicable to Indian country.

The discussion in the previous section as to the meaning of the terms "physical force" and "serious bodily injury" is applicable here.

The conduct in this section is engaging in acts involving physical force. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing" (as under section 1611), i.e., that the offender was aware that he was using physical force."[31]

The element that the conduct causes serious bodily injury to another person is a result of conduct. Because no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "reckless" (as compared with "intentional" under section 1611), i.e., that the offender was aware of but disregarded the substantial risk that serious bodily injury to another would result.[32]

3. Affirmative Defense

Section 1617 contains an affirmative defense of consent applicable to this section. This provision has been discussed in connection with the previous section.

4. Jurisdiction

Federal jurisdiction is coextensive with that under section 1611. Therefore the jurisdictional discussion there is applicable to this section.

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison).

SECTION 1613. BATTERY

1. In General and Present Federal Law

This section is a lesser included offense of aggravated battery (section 1612), differing only in that the bodily injury need not be serious.

The National Commission proposed an offense of simple assault based on negligently caused injury.[33] The Committee has rejected this idea, leaving the remedy for such injury to civil (or State) law.

This section replaces a number of statutes in current Federal law. Principal among these is 18 U.S.C. 113, punishing a variety of assaultive crimes committed within the special maritime and territorial jurisdiction, including assault by "striking, beating, or wounding" and "simple assault," both of which are misdemeanors.[34]

2. The Offense

Subsection (a) of section 1613 provides that a person commits an offense if by physical force he causes bodily injury to another person.

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[31] See sections 303(b)(1) and 302(b)(1).

[32] See sections 303(b)(2) and 302(c)(1).

[33] See Final Report, § 1611.

[34] See Working Papers, pp. 839-840, listing other assault provisions.

The notion of "physical force" has been explained in connection with section 1611 and need not be reexamined here. The term "bodily injury" is broadly defined in section 111 to mean physical harm to a person, including any impairment of a physical or mental function, any physical pain, and any other injury to the body no matter how temporary.[35]

The conduct in this section is engaging in the use of physical force. As in the preceding two sections, the applicable state of mind is at least "knowing," i.e., that the offender was aware of the nature of his actions. The fact that bodily injury is caused is a result of conduct. Since no culpability level is specifically designated, the applicable state of mind that must be proved is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that bodily injury would ensue.[36] Thus, if the defendant swung a club around wildly when he knew that other people were present and hit someone, he would be guilty of battery. On the other hand, if he negligently topples a brick off a window sill and it lands on the victim's head, no crime of battery has occurred.

3. Affirmative Defense

Section 1617(a) contains an affirmative defense of consent applicable to this section and the one next following. It provides that it is an affirmative defense to a prosecution under those sections that the conduct charged was consented to by the person injured or placed in fear. The concept of "consent" as defined in section 111 excludes consent obtained involuntarily or without adequate understanding, so that, for example, consent given by a legally incompetent person or an individual under the influence of narcotics or alcohol would not be sufficient. Likewise, consent secured by force, threat, intimidation, or deception would not be effective under this provision. Beyond this, however, the Committee intends to leave the question of the existence of consent to the courts, deeming a more specific formulation inappropriate.

Unlike the consent defense under section 161(b), applicable to sections 1611 and 1612, there is no additional requirement that the injury and conduct charged be reasonably foreseeable hazards of a lawful sporting contest, occupation, profession, or medical or scientific experiment or treatment. The reason is that the bodily injury contemplated in those sections is of a serious order, whereas this section and section 1614 deal with bodily injury that is less serious. Accordingly, showing consent ought alone be sufficient to insulate the actor from criminal liability.

As will appear in the discussion of grading, the maximum punishment level for the offense is reduced if it is committed "in the course of an unarmed fight or affray that was entered into mutually." The result of the consent defense, when read in connection with this grading provision, would be to exclude from Federal criminal liability those persons who engage in relatively harmless

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[35] Cases such as *United States* v. *Masel*, 563 F.2d 322. (7th Cir. 1977), cert. denied, 435 U.S. 927 (1978) (18 U.S.C. 351(e) violated by spitting on a U.S. Senator), will not be covered by this section, unless the spitting causes a temporary injury (e.g., spitting in the eyes).

[36] See sections 303(b)(1) and 302(b)(1) as to "knowing" state of mind, and sections 303(b)(3) and 302(c)(2) as to "reckless" state of mind.

"sparring matches," while preserving the possibility of prosecution at the lower grading level in cases of "bad blood" fights entered into mutually" but not with genuine consent.[37] The consent defense applicable to this section would also apply to a fight in which the combatants were armed, provided that the injury inflicted is not serious.[38]

The defense is denominated as "affirmative," thus requiring the defendant to prove the elements of the defense by a preponderance of the evidence.[39]

4. Jurisdiction

Federal jurisdiction is identical to the previous two sections except that the ancillary jurisdiction aspect has not been incorporated because, as a matter of general policy, the minor offenses throughout the Code are left to State law in the absence of an independent substantial Federal interest.

The elimination of this ancillary jurisdiction represents a curtailment of jurisdiction as compared with the recommendation of the National Commission.[40]

5. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison), unless it is committed in "an unarmed fight or affray that was entered into mutually," in which case it is a Class C misdemeanor (up to thirty days in prison). The one-year grading level reflects the Committee's decision to treat the battery offenses according to the severity of the injury inflicted. Thus, assault on a stewardess while a plane is in flight, which currently can be punished by twenty years in prison even if no serious injury results,[41] would here be punishable by only one year in prison. However, if a dangerous weapon or other means indicating an effort to cause serious bodily injury were used, the offender could of course be prosecuted under section 1001 for an attempt to commit a higher level battery offense carrying felony penalties.

The reduced grading for unarmed fights or affrays mutually entered into encourages disposition of such offenses by a magistrate rather than a Federal district court. The term "unarmed" is meant to reach those fights where a "dangerous weapon," as defined in section 111, is not used. The concept of mutual entry should be construed broadly and applied to most unarmed scuffles, unless it is clear that one of the parties was the aggressor.

SECTION 1614. MENACING

1. In General and Present Federal Law

This section punishes conduct very similar to the traditional common law definition of "assault." Thus, the current assault statutes previously referred to in the discussion of this subchapter are partially covered by this section. The conduct proscribed is transitional between batteries and threats. It usually involves close physical proximity of the defendant to the victim and would, in many cases, also be punishable as an attempted battery.[42] For example, shooting a person and missing him could be both an attempted aggravated battery (section 1612) and menacing, if the intended victim were placed in fear of imminent bodily injury. However, if the defendant were merely to fire in the air or into the ground, thereby putting the victim in fear of imminent injury, his conduct would constitute menacing but not attempted battery.

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[37] See Working Papers, p. 851.

[38] If the injury were serious, the offense would be prosecutable as aggravated battery (section 1612), and the consent defense set out in section 1618(b) would apply.

[39] See section 111.

[40] See Final Report, § 1611(3).

[41] 49 U.S.C. 1472(j).

2. *The Offense*

Subsection (a) provides that a person commits an offense if he engages in physical conduct that intentionally places another person in fear of imminent bodily injury.

The phrase "physical conduct" is designed to remove mere verbal conduct, such as a threat, from the operation of this section.[43] The Committee has used the quoted phrase, as opposed to the phrase "physical force" used in the previous three sections, to make clear the distinction that, in this section, unlike in the battery series of offenses, physical force need not actually be exerted against the victim. Thus, adopting a threatening posture or raising one's arm as if to strike while in close proximity to the victim may violate this section.

The conduct element in this section is engaging in physical conduct. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was engaging in such conduct.

The element that another person is placed in fear of imminent bodily injury is a result of conduct. The culpability level is set at "intentionally," hence requiring proof that the defendant consciously desired to cause this result.[44] This section thus rejects the tort concept that the reasonableness of the victim's fear or apprehension is determinative of liability.[45] Rather, the section requires only that the result of fear of imminent bodily injury occur, provided that it was the offender's conscious objective to create such a feeling.[46] Unintended apprehension, in the Committee's view, is best left to redress through the law of torts or by the States.

The fear instilled must be one of "imminent" bodily injury. Thus, an apprehension of future injury is not here covered. The term "bodily injury" has the same meaning as in the preceding section.

3. *Affirmative Defense*

Section 1617 sets forth an affirmative defense of consent applicable to this section. This defense has been discussed in connection with the preceding section, and that discussion is incorporated here.

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[42] See section 1001.

[43] Of course, the utterance of a threat may illuminate the intent of the defendant even though it does not constitute physical conduct.

[44] See section 302(a)(2).

[45] See Perkins, *supra* note 8 at 116–122.

[46] It follows, of course, that there is no requirement of an actual or even reasonably apparent ability to injure.

4. *Jurisdiction*

There is Federal jurisdiction over an offense described in this section in the circumstances set forth in section 1611(c) (1), (2), or (4), i.e., in essence, when the offense is committed in a Federal enclave or against certain enumerated classes of individuals or on a "for-hire" basis. These provisions have been discussed in greater detail in connection with section 1611. The ancillary jurisdiction concept has been rejected for this offense (as for section 1613) because of a belief that this relatively minor offense should be left to State law except when a direct Federal interest is involved. The jurisdictional branch of section 1611(c)(3) was eliminated as inappropriate, since the menacing offense is intended primarily to cover the noninjurious minor person to person altercations between individuals in face to face confrontation characteristic of common law assault. Mailing an explosive is an offense punished under 18 U.S.C. 1716 transferred by this bill to title 39 by the conforming amendments.

5. *Grading*

An offense under this section is graded as a Class A misdemeanor (up to one year in prison).

SECTION 1615. TERRORIZING

1. *In General*

This section has a dual purpose: It reaches, in one consolidated statute, effort to terrorize a person by a threat serious enough to cause sustained fear, for example, mailed threats to kidnap or to murder; and it reaches acts of public terrorism, such as bomb scares. Less serious threats are covered at a lower grading level in the succeeding section.

2. *Present Federal Law*

A number of Federal statutes punish conduct similar to or embraced within the proposed "terrorizing" offense herein, but there is no single statute of general application.

18 U.S.C. 875 punishes by up to five years in prison the transmission in interstate commerce of any threat to kidnap or injure another person.[47] The penalty rises to a maximum of twenty years if the communication is accompanied by an intent to extort anything of value from another. This section also punishes by up to two years in prison the transmission in interstate commerce, with intent to extort, of any threat to injure the property or reputation of the adressee or another, or the reputation of a deceased person, and any threat to accuse the addressee or another of a crime.

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[47] This statute has been sustained against First Amendment attack in the context of a prosecution or threatening to assassinate a foreign political leader, the court indicating that the statute should be construed similarly to 18 U.S.C. 871 (carried forward in the Code in section 1357) involving a threat against the President. See *United States* v. *Kelner*, 5343 F.2d 1020 (2d Cir. 1976).

18 U.S.C. 876, a parallel statute protecting the Federal interest against misuse of the mails, punishes by up to five years in prison the mailing within the United States of any threat to kidnap or injure another person. The penalty increases to a maximum of twenty years if the communication is accompanied by an intent to extort. This section also punishes by up to two years in prison the mailing with intent to extort, of any threat to injure the property or reputation of the addressee, or the reputation of a deceased person, and any threat to accuse the addressee or another of a crime.

18 U.S.C. 877 punishes the identical conduct when the mailing is from a foreign country.

18 U.S.C. 878, enacted in 1976, punishes whoever threatens to kill, kidnap, or assault a foreign official, offical guest, or internationally protected person, in violation of 18 U.S.C. 112, 1116, or 1201. The penalty is up to five years' imprisonment except that a threatened assault carries only a maximum three-year prison term.

Each of these sections is drafted without regard to the result of the defendant's conduct, and it has been held that it is not an element of the offense that the threat actually induced fear in the recipient.[48] In determining what constitutes a threat, the courts have ruled that the test is whether the language itself, plus its implications from the circumstances, were such as reasonably to instill actual apprehension of impending bodily harm.[49]

18 U.S.C. 844(e), enacted in 1970, punishes by up to five years' imprisonment whoever, through the use of the mail, telephone, or other instrument of commerce, willfully makes any threat or maliciously conveys information he knows to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any real or personal property by means of an explosive. It has been held under this section that the threat may be conditional and need not be accompanied by a present intention to carry out the threat.[50]

18 U.S.C. 871 punishes threats against the life of, or to inflict bodily harm against, the President or a potential successor to the Presidency. This section is carried forward in section 1357 (Tampering with a Public Servant).

18 U.S.C. 35(b) punishes by up to five years in prison whoever willfully and maliciously, or with reckless disregard for the safety of human life, conveys information known to be false, concerning any attempt or alleged attempt being made, or to be made, to commit certain offenses against aircraft, trains, and vessels. This section has been sustained against First Amendment challenge and has been held to reach even words spoken in jest, since such a hoax may create fear and panic, may create a serious disruption to the public or to Federal transportation facilities, and is likely to cause

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[48] See *United States* v. *Holder*, 302 F. Supp. 296, 301 (D. Mont. 1969), aff'd. 427 F.2d 715 (9th Cir. 1970). However, whether the communication did cause the recipient to be in fear is deemed pertinent in assessing the nature of the communication as a threat. *United States* v. *Reynolds*, 532 F.2d 1150 (7th Cir. 1976).

[49] See *United States* v. *Prochaska*, 222 F.2d 1 (7th Cir.), cert. denied, 350 U.S. 836 (1955). *United States* v. *Reynolds, supra* note 48.

[50] See *United States* v. *Nusz*, 462 F.2d 17 (9th Cir. 1972).

the expenditure of considerable resources in order to investigate the veracity of the information conveyed.[51] The *scienter* requirement of "willfully" in this statute has been construed to mean merely voluntarily or knowingly, as opposed to "with evil purpose" or mailice.[52]

A provision similar to 18 U.S.C. 35(b), tailored to cover the conveying of false information concerning hijacking and related offenses, is contained in 49 U.S.C. 1472(m).

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he communicates[53] a threat to commit, or to continue to commit, a Federal, state or local crime of violence or unlawful conduct dangerous to human life, or information, that he knows is false, that the commission of a Federal, state, or local crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist, and, in either case, the communication "causes any person to be in sustained fear for his or another person's safety; causes evacuation of a building, a public structure, or a facility of transportation; or causes other serious disruption to the public."

Paragraph (1), along with subsection (a)(1) of section 1616, is designed to replace the felony provisions of 18 U.S.C. 874-876, but with an emphasis on the harm resulting from the communication of a threat.[54] The concept of "threat" is meant to be identical with existing law.

The term "crime of violence" is defined in section 111 as an offense which has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other felony which, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The alternative phrase "unlawful conduct dangerous to human life" is not defined. Normally, such a threat will be to commit a crime of violence. However, the alternative provision may have a broader application. For example, an operator of a dam could threaten to refuse to open the floodgates during a flood, thereby placing the residents of an upstream area in jeopardy of their lives. Assuming the operator had some legal duty to act (whether under the civil or criminal law), his threat would be to engage in unlawful conduct dangerous to human life which is not a crime of violence (since he did not use or threaten to use physical force).[55]

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[51] See *United States* v. *Rutherford*, 332 F.2d 444 (2d Cir.), cert. denied, 377 U.S. 994 (1964); *United States* v. *Allen*, 317 F.2d 777 (2d Cir. 1963).

[52] See *United States* v. *Allen*, *supra* note 51; *United States* v. *Sullivan*, 329 F.2d 755 (2d Cir.), cert. denied, 377 U.S. 1005 (1964).

[53] "Communicate" is defined in section 111. As under current law, there is no requirement under this offense that the threat be addressed bo a specific person *United States* v. *Kelner*, *supra* note 47 at 1023.

[54] The other aspects of those statutes are embraced within proposed sections 1722 (Extortion) and 1723 (Blackmail).

[55] By contrast the National Commission stressed the intent of the actor. See Final Report, § 1614.

Paragraph (2), along with subsection (a)(2) of section 1616, is intended to replace 18 U.S.C. 35(b) and 844(e) and 49 U.S.C. 1472(m), discussed *supra*. As under those statutes, it is not an element of the offense that the communication was made seriously. Hoaxes are clearly within the scope of the prohibition.

Under either branch of this statute, it is an element that the communication actually *causes* a person to be in "sustained fear" for his or another's safety; causes evacuation of a building, public structure, or facility of transportation; or causes other serious disruption to the public. A person who communicates a threat to commit a crime of violence in order to cause a building to be evacuated would not violate this section if the building was not actually evacuated.[56]

The term "sustained fear" is not meant to convey the notion of prolonged fear, but the fear must be more than momentary.

The element of causing evacuation of a building, etc., need not be a direct causation. For example, if A communicates a false bomb threat to B, who tells the authorities, who cause the building to be evacuated, A may be guilty of terrorizing even though he did not directly cause, or even intend that evacuation occur.

The term "building" is defined in section 111. It includes a purely private house as well as semi-public places such as apartment and office buildings. The term "public structure" is also defined in section 111; the definition is similar to that of a "building," except that it reaches structures that are not enclosed.

The term "facility of transportation" is included in the definition of "public facility" in section 111. It is intended to encompass an airplane, bus, train, or other public conveyance. For example, causing evacuation of a cable car would come within this section.

Finally, the term "serious disruption to the public" is meant to reach communications which may be less disruptive than evacuation, for example, causing an airplane to be searched because of a bomb threat (even though the passengers are not evacuated).

B. Culpability

The conduct in these offenses is communicating a "threat" or "information" of the types specified in paragraphs (1) and (2). As no culpability standard is prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his communication.[57] The fact that, in paragraph (2), the information is "false" is an existing circumstance. However, the culpability level is set at "knowing," thus requiring proof that the offender was aware that the information was untrue.

The fact that the conduct "causes any person to be in sustained fear for his or another person's safety," etc., is a result of conduct. Since no culpability level is specifically designated, the applicable state of mind that must be shown is at least "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that the result would occur, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[58]

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[56] In such event he would, in all likelihood, be guilty of an attempt under section 1001.

[57] This is consistent with the cases under 18 U.S.C. 35(b), indicating that no evil motive need be shown. E.g., *United States* v. *Sullivan, supra* note 52; *United States* v. *Allen, supra* note 51.

4. Jurisdiction

There is Federal jurisdiction over an offense in this section in five circumstances. The first exists when there is a circumstance set forth in section 1611(c). These jurisdictional bases have been discussed in connection with that section. The second circumstance occurs if the United States mail is used in the commission of the offense. This reflects existing jurisdiction under 18 U.S.C. 876 and 877. The third circumstance exists if the threat or information is transmitted in interstate or foreign commerce, as by the use interstate of a telephone. This essentially carries forward the jurisdictional purview of 18 U.S.C. 875 and 844(e).[59] The fourth circumstance occurs when the threat or information concerns property that is owned by, or is under the care, custody, or control of, a transportation, communication, or power facility which operates in interstate or foreign commerce. This includes the reach of 18 U.S.C. 35(b), but is broader in that it also embraces communication and power facilities that operate in interstate or foreign commerce. The fifth circumstance occurs when the threat or information concerns property that is owned by, or is under the care, cutody, or control of, the United States. Although apparently no general statute protects United States property against this kind of crime, the Committee deemed such additional coverage to be justified.

The Committee rejected enlarging Federal jurisdiction to any case where a facility of interstate commerce (e.g., the telephone) is used to convey the threat or information, as proposed by the National Commission. The legislative history of 47 U.S.C. 223 (Obscene or Harassing Telephone Calls), which statute will be discussed in connection with the following section, indicated that in the mid-1960's there were well over 500,000 harassing telephone calls per year, but that only 500 of these were interstate. In enacting 47 U.S.C. 223 in 1968, the Congress carefully limited the Federal role of interstate calls. The Committee believes that any expansion would represent an undue burden on Federal law enforcement officials and would interfere with local legislation and enforcement without adequate justification. Accordingly, both terrorizing and harassing (section 1616) telephone calls must be interstate in order for Federal jurisdiction to attach on that basis.[60]

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is generally in accordance with present law.

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[58] See sections 303(b)(3) and 302(c)(2).

[59] See also *United States* v. *Kelner, supra* note 47, upholding application of 18 U.S.C. 875 to a threat uttered in a telecast that was broadcast in three States.

[60] Obscene telephone calls may be punished in Federal enclaves under the assimilative crime provisions of the proposed Code (section 1861).

SECTION 1616. COMMUNICATING A THREAT

1. In General and Present Federal Law

This section is a lesser included offense of section 1615 (Terrorizing). It is identical in terms of the conduct proscribed but differs from terrorizing in that it requires a specific intent to frighten or harass and requires no showing that any harmful consequence ensued from the communication.

This section covers, to some extent, all of the existing statutes discussed in connection with the previous section. In addition, it carries forward a part of 47 U.S.C. 223, punishing obscene or harassing telephone calls. That statute punishes by up to six months in prison whoever, by means of a telephone in interstate or foreign commerce (or in the District of Columbia), makes, *inter alia,* "repeated telephone calls, during which conversation ensues, solely to harass any person at the called number." [61]

2. The Offense

Subsection (a) provides that a person commits an offense if, with "intent to alarm or harass another person, he communicates" a "threat" or "information" of the types described in paragraphs 1615 (a) (1) and (2). Accordingly, the discussion of the elements in and the culpability with respect to those paragraphs is applicable here. In addition, this section requires that the conduct be engaged in with a specific purpose to "alarm or harass" another person. The intent is similar to that required under a typical disorderly conduct section—i.e., to "alarm, harass, or annoy" [62]—except that the milder term "annoy" has been dropped from this section. Thus an intent merely to annoy or irritate another individual by communicating a threat or false information is not within the scope of this section.

This section does not require that the conduct have produced the result intended or, indeed, have caused any harmful result. Thus, if a communication of the specified type is intercepted by an F.B.I. agent rather than received by the intended victim, the offense is nevertheless consummated if the requisite intent to alarm or harass can be proved.[63]

3. Jurisdiction

There is Federal jurisdiction over an offense under this section if the offense is committed within the special jurisdiction of the United States or in a circumstance set forth in section 1611(c)(2)(F) or section 1615(c) (2) through (5). These provisions have been described in connection with sections 1611 and 1615.

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[61] This section will overlap that provision to the extent that the conduct involves "repeated" telephone calls (not a requirement under this section) and that the communication involves a threat or false information of the specified type. Since the provisions of 47 U.S.C. 223 are nowhere precisely covered in the proposed Code, yet are of a relatively minor, regulatory nature, the Committee determined to retain this statute in title 47.

[62] See Final Report, section 1861.

[63] Under 47 U.S.C. 223, by contrast, it has been held that telephone calls which were handled by an answering service rather than the intended recipient could not be considered in determining whether "repeated" calls designed to "harass any person at the called number" had been made. See *United States* v. *Darsey,* 342 F. Supp. 311 (E.D. Pa. 1972).

4. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison) if the threat or information concerns a crime, conduct, or circumstance dangerous to human life, and a Class B misdemeanor (up to six months in prison) in any other case. The Committee deems that the prohibited conduct is more likely to succeed in alarming or harassing another (and to produce a more severe or sustained reaction of alarm or harassment) if the communication involves a threat or information bearing upon danger to human life.

In S. 1400 a further grading distinction was created (i.e., Class E felony) for communicating a threat to the President. This higher grade was regarded as necessary because a threat to the President causes a certain disruption of government functions (e.g., it may result in the canceling of a Presidential appearance and the diversion of Secret Service personnel). The Committee concurred in this judgment but felt that the offense of threatening the President should be contained as a separate offense within chapter 13 (Offenses Involving Governmental Process).[64] So far as the liability for communicating the threat itself is concerned, threatening the President is treated no differently under this section from threatening any other person.

SECTION 1617. GENERAL PROVISIONS FOR SUBCHAPTER B

This section contains affirmative defenses of consent applicable to certain offenses in this subchapter. These provisions have been treated in connection with the specific sections to which they apply, and no further discussion is therefore needed here.[65]

SUBCHAPTER C.—KIDNAPPING AND RELATED OFFENSES

(Sections 1621-1624)

This subchapter contains four sections, all dealing with various forms of criminal restraint. Section 1621 proscribes kidnapping, the most serious of the offenses herein, involving the restraining of a person for one or more enumerated heinous purposes. Section 1622 punishes aggravated criminal restraint, involving the restraint of an individual, without specific intent, but where one or more enumerated factors is present enhancing the danger to the victim or concerning holding him in a condition of slavery or involuntary servitude. Section 1623 punishes simple criminal restraint, involving a non-trivial, unlawful restraint upon a person's liberty, but unaccompanied by any aggravating factors or heinous intent. Section 1624 contains some general provisions for the foregoing sections.

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[64] See section 1357(a)(2).

[65] S. 1722 as reported in the 96th Congress contained an offense titled "endangerment", which would have made it a felony to engage in conduct that the actor knew placed another person in imminent danger of death or serious bodily injury, if in addition the conduct manifested "extreme indifference to human life" or "unjustified disregard for human life". Jurisdiction over this proposed offense, which would have been new to Federal law, would have been extended to Federal enclaves, to all situations in which the endangerment occurred during the commission of any title 18 offense (other than an offense described by cross-reference), and to six situations in which the offense occurred during the commission of six enumerated public health or safety offenses outside title 18. Although much thought and work was expended in formulating this offense, and although in the previous Administration it had the support of the Department of Justice and the Business Roundtable, the offense created substantial confusion and controversy because of the language it employed in attempting to distinguish between culpable and non-culpable, or degrees of culpable, risk-taking conduct as it would apply to business operations relating to the six specified public health or safety areas.

In view of the extent of the controversy surrounding this matter, the sponsors of S. 1630 determined to delete this offense from the Criminal Code bill, on the ground that, whatever the underlying merits of the general concept, any statutory proposal in this area should be pursued independently of the general effort to revise the Federal criminal laws. Subsequently, the Committee rejected a proposed amendment to restore the endangerment offense to the bill.

SECTION 1621. KIDNAPPING

1. In General and Present Federal Law

This section is designed to provide severe penalties for this most serious form of criminal restraint. Unlike the current Federal kidnapping laws, milder forms of unlawful restraint are proscribed in separate sections, rather than being lumped together in a single provision.

Current law covers the offense of kidnapping with a number of spearate statutes. These statutes include the basic Federal kidnapping act (commonly referred to as the Lindbergh Law), 18 U.S.C. 1201-1202, and special kidnapping statutes covering the offense when committed in the course of a bank robbery, 18 U.S.C. 2113(e), and when it involves the abduction of the President or Vice President, 18 U.S.C. 1751, or a Member of Congress, 18 U.S.C. 351. Kidnapping also is covered to some extent by the White Slave Traffic statutes, 18 U.S.C. 2421-2423, and by statutes dealing with cruelty to seamen and ship mutinies, 18 U.S.C. 2191-2192, and shanghaiing of sailors, 18 U.S.C. 2194. Other offenses closely related to kidnapping are the laws against slavery, 18 U.S.C. 1581-1588.

The so-called "Lindbergh Law," 18 U.S.C. 1201, was enacted in 1932 in response to the infamous abduction and murder of the Lindbergh baby. As originally enacted, the statute made it a crime knowingly to transport in interstate or foreign commerce any person "who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward," except in the case of a minor who is abducted by a parent. If the kidnapped person were not liberated unharmed, the maximum penalty was death on recommendation of the jury; otherwise, the offense was punishable by any term of years or for life.

In 1934 Congress amended the statute to add the words "or otherwise" after "ransom or reward," apparently because of concern about other serious forms of kidnapping such as the kidnap-murder of racketeers by their rivals.

The addition of the words "or otherwise" transformed the statute into one of very broad scope. In *Gooch* v. *United States,*[1] the Supreme Court, in sustaining a conviction under the then recently amended statute for holding and transporting a State peace officer in order to avoid arrest, stated:[2]

> Evidently, Congress intended to prevent transportation in interstate or foreign commerce of persons who were

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[1] 297 U.S. 124 (1936).

[2] *Id.* at 128-129.

> being unlawfully restrained in order that the captor might secure some benefit to himself. And this is adequately expressed by the words of the enactment.
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> * * * * * * *
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> Holding an officer to prevent the captor's arrest is something done with the expectation of benefit to the transgressor. So also is kidnapping with purpose to secure money. These benefits, while not the same, are similar in their general nature and the desire to secure either of them may lead to kidnapping. If the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of arrest, they fall within the broad term, "otherwise."

In *United States* v. *Healy,*[3] the Supreme Court reaffirmed the *Gooch* holding that no motive of pecuniary profit for the kidnapping need be shown and upheld an indictment charging kidnapping and air piracy where the defendants at gunpoint kidnapped the pilot of a private plane and compelled him to transport them from Florida to Cuba. The Court also rejected the defendant's contention that since the object of the kidnapping (i.e., the transportation to Cuba) was not illegal, their actions did not constitute an offense under 18 U.S.C. 1201; the Court held that the legality of the ultimate purpose is irrelevant and that the statute simply proscribes kidnapping as a method to attain the purpose.

In light of *Gooch* and *Healy,* the lower Federal courts have construed the "or otherwise" language expansively so as to eliminate from the statute any limitation based on the purpose or motive of the kidnapping. Thus the current statute has been held, e.g., to reach kidnapping in order to force the victim to confess to a heinous crime so as to enhance the defendant-private investigator's fame,[4] kidnapping in order to take "indecent liberties" with the victim,[5] kidnapping by Klansmen of a couple who were transported to a lonely spot, given a flogging, and told to attend church and stop living together,[6] kidnapping to force the victim-driver to cross a State line in order that the defendant could be let off closer to his destination,[7] kidnapping for the purpose of holding a stepdaughter in involuntary servitude,[8] and kidnapping for the purpose of rape.[9]

The "or otherwise" aspect of 18 U.S.C. 1201 is indeed so broad that it would clearly permit prosecution of youths who kidnap a pledge in a fraternity initiation. Criticism has been leveled at this statutory formulation, particularly in view of the heavy potential penalties, because it does not discriminate between the less serious forms of criminal restraint and the more dangerous kidnappings to obtain ransom or to aid in the commission of a felony or an escape.

A second major problem with 18 U.S.C. 1201 is the difficulty of determining when movement of the victim in the course of another offense, such as robbery or rape, is sufficiently distinct or independent to justify a separate kidnapping charge.[10] Generally, the cases under the current statute have been extremely permissive in upholding kidnapping convictions in such circumstances, in the face of a contention that the kidnapping should be deemed to have merged in the offense it was designed to facilitate.[11]

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[3] 376 U.S. 75, 81–83 (1964).

[4] *United States* v. *Parker,* 103 F.2d 857 (3d Cir.), cert. denied, 307 U.S. 642 (1939).

[5] *De Herrera* v. *United States,* 339 F.2d 587 (10th Cir. 1964).

[6] *Brooks* v. *United States,* 199 F.2d 336 (4th Cir. 1952).

[7] Wheatley v. *United States,* 159 F.2d 599 (4th Cir. 1946).

[8] *Miller* v. *United States,* 123 F.2d 715 (8th Cir. 1941), rev'd on other grounds, 317 U.S. 192 (1942).

[9] *Poindexter* v. *United States,* 139 F.2d 158 (8th Cir. 1943).

18 U.S.C. 1201 was amended in 1972 to its present form. The amendments in no way altered the application of the cases discussed above and did not purport to deal with the "merger" problem involving transportation of the victim in the course of another crime. Instead, the purpose of the amendments was primarily to expand Federal jurisdiction. Thus, the statute currently reaches not only situations where the victim is "willfully transported in interstate or foreign commerce,"[12] but also kidnappings within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. 7, and within the special aircraft jurisdiction of the United States as defined in 49 U.S.C. 1301(32). The amendment also extended the statute to instances where the victim is a foreign official, an official guest of the United States, or an internationally protected person, as defined in 18 U.S.C. 1116(b). Finally, the penalty provision was modified to eliminate the death sentence. This latter amendment was in response to the holding in *United States* v. *Jackson,*[13] which had declared the death penalty in the former statute unconstitutional because, by permitting its imposition only in the event of a jury trial, it tended to discourage defendants from exercising their rights to plead not guilty and to demand a jury trial.

Before briefly reviewing the remaining Federal law dealing with kidnapping, it should be noted that the criticisms directed against 18 U.S.C. 1201 and similar State enactments have led in recent years to wholesale changes in the State statutes that punish the several offenses that were formerly lumped in the general category of kidnapping. In very broad outline, the new codes break the offense of kidnapping into three separate crimes. The first retains the name "kidnapping" and covers only the most heinous offenses by requiring certain specific intents such as holding a person for ransom, or as a hostage, or to facilitate commission of a felony. Kidnapping is usually graded as a Class A or B felony. The second offense is generally entitled "felonious restraint" and punishes those offense in which a person is deprived of his liberty and some aggravating factor such as threats, endangerment, or exposure to risk of serious bodily injury is present, but where the most dangerous purposes that characterize the higher crime of kidnapping are absent. Felonious restraint is generally graded at the Class C or D felony level. The third offense, called "unlawful imprisonment," covers any other form of unlawful restraint imposed on a person, and because of the absence of any serious criminal purpose or any endangerment of the victim or another, this offense is graded as a misdemeanor.

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[10] See Working Papers, p. 855.

[11] E.g., *United States* v. *Baker,* 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970); *United States* v. *De La Motte,* 434 F.2d 289 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971); see also *United States* v. *Wolford,* 444 F.2d 876 (D.C. Cir. 1971), generally reviewing the authorities.

[12] The purpose of the change from "knowingly" to "willfully" in this respect is not explained in the legislative history. However, it is apparently aimed at indicating that the defendant need not have actual knowledge of the crossing of State or international boundaries, thereby resolving a conflict under the former version of the statute. See *United States* v. *Napier,* 518 F.2d 316 (9th Cir.), cert. denied, 423 U.S. 895 (1975). Compare *Edison* v. *United States,* 272 F.2d 684 (10th Cir. 1959), and *United States* v. *Powell,* 24 F. Supp. 160 (E.D. Tenn. 1938) (knowledge not required), with *Wheatly* v. *United States,* 159 F.2d 599 (4th Cir. 1946) (knowledge of jurisdictional element required).

[13] 390 U.S. 570 (1968).

This basic three-offense concept has been enacted into law in New York and has been adopted or proposed in at least a dozen other State revisions.[14] It has been recommended by the Model Penal Code [15] and, for the Federal system, by the National Commission.[16] The Committee has incorporated this essential idea into the bill, as reported, although, as will be seen, the formulation proposed here differs in some significant respects from that suggested by the National Commission.

18 U.S.C. 1202, a seldom utilized companion statute to 18 U.S.C. 1201, penalizes by up to ten years in prison whoever receives, possesses, or disposes of any money or other property, or any portion thereof, known to have been delivered as ransom or reward in connection with a violation of 18 U.S.C. 1201. This statute will not be covered in this subchapter but will be carried forward under the general accomplice section [17] and under section 1311(a)(3) (Hindering Law Enforcement).

18 U.S.C. 2113(e) punishes whoever, in committing any offense defined in that section (i.e., bank robbery and related crimes), or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, "forces any person to accompany him without the consent of such person." The penalty is imprisonment for not less than ten years or death if the jury shall so direct.[18]

It has been held that this subsection creates a separate offense from the offense of bank robbery, permitting cumulative punishment.[19]

18 U.S.C. 1751, enacted in 1965, is another specialized statute, dealing in part with kidnapping. It provides that any person who, *inter alia*, kidnaps the President of the United States, the President-elect, the Vice President (or, if there is no Vice President, the officer next in the order of succession to the Presidency), the Vice President-elect, or any individual acting as President under the Constitution and laws of the United States, shall be punished by up to life imprisonment or by death if the victim was killed.

18 U.S.C. 351, enacted in 1971, provides similar coverage for members of Congress. Subsection (b) punishes, by up to life impris-

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[14] In addition to New York, the concept has been adopted, with occasional variations, in Colorado, Connecticut, Illinois, Kansas, Minnesota, Montana, New Mexico, Oregon, and Pennsylvania.

[15] See sections 212.1–212.3 (P.O.D. 1962).

[16] See Final Report. §§ 1631–1634.

[17] Section 401 of the Code.

[18] The death sentence aspect of this statute has been declared unconstitutional under the rationale of *United States* v. *Jackson, supra* note 13. See *Pope* v. *United States*, 392 U.S. 651 (1968); see also *Coker* v. *United States*, 433 U.S. 584 (1977) (death penalty for the non-fatal rape of an adult women held unconstitutional).

[19] See *Clark* v. *United States*, 281 F.2d 230 (10th Cir. 1960); *United States* v. *Parker*, 283 F.2d 862 (7th Cir. 1960). cert. denied, 366 U.S. 937 (1961); *contra, United States* v. *Rossic*, 552 F.2d 381 (1st Cir. 1977).

onment, or by death if death results any person who kidnaps a member of Congress or member-elect.[20] No reported cases under these statutes exist.

18 U.S.C. 2191 punishes by up to five years in prison whoever, being the master or an officer of a vessel of the United States on the high seas or any other waters within the admiralty and maritime jurisdiction, "imprisons any of the crew of such vessel." No reported cases under this provision apparently exist.

18 U.S.C. 2192 punishes by up to five years in prison whoever, being a member of the crew of a vessel of the United States on the high seas or any other water within the admiralty and maritime jurisdiction "unlawfully confines the master or other commanding officer thereof." No recent cases under this provision apparently exist. Several old decisions indicate that any seizing of the master, for however brief a period (e.g., momentarily grabbing him and holding him against the rail), violates this statute.[21] Such conduct would not constitute a restraint under the offenses defined in this subchapter,[22] although it might be punishable as a battery under section 1613.

18 U.S.C. 2194 punishes by up to one year in prison whoever knowingly detains on board any vessel engaged in interstate or foreign commerce or on board a vessel of the United States navigating the high seas or other navigable waters of the United States any person who has been "shanghaied" on such vessel with intent that he perform labor or service of any kind. This provision will be carried forward in section 1622 of the proposed Code.

18 U.S.C. 2421-2423, the White Slave Traffic Act, covers the transportation in interstate or foreign commerce of women or girls for prostitution or immoral purposes. Section 2421, the principal statute, punishes the act of transportation with criminal intent, without regard to whether there was consent by the woman or not. For this reason, the offense is distinct from kidnapping,[23] and it would not be covered in this subchapter.[24]

Sections 2422 and 2423, punish, by contrast, whoever "knowingly persuades, induces, entices, or coerces any woman or girl" to travel in interstate or foreign commerce for purposes of prostitution or other immoral purpose. To the extent that these statutes apply where the means used is coercion, they will be covered in this subchapter. Section 2422 has a maximum penalty of five years in prison. Section 2423, which applies where the woman is under eighteen years of age, is punishable by up to ten years in prison.

Various statutes in chapter 77 of title 18 (Peonage and Slavery) and chapter 107 (Seamen and Stowaways) also proscribe kidnapping or similar crimes of restraint.

18 U.S.C. 1581(a) punishes by up to five years in prison whoever "holds or returns any person to a condition of peonage, or arrests

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[20] This statute and 18 U.S.C. 1751 also punish an attempt to kidnap any of the respective officials there set forth. An attempt is punishable by up to life imprisonment.

[21] See *Lander* v. *United States,* 14 F. Cas. No. 8,039 (C.C.S.D.N.Y. 1844); *United States* v. *Bladen,* 24 F. Cas. No. 14,606 (CC. Pa. 1816).

[22] See section 1624.

[23] See *Hattaway* v. *United States,* 399 F.2d 431 (5th Cir. 1968).

[24] The basic coverage of the White Slave Traffic Act, albeit only partial, is found in proposed section 1843 (Engaging in a Prostitution Business).

any person with the intent of placing him in or returning him to peonage."

The term "peonage" has been held to be a form of involuntary servitude within the meaning of the Thirteenth Amendment[25] and to mean "compulsory service to secure the payment of a debt."[26] It is immaterial whether the debt is real or alleged, and the amount of the debt and the method of coercion are also irrelevant.[27] What the statute outlaws is any form of compulsion to secure services of the victim in payment of the debt.[28]

18 U.S.C. 1583 punishes by up to five years in prison whoever, *inter alia,* "kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave."

18 U.S.C. 1584 imposes an identical punishment upon whoever "knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term."

The term "involuntary servitude" as used in this statute has been narrowly defined to mean "causing the servant to have, or to believe he has, no way to avoid continued service or confinement . . . not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad."[29] Under this definition, a Connecticut farmer who hired a Mexican family to work for him, kept them at his farm under onerous conditions, and threatened them with deportation if they left, was found not to be guilty of holding the family to involuntary servitude. The court, in a thorough review of virtually all the cases arising under chapter 77, determined that either physical restraint or threat to cause immediate confinement would suffice but that a threat of deportation was not such a means as would constitute a "holding" to involuntary servitude.[30]

18 U.S.C. 1585 punishes by up to seven years in prison whoever, being a United States citizen or resident and of the crew of a foreign vessel engaged in the slave trade, or being of the crew of a vessel owned in whole or part by a United States citizen, *inter alia,* seizes any person on a foreign shore with intent to make him a slave, or forcibly brings, carries, receives, confines, detains or transports any person as a slave on board such a vessel.

18 U.S.C. 1587 punishes by up to four years in prison whoever, being the master or commander of any vessel within the jurisdiction of the United States, has on board any person with intent of selling him as a slave or landing him for such purpose.

18 U.S.C. 1588 punishes by up to five years in prison whoever, being the master or owner of a vessel, receives a person on board

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[25] See *Taylor* v. *Georgia,* 315 U.S. 25 (1942).

[26] See *Clyatt* v. *United States,* 197 U.S. 207, 216 (1905).

[27] See *Bailey* v. *Alabama,* 219 U.S. 219, 242-243 (1911); *Pierce* v. *United States,* 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

[28] Under the "arrest" branch, it is not necessary that any service actually be performed. See *United States* v. *Gaskin,* 320 U.S. 527 (1944).

[29] *United States* v. *Shackney,* 333 F.2d 475, 486 (2d Cir. 1964).

[30] *Id.* at 481-487. However, a threat of physical harm is sufficient to constitute a form of prohibited holding to involuntary servitude even if an opportunity for escape exists. See *United States* v. *Bibbs,* 564 F.2d 1165 (5th Cir. 1977), cert. denied, 435 U.S. 1007 (1978).

knowing or intending that he be carried from the United States to any place to be held or sold as a slave, or carries within the United States any person with intent to hold or sell him as a slave.

All the offenses in chaper 77 described above will be carried forward, in part or in whole, in section 1622.[31]

2. The Offense

A. Elements

Subsection (a) of section 1621 provides that a person commits an offense if he restrains another person with intent to (1) hold him for ransom or reward, (2) use him as a shield or hostage, (3) commit a felony, or (4) interfere with the performance of a government function.

The term "restrain" is defined in section 1625 to mean to "restrict the movement of a person without consent, so as to interfere with his liberty, by (A) removing him from his place of residence or business; or (B) confining him in any place or moving him from one place to another unless such confinement or movement is not substantial."

The term "consent" is defined in section 111 so as to include willing assent, but not to include assent given by a person (a) who is legally incompetent to authorize the conduct assented to, (b) who is a member of a class whose improvident consent is sought to be prevented by the law describing the offense, (c) who is, by reason of age, mental disease or defect, or intoxication, manifestly unable, or known by the actor to be unable, to make a reasonable judgment as to the nature or harmfulness of the conduct assented to, or (d) whose assent is induced by force, threat, intimidation, or deception. Subsection (a)(1) of section 1624 also contains a special definition of "consent" applicable to the offenses in this subchapter as excluding assent given by the victim "if in fact he is less than fourteen years old or is incompetent and if his parent, guardian, or other person responsible for his welfare has not acquiesced in the movement or confinement."

The definitions of "restrain" and "consent" are very similar to those adopted by the National Commission.[32] The National Commission, however, also utilized another term—"abduct"—in conjunction with "restrain." Abduct was defined to include all the elements of "restrain" plus an intent on the part of the defendant to prevent the person's liberation (1) by secreting or holding him in a place where he is not likely to be found, or (2) by endangering or threatening to endanger the safety of any human being.[33] To constitute the offense of kidnapping in the Commission's scheme, it was necesary to find first, the elements of restraint, second, one of the intents that establishes abduction, and third, one of the specific purposes enumerated (e.g., to hold the victim for ransom or reward).[34]

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[31] 18 U.S.C. 1582, dealing with equipping vessels for the slave trade, and 18 U.S.C. 1586, punishing service on board a vessel engaged in the slave trade, are unrelated to this subchapter dealing with offenses involving criminal restraint.

[32] See Final Report, § 1639(a).

[33] See *id.* § 1639(a).

[34] See *id.* § 1631.

The National Commission's reason for adding the concept of "abduct" to that of "restrain" was "to emphasize the complete control of the victim involved in a kidnapping."[35] The Committee feels this is unnecessary and that the concept of "restrain" includes both (1) and (2) immediately above. If a person is taken without consent (e.g., by "force, threat, intimidation,[36] or deception") and is deprived of his liberty for the purpose of ransom (to use the most common example), it is difficult to understand how this activity can be accomplished without either confining him in a place where he is not likely to be found or endangering or threatening him or another person. Thus, the elements already present in "restrain" are such that the addition of the concept of "abduct" would result in little other than problems in proof at the trial. Moreover, even if it is possible to envisage a restraint, as defined in this section, accompanied by one of the enumerated specific intents, without endangerment or isolation of the victim, there is no reason why the offense should not be complete none the less. It would seem that even without the element of abduction the conduct described is within the traditional offense covered by the Lindbergh Law and hence should be subject to severe punishment.

The term "restrain" as noted above, is defined in section 1624 to mean (1) the restriction of the movement of a person without consent[37] (2) so as to interfere with his liberty (3) by removing him from his place of residence or business, or by confining him in any place or moving him from one place to another unless such confinement or movement is not substantial. These three elements must coalesce in order to fit the definition.

Restraint is without consent if it is accomplished, *inter alia,* by "force, threat, intimidation, or deception."[38] The inclusion of coercive factors other than force is consistent with existing cases under the Lindbergh Law which make it clear that the holding or restraint can be achieved by mental as well as physical means.[39] Restraint can be accomplished even though the victim has acquiesced if in fact the victim is less than fourteen years old or is incompetent and if his parent or guardian, or the individual or institution responsible for his welfare, has not acquiesced in the movement or confinement.[40] This provision is derived from the decision in *Chatwin* v. *United States.*[41] That case involved a prosecution under the Lindbergh Law for inveigling or decoying a fifteen year old girl (with a mental age stipulated as seven) to live with the defendant, a Mormon, as a partner in a "celestial" marriage. The Supreme Court reversed the conviction on numerous grounds, one of which was that there was no substantial proof that the girl was of such an age or mentality as necessarily to preclude her from understanding the doctrine of celestial marriage and from exercising her own free will. The Court noted that:[42]

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[35] See Working Papers, p. 856.

[36] The Model Penal Code employed the word "threat" alone, without "intimidation"; the National Commission did the reverse. Although the terms are close in meaning, the Committee has utilized both for added clarity and to insure completeness in coverage.

[37] The National Commission, in addition to the concept of "without consent", provided in its definition of "restrain" that the restraint be done "unlawfully". See Final Report, § 1639(a). The function of the modifier "unlawfully" was obviously to exclude acts such as arrests which may be both forcibly and lawfully. While the Committee, of course, shares the view that an arrest should not be punishable as a criminal restraint, this result is achieved under the Code by operation of the defense of exercise of public authority carried forward in section 501. This treatment of the issue is deemed superior to including the term "unlawfully" in the offense, since the same defense would normally be available to a law enforcement officer who makes an arrest later determined to be "unlawful".

[38] See the definition of "consent" in section 111.

[39] See e.g., *United States* v. *McGrady,* 191 F.2d 829 (7th Cir. 1951), cert. denied, 342 U.S. 911 (1952). The same words—"force, threat, intimidation, and deception"—are also used together in sections 1115, 1323 and 1357 and reference should be made for further explanation to the discussion in connection with those offenses.

[40] See the special definition of "consent" in section 1624(a)(1).

[41] 326 U.S. 455 (1946).

> At the time of the alleged inveiglement . . . she was 15 years and 8 months of age and the alleged holding occurred thereafter. There is no legal warrant for concluding that such an age is ipso facto proof of mental incapacity in view of the general rule that incapacity is to be presumed only where a child is under the age of 14. 9 Wigmore on Evidence (3rd ed.) § 2514.

The Court further observed that, although it had been stipulated that the alleged victim had a mental age of only seven, it had not been shown what tests had been used to arrive at this conclusion. The Court held that before criminal liability could be sanctioned in a case of this kind (i.e., as previously found by the Court, a case where there was no unlawful physical or mental restraint on the girl and no proof of a desire by the defendant to hold her against her will), there "must be competent proof beyond a reasonable doubt of a victim's mental incapacity in relation to the . . . acts in question."[43]

Based on this holding, the Committee has adopted fourteen as the critical age below which consent for purposes of this statute will not suffice to immunize the defendant (or, alternatively, proof of the victim's incompetence, whatever his age) unless, in either instance, the victim's guardian or person responsible for his welfare has acquiesced in the confinement or movement.[44]

The second element of the definition of "restrain" incorporates the concept of interference with liberty. Obviously there can be no restraint in the common meaning of the word without such interference. The National Commission qualified this phrase by requiring that any interference with liberty be "substantial."[45] The Committee has essentially adopted this formulation although phrasing it in the negative.[46]

The test as to whether a movement or confinement is more than insubstantial is also designed to aid in resolving problems of the type that have arisen under 18 U.S.C. 1201 involving a contention that the kidnapping offense should be dismissed because the detention or movement of the victim was merely incidental to the defendant's commission of another offense. Under the Committee's formulation, there will be a statutory standard by which to evaluate such claims.

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[42] *Id.* at 461.

[43] *Id.* at 462.

[44] See Working Papers, p. 862.

[45] See Final Report, § 1639.

[46] The Committee considers that any removal of a person from his residence or place of business is more than an insubstantial interference with his liberty and accordingly has applied the "not substantial" test only to other confinements or movements.

S. 1400 attempted to codify the notion that kidnapping should exclude that confinement or movement that was trivial or "wholly incidental to the commission of another offense."[47] This latter phrase was rejected by the Committee as ambiguous and presenting the potentially adverse effect of eliminating prosecution for some clear "kidnapping" offenses. For instance, a defendant who abducted a child and held him for two weeks for $100,00 ransom could argue with some plausibility under the S. 1400 formulation that this was "wholly incidental" to his extortion scheme. However, the interference with the child's liberty in such a case is by no means insubstantial and the conduct should certainly be prosecutable as kidnapping. Furthermore, there was a burden of proof problem. The government could not be expected to prove in every case that an abduction was *not* incidental to some other unspecified crime. But if the burden were placed on the defendant, it might require admission of the crime to which the abduction is claimed to have been "incidential," in derogation of his Fifth Amendment rights.

Accordingly, the Committee determined to place the burden on the government to show, as to restraint: (1) restriction of movement; (2) unlawful and unconsented restriction; and (3) interference with liberty by (a) removal from residence or place of business, or (b) not insubstantial confinement or movement.

Some examples may help to clarify this formulation. If a messenger from a Federally insured bank carrying bank funds is walking down the street and is forced into an alley at gunpoint and robbed, this would not constitute kidnapping under this section despite the fact that the victim was briefly confined and his liberty interfered with. The confinement would not be deemed substantial. On the other hand, if the victim in a robbery were forced into a car and driven several blocks before being released, such an act would be a kidnapping.[48] Similarly, in a truck hijacking of an interstate shipment, the mere removal of the driver from the cab of his truck is not restraint. However, locking him in the trunk of a car and driving him around for a time would be covered.[49]

The significance of the elimination of the "wholly incidental" exception is illustrated by the facts in *United States* v. *Healy,*[50] where the defendant compelled the pilot of a private plane to fly him from Florida to Cuba. As the Court held, this is both a kidnapping and air piracy, notwithstanding the fact that the kidnapping arguably was wholly incidental to the air piracy.

Paragraphs (1) through (4) set forth the specific intents deemed by the Committee to represent the most serious forms of restraint. Less serious forms are dealt with in the following two sections.

Paragraph (1) punishes restraining another person with intent to "hold him for ransom or reward." This reinstates the original language of the Lindbergh Law, shorn of the overly broad "or otherwise" amendment discussed above. The Committee intends that existing case law as to the meaning of "ransom or reward" be followed. Thus, the term "reward" is not meant to be narrowly limited to money, but on the other hand must be of some tangible benefit to the defendant. For example, a woman who abducts a child as a consequence of her "maternal instinct and desire to have a child of her own"[51] would not have held the child for "reward" under this paragraph.

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[47] See S. 1400 § 1624.

[48] Cf. *United States* v. *Fox*, 97 F.2d 913 (2d Cir. 1938).

[49] See *United States* v. *Wolford*, 444 F.2d 876 (D.C. Cir. 1971).

[50] *Supra* note 3.

Paragraph (2) proscribes restraining another with intent to "use him as a shield or hostage." This covers the common situation where a victim is used as a shield or hostage in connection with the commission or escape from commission of another offense,[52] and to that extent is largely coextensive with the following paragraph.[53] However, the hostage aspect also reaches cases where a person is held in order to support the kidnapper's demand for the release of a prisoner or for certain corporate or governmental action.

Paragraph (3) penalizes the restraining of a person with intent to "commit a felony." The phrase "commission of an offense," which includes variants such as "commit a felony," is defined in section 111 to include the attempted commission of an offense, the consummation of an offense, and any immediate flight from the commission of an offense. Thus, this paragraph carries forward the offenses in 18 U.S.C. 2113(e) and 18 U.S.C. 2422–2423, applicable to bank robbery, prostitution, and related crimes, but generalizes it to include all felonies.[54] The intent to commit a felony must, of course, arise before the kidnapping occurs. Thus if a victim is abducted and later shot, the shooting does not convert the abduction into a kidnapping. On the other hand, if there existed a purpose to shoot or assault the victim when he was abducted, the shooting or assault need not have occurred for the offense of kidnapping to be completed.

Paragraph (4) punishes restraining another with intent to "interfere with the performance of a government function." This element is not jurisdictional and hence is not restricted to Federal government functions. It is designed to deal, for example, with situations such as that in *Gooch* v. *United States, supra,* where the defendants kidnapped two Texas peace officers who attempted to arrest them.

The National Commission included the four specific intents set forth above in its suggested kidnapping statute, as well as two others involving an intent to hold a person in a condition of involuntary servitude, and an intent to terrorize the victim or a third person. The Committee deleted the latter branch because such an act is covered by paragraph (3), since terrorizing is itself a felony under the proposed Code.[55] The involuntary servitude kidnapping offense is covered, without the need for proof of a specific intent, in section 1622.

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[51] See *United States* v. *Varner,* 283 F.2d 900, 902 (7th Cir. 1960), overruled on other grounds in *United States* v. *Atchison,* 524 F.2d 367 (7th Cir. 1975).

[52] See e.g., *United States* v. *Blux,* 261 F.2d 807 (3d Cir. 1958), in which the bank manager was forced to accompany the robbers in their getaway.

[53] However the following paragraph covers only kidnappings in the course of a felony, whereas paragraph (2) would apply where a victim was used as a shield or hostage during the commission of a misdemeanor.

[54] The term "felony" is defined in section 111.

[55] See section 1615.

Because section 1621 limits the offense of kidnapping to cases in which the actor has the intent to do one of the nefarious acts listed in subsection (a)(1) through (4), the provision of existing 18 U.S.C. 1201 excluding the confining, etc., of a minor by his parent from the definition of kidnapping is not carried forward in chapter 16, subchapter C.

B. Culpability

The conduct in this offense is the restriction of the movement of a person so as to interfere with his liberty by removing him from a place, or by confining him in any place or moving him from one place to another. Since no culpability standard is set forth in this section, the applicable state of mind that must be proved is, at a minimum, "knowing," i.e., that the offender was aware of the nature of his actions. Conduct does not include all of the component elements of "restraint," i.e., lack of consent, which may involve actual lack of consent or legal incapacity to give effective consent. This must be regarded as a "circumstance" as to which recklessness is the minimum culpability required. Likewise, it is a "circumstance" that the place from which the victim was removed was "his place of residence or business," so at least recklessness is necessary as to that fact. The elements in paragraphs (1) through (4) state the specific intents or purposes for which it must be shown that the conduct was performed.

3. Jurisdiction

Section 1621(c) provides that there is Federal jurisdiction over the crime of kidnapping in a variety of circumstances set forth in four paragraphs.[56]

Paragraph (1) states that there is Federal jurisdiction if the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 and includes the special maritime, special territorial, and special aircraft jurisdictions. These are defined in terms very similar to the present scope of 18 U.S.C. 7 and 49 U.S.C. 1301 (32) so that this jurisdictional branch in essence carries forward that part of the 1972 amendment of 18 U.S.C. 1201, extending kidnapping jurisdiction to Federal enclaves, various vessels on the high seas, and certain aircraft while in flight.

Paragraph (2) provides that there is Federal jurisdiction over the offense of kidnapping if it is committed against (A) a United States official; (B) a Federal public servant who is engaged in the performance of his official duties and who is a juror, a law enforcement officer, an employee of an official detention facility, or a person designated in regulations for coverage under this section by the Attorney General; (C) a foreign dignitary or a member of his immediate family, who is in the United States; (D) a foreign official who is in the United States on official business or a member of his immediate family who is in the United States in connection with the visit of such official; (E) an official guest of the United States; (F) an internationally protected person; or (G) a person under the protection of the United States Secret Service pursuant to the provisions of section 3021.

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[56] The jurisdiction over this offense is virtually identical to that afforded in section 1611(c) as to maiming and the general discussion there is pertinent here.

The term "United States official" is defined in section 111 to include the President, President-elect, Vice President, Vice President-elect, Member of Congress, member-elect of Congress, a judge, or a member of the executive branch who is the head of a department listed in section 101 of title 5, United States Code or the second ranking official in such a department, or an employee in the Executive Office of the President or in the office of the Vice President authorized to receive an annual rate of pay equal to that provided in level II of the Executive Schedule. Subparagraph (A) thus carries forward, in expanded form, the current jurisdictional purview of 18 U.S.C. 351 and 1751. With respect to the reasons for the expansion, the discussion of the identical base in section 1601 (Murder) should be consulted.

Subparagraph (B) represents an extension of present jurisdiction, but one which the Committee feels is warranted and which was recommended by the National Commission. In essence the extension makes Federal jurisdiction over kidnapping coexistive with jurisdiction over assaultive offenses committed against Federal public servants. Currently acts of kidnapping of, for example, a law enforcement officer or an employee of an official detention facility engaged in the official performance of his duties, are punishable only at the level of an assault under 18 U.S.C. 111.[57] Kidnappings of judges and jurors can be prosecuted only as a form of obstruction of justice.[58] This results in an unwarranted limitation of the applicable penalty. Moreover, there seems no reason for the present gap in Federal coverage since, if there is sufficient Federal interest to support Federal jurisdiction over an assault or obstruction of justice involving judges, jurors, law enforcement officers,[59] and employees at an official detention facility, there would seem *a fortiori* to be sufficient Federal interest in protecting such officials against kidnapping.

Subparagraphs (C), (D), (E), and (F) basically codify the present jurisdictional scope of 18 U.S.C. 1201 under the 1972 and 1976 amendments extending that statute to instances where the victim of a kidnapping is a foreign official, an official guest, or an internationally protected person, defined in 18 U.S.C. 1116(b). The definitions in section 111 of the proposed Code of the terms "foreign dignitary," foreign official," "internationally protected person," "official guest of the United States," and "immediate family" correspond almost exactly with the coverage in 18 U.S.C. 1116 as incorporated into the Lindbergh Law.

Subparagraph (G) is an extension of Federal jurisdiction made on the rationale that those persons as to whom there is a sufficient Federal interest to warrant protection, as authorized by Congress, by the Secret Service should also be covered against kidnapping. An identical base is included in the preceding two subchapters as well.

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[57] See 18 U.S.C. 1114, listing the categories of Federal officials subject to protection against assault and murder.

[58] Federal judges are also protected under 18 U.S.C. 1114. They have been included in subparagraph (A) as United States officials.

[59] The terms "judge," "juror," and "law enforcement officer" are defined in section 111.

Paragraph (3) provides that there is Federal jurisdiction over an offense in this section if movement of the victim across a State or United States boundary occurs in the commission of the offense.[60] This brings forward to the basic jurisdictional reach of 18 U.S.C. 1201. The national Commission, without comment recommended an expansion of Federal jurisdiction over kidnapping to include the movement of any person across State or United States lines, not just the victim.[61] Although limiting the jurisdictional element to movement of the victim may not be defensible as an abstract proposition of logic, from a practical standpoint the delineation of this line restricting jurisdiction (especially when viewed in the context of the other available bases for invoking Federal jurisdiction over the offense) has not proved detrimental to Federal interests and the Committee therefore has concluded that there is no reason to expand Federal jurisdiction in this regard beyond its present boundaries.[62]

Paragraph (4) extends Federal jurisdiction over kidnapping to situations in which the offense occurs during the commission of one or more of the Federal offenses enumerated in this paragraph.[63] This adoption of ancillary jurisdiction represents, in the main, an extension of exsiting law, albeit one of considerably less magnitude than that suggested by the National Commission.[64] The concept of ancillary jurisdiction is discussed in general in this report in connection with chapter 2.

The reasons why the designated offenses were chosen as sources for Federal jurisdiction should be readily apparent from the nature of the offenses listed. The decision was made based both upon the severity of the underlying offense and the likelihood that a kidnapping over which there would not otherwise be Federal jurisdiction would be committed in association with it.

Additionally, it should be pointed out that by operation of sections 201(b)(1)(B) and 204, there is extraterritorial jurisdiction over an offense in this section if committed, *inter alia,* against a United States official or a Federal public servant who is outside the country for the purpose of performing his official duties. The Committee considers kidnapping to be a "crime of violence" under section 204(a). The extraterritorial jurisdiction provisions of 18 U.S.C. 1201 as to internationally protected persons are perpetuated through section 204(j).

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[60] The terms "State," "United States," and "commission of the offense" are defined in section 111.

[61] See Final Report, §§ 1634(l), 201(h).

[62] The Lindbergh Law has a provision (18 U.S.C. 1201(b)) creating a "rebuttable presumption" that a victim who has been kidnapped and not released after 24 hours has been transported in interstate or foreign commerce. The purpose of this presumption, which is to permit the commitment of Federal investigative resources to solve kidnappings where jurisdictional authority remains unclear, is carried forward in section 1624(c) of the Code. The presumption has been cast expressly in investigative jurisdictional terms in order to avoid the possibility of its construction as a presumption for the purpose of proving the jurisdictional factor itself.

[63] These offenses are identical to those set forth in section 1611(c).

[64] See Final Report, §§ 1634, 201(b), which would have afforded Federal jurisdiction over kidnappings committed in the course of any other Federal offense in the Code. The ancillary jurisdiction concept exists at present under 18 U.S.C. 2113(e), punishing kidnappings in the course of bank robbery and related offenses.

4. Grading

An offense under this section is graded as a Class A felony (up to life imprisonment) if prior to trial the offender does not voluntarily release the victim alive and in a safe place or voluntarily cause the discovery of the victim alive; the offense is a Class B felony (up to twenty-five years in prison) in any other case. This distinction accords with the recommendation of the National Commission[65] to provide an incentive to keep the victim alive by the availability of the lower grading level for the kidnapping itself on, e.g., release of the victim alive and in a safe place (i.e., safe with respect to endangerment of the victim's life) prior to trial.[66] As the Special Committee of the New York City Bar Association observed, "[s]uch a distinction can provide an incentive not to harm the victim and is thus appropriate."[67] A further refinement in the grading structure was considered in order explicitly to afford an inducement for an offender not to injure the victim. Such an inducement could take the form, e.g., of Class A felony grading if the victim has suffered serious bodily injury.[68] However, the Committee rejected this concept on the ground that an incentive to keep the victim free from physical injury is already inherent in the scheme of the Code, since any injury to the victim can be taken account of in imposing sentence for the kidnapping and any further crime of maiming or battery committed on the person of the victim will be subject to separate prosecution and punishment under subchapter B of this chapter.

It should be emphasized that, in order for the reduced grading level to apply, the victim's release must be "voluntary." Thus, where the victim escapes or is liberated by police action, the offender would be liable for the higher range of penalties.

SECTION 1622. AGGRAVATED CRIMINAL RESTRAINT

1. In General and Present Federal Law

This section defines an intermediate offense between the misdemeanor of criminal restraint (section 1623) and kidnapping described in the previous section. In general, any unlawful interference with a person's liberty without one of the specific intents required for kidnapping will constitute a misdemeanor under section 1623. When, however, an element such as risk of serious bodily harm or other endangering or threatening circumstances is present along with the interference with the person's liberty, the crime becomes aggravated and is graded as a Class D felony under this section.

The theory underlying the offense in the subject section is that one who interferes with the liberty of another should be responsible for the proximate results of his action. Thus a boy who forces a girl against her will across a State line to a deserted area can, under the following section, be held liable for a misdemeanor if he returns her safely.[69] If, on the other hand, he forces her out of the car and deserts her in an isolated, dangerous area under winter weather conditions, he would be guilty under this section since the risk of serious bodily injury in such a case justifies felony treatment.

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[65] See Final Report, 1631(2).

[66] The release must be prior to trial so that there will be no necessity at trial to prove what happened to the victim if he has vanished. If the victim is not released in a safe place or his discovery alive voluntarily caused prior to the commencement of the trial, the offender will be liable to the higher range of punishment.

[67] Hearings, p. 7748.

[68] S. 1400 so proposed. See section 1621(b) of that bill.

As indicated in the discussion of the preceding section, there is no direct analogue to section 1622 in current law since the current general kidnapping statute, the Lindbergh Law, does not have a lesser included offense. Thus this section will carry forward in part conduct presently proscribed under 18 U.S.C. 351, 1201, 2422, and 2423, discussed in the foregoing section. It will also bring forward 18 U.S.C. 2194 and the various laws punishing peonage and slavery (18 U.S.C. 1581-1588) outlined in the foregoing section.

2. The Offense

A. Elements

Subsection (a) of section 1622 provides that a person commits an offense if he "restrains another person (1) under circumstances that in fact expose him to a risk of serious bodily injury; (2) by secreting and holding him in a place where he is not likely to be found; (3) by endangering or threatening to endanger the safety of any person; or (4) by holding him in a condition of involuntary servitude, slavery, or peonage."

The term "restrain" is defined in section 1624, and the term "consent," which appears in the definition of "restrain," is defined in section 111 and is modified by a special definition in section 1624. Those definitions have been explained in connection with section 1621.

Paragraph (1) penalizes whoever restrains another person under circumstances that in fact expose him to "serious bodily injury." The quoted phrase is defined in section 111 to mean bodily injury which involves (a) death or a substantial risk of death, (b) unconsciousness, (c) extreme physical pain, (d) protracted and obvious disfigurement, or (e) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. This paragraph would include any unlawful restraint where the victim has been taken, lured, frightened or trapped into a dangerous situation from which he cannot readily escape. The rationale underlying this offense is that, regardless of the cause of an unlawful restraint, whether through mistake or practical joke, a person who knowingly restrains another takes upon himself a high responsibility for the safety of the person whom he has deprived of freedom. Hence felony punishment seems warranted when the restrained person is kept in circumstances that expose him to a risk of serious bodily injury.[70]

Paragraph (2) punishes a restraint where the victim is secreted and held in a place where he is not likely to be found, and paragraph (3) punishes a restraint which endangers or threatens to endanger the safety of any person. These provisions are derived from the definition given to the term "abduct" by the National Commission,[71] the elimination of which as part of the definition of kidnapping was discussed generally in relation to the foregoing section.

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[69] Currently this could be prosecuted as a full fledged kidnapping, carrying a possible sentence of life imprisonment. See Working Papers, p. 854.

[70] See Working Papers, p. 859.

If a victim is restrained in his home or place of work while, for example, robbers make their escape, kidnapping or aggravated criminal restraint would not be committed. However, if the victim is locked in an air tight bank vault from which he may not be rescued in time, the endangerment of the victim's safety would constitute aggravated criminal restraint as defined in this section.[72] Similarly, an offense hereunder would be committed if the victim is secreted and held, e.g., in an abandoned building where he would not likely be found, or even on the victim's own property, if it is a place not known by others.

Paragraph (4) punishes a restraint by holding the victim in a condition of involuntary servitude, slavery, or peonage. This carries forward 18 U.S.C. 2194, dealing with "shanghaiing" sailors, as well as the provisions of chapter 77 of title 18, proscribing peonage and slavery, all discussed in connection with the preceding section. Enactment of paragraph (4) will also continue to satisfy the international obligation of the United States, as a party to the United Nations sponsored Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[73] to make criminal the conveying of a slave from one country to another, the use of a national flag aircraft of ship to convey slaves, and the enslaving of any person.

The Committee intends that the terms "involuntary servitude," "slavery," and "peonage" bear the meanings given to those terms under present Federal decisions. The Committee also endorses the interpretation of "holding" to "involuntary servitude" in *United States* v. *Shackney*,[74] as requiring either the use of physical restraint or threat to cause immediate confinement of the victim.

There is no requirement in this paragraph that the person kept in involuntary servitude be secretly confined. The proposal recognizes, as does current law, that a person may be kept working quite openly, even though he is in a condition of involuntary servitude.[75]

The National Commission brought forward the involuntary servitude statutes as "kidnapping," defining the offense as an abduction or restraint of a person "with intent . . . to hold him in a condition of involuntary servitude."[76] This revision would subject the offender to a possible thirty-year prison sentence whereas the laws in chapter 77 now generally punish the equivalent offenses by a maximum of five years' imprisonment. While two of these principal statutes, 18 U.S.C. 1581 and 1583, contain a specific intent requirement, another such statute (the one utilized in the *Shackney* case, *supra*) does not.[77] In light of these considerations, and to obviate problems of proof, already extremely difficult in light of the stringent interpretation in *Shackney, supra*, as to the type and degree of control over the victim which is necessary to be shown, the Committee determined to eliminate the need to prove a specific intent to hold the victim in involuntary servitude and to treat the offense under this section (rather than as kidnapping), carrying penalties commensurate with those in existing law.

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[71] See Final Report, § 1639(b).

[72] The taking of a person as a hostage or shield, punishable as kidnapping under section 1621, would also constitute a violation of paragraph (3) herein and to that extent the sections overlap, affording an opportunity for an exercise of prosecutorial discretion.

[73] 18 U.S.T. 3201, Sept. 7, 1956 (eff. Dec. 6, 1967).

[74] *Supra* note, 29.

[75] See Final Report, § 1631(1)(c).

[76] See 18 U.S.C. 1584.

[77] See 18 U.S.C. 1584.

Although in all probability, under the cases, the term "involuntary servitude" includes "peonage" and "slavery," the Committee has used all three terms to insure completeness of coverage of the chapter 77 offenses.[78]

A violation of this section described in paragraphs (1), (3), or (4) of subsection (a) involves conduct so offensive that the Committee has decided not to exclude the restraint of a minor by his parent from coverage by those paragraphs. However, it has provided an affirmative defense applicable to paragraph (2) of subsection (a), and to the conduct of parents, discussed below in connection with section 1624.

B. Culpability

The conduct in paragraph (1) is restraining another person. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is, at a minimum, "knowing," i.e., that the offender was aware that he was restraining another individual.[79] The element that the restraining exposes the other to a risk of serious bodily injury is an existing circumstance. Since, however, this element is preceded by the phrase "in fact," no proof of any mental state of the defendant need be shown with respect thereto.[80]

In paragraph (2) the conduct is restraining another person by secreting and holding him. Because no culpability level is specifically stated, the requisite mental state is "knowing." The fact that the secreting and holding is "in a place where [the victim] is not likely to be found" is an existing circumstance. As no culpability standard is provided in this section, the applicable state of mind that must be established is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the place was of the type described.[81]

Paragraphs (3) and (4) consist entirely of conduct elements. Since no culpability level is specifically prescribed, the applicable state of mind is, at a minimum, "knowing." Thus, in order to prove these offenses, the government must prove, for example, that the defendant was aware that he was holding another person in a condition of peonage, or had endangered or threatened to endanger the safety of any person.

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[78] 18 U.S.C. 2194, punishing "shanghaiing" sailors, is also covered since service is clearly a form of involuntary servitude. See Working Papers, p. 859.

[79] See sections 303(b)(1) and 302(b)(1). The element "without consent" in the definition of "restrain" should, however, be regarded as a circumstance as to which the minimum culpability level that must be established is "reckless". See sections 303(b)(2) and 302(c)(1).

[80] See section 303(a)(2).

[81] See sections 303(b)(2) and 302(c)(1).

3. Jurisdiction

Subsection (c) of section 1622 provides that there is Federal jurisdiction over an offense described in paragraphs (1), (2), and (3) if a circumstance specified in section 1621(c) exists or has occurred. These jurisdictional bases have been fully discussed in relation to the previous section and that discussion is pertinent here.

With respect to paragraph (4), there is Federal jurisdiction if the offense is committed within the general jurisdiction of the United States, as defined in section 202, or the special jurisdiction of the United States, defined in section 203. This reflects the current reach of the chapter 77 statutes carried forward by this paragraph, and implements the treaty obligations of the United States with regard to outlawing slavery, as well as the plenary grant of power under the Thirteenth Amendment over all crimes of slavery and involuntary servitude committed anywhere in the United States or in any place subject to its jurisdiction.[82]

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This is generally consistent with the chapter 77 offenses in current law and is deemed also to be an appropriate sanction for the other types of aggravated criminal restraints punished under this section.

SECTION 1623. CRIMINAL RESTRAINT

1. In General and Present Federal Law

This section creates a lesser included offense to the crimes in sections 1621 and 1622. It punishes those restraints on another person's liberty which, while criminal, do not involve a heinous purpose or other aggravating factor such as the endangering of any person's safety. This section is designed to bring forward all the offenses not reached by sections 1621 and 1622 that are encompassed by the words "or otherwise" in the current Lindbergh Law, 18 U.S.C. 1201.[83] Although these offenses generally involve an imposition on a person's liberty that is limited in duration and effect, the Committee believes them to be sufficiently serious to require the criminal sanction to fulfill the Federal interest in punishment and deterence of such conduct. A similar judgment was made by the National Commission.[84]

2. The Offense

Subsection (a) provides that a person commits an offense if he "restraints another person."

The term "restraint" is defined in section 1624, and the term "consent," which is used in the definition of "restrain," is defined in section 111 and is modified by a special definition in section 1624. Those definitions are explained in this report in connection with section 1621. An illustration of the type of restraint falling within this section is the unlawful taking by a baby sitter of her charge, for mere companionship purposes, where the baby is returned unharmed the following day.[85]

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[82] See Working Papers, p. 866.

[83] See, e.g., *United States* v. *Atchison*, 524 F.2d 367 (7th Cir. 1975) (kidnapping of child for ostensibly noble purpose of removing her from unfit home environment). The scope and significance of the quoted words, which were added as an amendment to the kidnapping statute in 1934, are discussed in detail in connection with section 1621.

[84] See Final Report, § 1633.

The culpability with respect to "restraints another person" has been analyzed in connection with the preceding section, and that analysis should be consulted here.

The provisions of section 1624(b) and (c) apply to section 1623 and are discussed below.

3. Jurisdiction

Subsection (c) of section 1623 provides that there is Federal jurisdiction over an offense described in this section if a circumstance specified in section 1621(c), (1), (2), or (3) exists or has occurred. These jurisdictional bases have been discussed in relation to section 1621 and that discussion should be consulted here. The ancillary jurisdiction base under section 1621(c)(4), applicable both to kidnapping and aggravated criminal restraint, has been deleted for this offense, consistent with the Committee's policy of not using that jurisdictional device with regard to misdemeanors that involve only a relatively minor harm.[86] In addition, while it is readily foreseeable that the crimes of kidnapping or aggravated restraint might occur in the course of other specified Federal offenses, the likelihood of a non-dangerous restraint occurring in such circumstances is considerably more remote.

4. Grading

An offense under this section is graded as a Class A misdemeanor.

SECTION 1624. GENERAL PROVISION FOR SUBCHAPTER C

This section contains certain general provisions for sections 1621-1624. Subsection (a) defines the terms "restrain" and "consent." These definitions are discussed in this report in relation to section 1621.

In prior versions of the bill, e.g., S. 1437 as reported by the Subcommittee on Criminal Laws and Procedures, section 1624(b) set forth an affirmative defense, based generally upon the exception in 18 U.S.C. 1201 for kidnapping "of a minor by the parent thereof" and upon a parental defense to "unlawful imprisonment" proposed by the National Commission, applicable to sections 1621 through 1623. It would have applied when the actor was a parent or guardian of the person restrained and the latter was under age eighteen. The reported bill modifies that affirmative defense as a means of dealing with the problem of child-snatching by separated or divorced parents involved in child custody disputes. Subsection (b) creates an affirmative defense to an offense described in sections 1622(a)(2) and 1623 that the actor is "a parent or guardian of the person restrained and that the person restrained is less than eighteen years of age." Thus, except for the aggravated criminal restraints described in sections 1621 and 1622 (a)(1), (3), and (4), the problem of childsnatching is not addressed in this Code.[87]

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[85] Cf. Working Papers, p. 854.

[86] See also, e.g., sections 1614, 1703.

Subsection (c) provides that in the absence of facts indicating a lack of Federal jurisdiction, the failure to release the victim of one of section 1621 through 1623 offenses within twenty-four hours justifies Federal investigative efforts based on probable interstate movement of the victim. This provision is intended to serve the same purpose as 18 U.S.C. 1201(b) in current law. It is not intended to prevent the commencement of Federal investigative efforts sooner than twenty-four hours after an offense whose circumstances justify such action.

SUBCHAPTER D.—HIJACKING OFFENSES

(Sections 1631-1632)

This subchapter deals with offenses involving the seizure or taking control of an aircraft or vessel by force, threat, intimidation, or deception. Section 1631 sets forth the offense with respect to aircraft; section 1632 contains a parallel offense applicable to vessels. Although similar to the kidnapping and criminal restraint offenses defined in the previous subchapter, and often allied with them, the thrust of the offenses in this subchapter is not confined to a concern with the restriction of the liberty of other persons but also is directed at the seizure of property.

SECTION 1631. AIRCRAFT HIJACKING

1. In General

Aircraft hijacking represents a serious threat to large numbers of people. The frequency with which this crime occurs has made it necessary that strong laws be passed to deal with it. In response to this need the United States entered into an international treaty in 1971 and, in 1974, incorporated certain provisions of that treaty in the criminal law. This section carries forward those provisions.

2. Present Federal Law

Aircraft hijacking is currently punished (by the name "aircraft piracy") under the provisions of 49 U.S.C. 1472, enacted in 1961 and most recently amended in 1974 by Public Law 93-366.[1] The 1974 amendment was enacted to implement the "Convention for the Suppression of Unlawful Seizure of Aircraft," an international treaty entered into by the United States in December of 1970 and ratified by the Senate on September 14, 1971. Under the provisions of the Convention, each signatory nation is required to make aircraft hijacking punishable by "severe penalties" and to establish criminal jurisdiction to cover any hijacker found in its territory regardless of where his offense was committed.

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[87] Last year the Congress enacted the Parental Kidnapping Prevention Act of 1980 (P.L. 96-611), which deals extensively with this matter. Consistently with the terms of that statute, S. 1630 has omitted the section in last year's Criminal Code which would have made it a misdemeanor under prescribed circumstances for a parent to kidnap his or her minor child.

[1] 88 Stat. 409 (1974).

Pursuant to the terms of the Convention, 49 U.S.C. 1472(i) was amended to provide that whoever commits or attempts to commit aircraft piracy shall be punished "(A) by imprisonment for not less than 20 years; or (B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life." The term "aircraft piracy" is defind as "any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." The "special aircraft jurisdiction" is defined in 49 U.S.C. 1301(32) to include the following aircraft "while in flight": (a) civil aircraft of the United States; (b) aircraft of the national defense forces of the United States; (c) any other aircraft within the United States; (d) any other aircraft outside the United States (i) that has its next scheduled destination or last point of departure in the United States, if the aircraft next actually lands in the United States; or (ii) whereon "an offense," as defined in the Convention, is committed, if the aircraft lands in the United States with the alleged offender still aboard; and (e) other aircraft leased without crew to a lessee who has his principal place of business in the United States or who has his permanent residence in the United States. This same subsection provides that, for the purpose of the above definition, an aircraft is considered to be "in flight" from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard."

The culpability phrase "wrongful intent" has been interpreted not to require proof of a specific intent and to refer only to the "general criminal intent present when one seizes or exercises control of an aircraft without having any legal right to do so."[2] The statute has been held applicable to private as well as commercial aircraft.[3]

Pursuant to the Convention, the 1974 amendment also established a new subsection, 49 U.S.C. 1472(n), that provides Federal jurisdiction over the offense of aircraft hijacking when the offense is committed outside the special aircraft jurisdiction of the United States and the offender is afterwards found in the United States.

3. The Offense

Subsection (a) provides that a person commits an offense if he "seizes or exercises control over an aircraft by force, threat, intimidation, or deception."

The phrase "seizes or exercises control" is taken both from 49 U.S.C. 1472(i) and the international treaty and thus continues existing law. The terms "force, threat, intimidation, or deception" represents a slight expansion of the prohibited means in the above statute and treaty, which refer only to force, threat of force, or any other manner of intimidation. The Committee has added the concept of "deception," on the ground that an unlawful assumption of control of an aircraft by deceptive means is just as dangerous and blameworthy as where the exercise of control is by means of force, threat, or intimidation.[4] The word "aircraft" is defined in section 111 as any craft used or designed for flight or navigation in air or space.

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[2] See *United States* v. *Bohle*, 445 F.2d 54, 60 (7th Cir. 1971).

[3] See *United States* v. *Healy*, 376 U.S. 75, 83-85 (1964).

The offense in this section, except for the element "an aircraft," consists entirely of conduct. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions. This accords with the present interpretation of 49 U.S.C. 1472(i) as not requiring proof of any specific intent (e.g., any evil motive or an intent to deprive the owner permanently of the aircraft).[5] The element that what is seized, etc., is an aircraft is an existing circumstance. Since no culpability level is designated in this section, the applicable state of mind to be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[6]

4. Jurisdiction

Subsection (c) of section 1631 provides that there is Federal jurisdiction over an offense in this section in two circumstances.

The first is if the offense is committed within the special aircraft jurisdiction of the United States. The special aircraft jurisdiction is defined in section 203(c) to include various categories of aircraft "during the period that such aircraft is in flight," which is defined to mean "from the moment when all the external doors of such aircraft are closed following embarkation until the moment when any such door is opened for disembarkation, or, in the case of a forced landing, until a competent authority takes over the responsibility for the aircraft and for the persons and property aboard." With the exception of minor changes in wording, this definition is identical to that enacted in the 1974 amendment to 49 U.S.C. 1472 pursuant to the Convention.[7]

The categories of aircraft covered are set forth in paragraphs (1) through (5) of section 203(c) and encompass all categories currently embraced within 49 U.S.C. 1472(i).

The second circumstance establishing jurisdiction exists if the offense is committed by means other than deception outside the special aircraft jurisdiction of the United States and three other circumstances coalesce: (a) the offense is committed aboard an aircraft

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[4] An identical combination of terms is used, *inter alia*, in the kidnapping series of offenses and in section 1323 (Tampering with a Witness, Victim, or an Informant). The section accords with the recommendation of the Committee on Reform of Federal Laws of the American Bar Association. Hearings, p. 5810.

[5] See *United States* v. *Bohle, supra* note 2 at 60.

[6] See sections 303(b)(2) and 302(c)(1).

[7] Section 1635 of the Final Report of the National Commission was limited to "aircraft in flight." This limitation was criticized by the ABA's Section of Criminal Law. Hearings, p. 5810, and the New York City Bar Association's Special Committees. Hearings, p. 7750. As the ABA Section stated: "[t]he current formulation of § 1635 is inadequate in this regard insofar as it would exclude from its coverage the take-over of a fully loaded commercial passenger plane which quite literally failed to get off the ground. The skyjacker who terrorizes passengers and crew while still on the runway, and then is captured before the aircraft is put in flight, is well beyond the point of inchoateness and should be chargeable with the substantive offense." In accordance with the recommendations, jurisdiction, as discussed above, extends from the time when all the external doors of the aircraft are closed following embarkation until the moment when any such door is opened for disembarkation. Where a defendant seizes control of an aircraft on the ground before the elements of "in flight" are met, he may be guilty of an attempt to violate this section, and would be guilty of a violation of this section if his exercise of control continued until the actual take off.

"inflight," as defined in section 203(c); (b) the place of take-off or the place of landing of the aircraft is situated outside the territory of the nation in which the aircraft is registered; and (c) the offender is thereafter found in the United States. This fulfills the obligations of the United States under the international treaty to punish certain offenders found in its jurisdiction even though the offense was committed outside the general or special jurisdiction of the United States. The various conditions attached to the exercise of such extra-territorial jurisdiction are identical with those contained in the treaty.[8]

5. *Grading*

An offense under this section is graded as a Class B felony (up to twenty-five years in prison). However, the Committee notes that if a murder or other serious assaultive offense is committed in the course of aircraft hijacking, it can be separately prosecuted and a cumulative punishment imposed by virtue of the fact that the special aircraft jurisdiction is part of the special jurisdiction of the United States, defined in section 203, for which Federal jurisdiction over such offenses is provided.[9]

The Committee is aware that 49 U.S.C. 1472(i) carries a mandatory minimum prison term even where death does not result in the commission of the offense. However, the Committee does not consider the concept of minimum mandatory sentences generally to be consistent with sound sentencing principles, and so has eliminated from this section that feature of the current law. The maximum sentence provided in the Code is believed to be a fully adequate deterrent to the commission of a non-homicidal aircraft hijacking offense.

SECTION 1632. COMMANDEERING A VESSEL

1. *In General and Present Federal Law*

This offense, which is defined in terms parallel to section 1631, brings forward 18 U.S.C. 2193, relating to revolt or mutiny by seamen, expanding it to cover commandeering by non-crew members.

18 U.S.C. 2193 punishes by up to ten years in prison whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, "unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto."

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[8] See Article 3 thereof. Since the constitutional basis for inclusion of the extraterritorial jurisdiction is the treaty making power, it is doubtful if there is authority under the Constitution to define the scope of jurisdiction in terms that are broader than the treaty itself. This is the reason that deception in seizing control of an aircraft is not included as a basis for jurisdiction as it does not appear in the Convention.

[9] See, e.g., section 1601(d)(1) (Murder): section 1611(c) (Maiming). It should be noted that the death penalty in current law for a murder occurring in the course of an aircraft hijacking is not changed by this bill other than to make necessary conforming amendments. See 49 U.S.C. 1472, 1473.

This statute has been held to apply even to a ship at dock in a domestic port, in the context of concerted activity by seamen who, in order to compel recognition of their union, staged a strike and persistently and deliberately defied the lawful commands of their captain and other officers that they perform their duties in preparation for the ship's departure.[10]

2. The Offense

Subsection (a) provides that a person commits an offense if he "seizes or exercises control over a vessel [11] by force, threat, intimidation, or deception."

Unlike 18 U.S.C. 2193, which is limited to usurpations by members of the crew, the proposed statute follows the recommendation of the National Commission in proscribing a usurpation of command by anyone—crewman, passenger, or outsider—[12] on the theory that any such seizure of a vessel presents serious dangers to human safety and property. Recognizing the obligation of the crew to the master, however, a grading distinction is afforded based in part on this factor.

The terms "seizes or exercises control over" are derived from the aircraft hijacking provisions of current law (also carried forward in section 1631) and are intended to have the same meaning as in those laws. The concept of "exercising control over" is not meant to require an appointment of another to command; there may be a violation of this section if a member of the crew or another should compel the master by one of the prohibited means to navigate the ship according to his [the offender's] own directions and prevent the master from the free exercise of his own judgment.[13]

The terms "force, threat, intimidation, or deception" are designed to bear the same meaning as in the previous section. Whereas the inclusion of "deception" as a prohibited means represented an expansion of the present aircraft hijacking laws, in the instant context it merely reflects the existing proscription in 18 U.S.C. 2193 of a usurpation "by fraud."

The offense in this section except for the element "a vessel" consists entirely of conduct. Since no culpability level is specifically designated, the applicable state of mind that must be proved is, at a minimum, "knowing," i.e., that the offender was aware of the nature of his actions. Unlike current law, a mistaken belief in the unseaworthiness of the vessel is not intended to afford a defense under this section to a refusal to go to sea aboard her.[14] The element that what is seized, or controlled, is a vessel is an existing circumstance as to which the applicable mental state that must be shown is at least "reckless."[15]

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[10] See *Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, 40–46 (1942).

[11] The term "vessel" is defined in section 111 as a self-propelled or wind-propelled craft used designed for transportation or navigation on, under, or immediately above, water.

[12] See Final Report § 1805. comment, p. 246.

[13] See *United States* v. *Forbes*, 25 F. Cas. No. 15,129 (E.D. Pa. 1845).

[14] Compare *United States* v. *Staly*, 27 F. Cas. No. 16,374 (C.C. R.I. 1846); *United States* v. *Nye*, 27 F. 906 (C.C. Mass. 1855). However, the ordinary defense of duress, recognized under existing law, would apply. See section 501; *United States* v. *Reid*, 210 F. 486 (D. Del. 1913).

[15] See sections 303(b)(2) and 302(c)(1).

3. Jurisdiction

Subsection (c) of section 1632 provides that there is Federal jurisdiction over an offense in this section if it is committed within the special maritime jurisdiction of the United States. The special maritime jurisdiction is defined in section 203 to include the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and various vessels on such waters or upon the Great Lakes or the waters connecting them. This definition, which is derived from 18 U.S.C. 7, is somewhat narrower than under current law, since it does not reach navigable waters over which concurrent State jurisdiction exists. Thus, a strike of the type dealt with in the *Southern Steamship Company* case, *supra,* aboard a vessel docked in a United States port would not be within the scope of this section but would be subject to punishment solely by State or local authorities.

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the defendant is a member of the crew of the vessel or the offense is committed on the high seas. This grading level, which essentially carries forward existing law, is designed to reflect the added degree of blameworthiness attaching when the offender is a member of the crew, and the added danger when the offense is committed (irrespective of who commits it) on the high seas.[16] In any other case, the offense is graded as a Class E felony (up to three years in prison).

SUBCHAPTER E.—SEX OFFENSES

(Section 1641-1646)

This subchapter proposes a substantial modification of existing Federal law in the area of sex offenses. Current Federal law contains only a few statutes punishing sex offenses, only three of which—rape (18 U.S.C. 2031), "statutory" rape (18 U.S.C. 2032), and assault with intent to rape (18 U.S.C. 113(a))—apply throughout the special maritime and territorial jurisdiction.[1] Criminal liability for other forms of sexual misconduct in Federal enclaves is dependent on State laws which are assimilated by the provisions of 18 U.S.C. 13. Because of the limitations of that statute, no coverage is presently available for sexual offenses, including such major crimes as forcible sodomy, committed in a place of exclusive Federal jurisdiction, e.g., a vessel on the high seas. Moreover, current Federal law does not define the offense of rape but instead relies upon its common law meaning to supply the necessary elements and definitions. Thus the offense of rape under 18 U.S.C. 2031, which is uniformly punishable by up to death or life imprisonment, would probably be construed to apply to such acts as having intercourse with a child under the age of ten, with an incompetent, with an unconscious person, or with a woman otherwise unable to resist sexual advances. In terms of grading, as noted by senior counsel to the National Commission: "There is no legislative distinction between violent ravishment by strangers and less brutal schemes to take advantage of an initially consensual relationship, as for example, between adults who may have been dating."[2]

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[16] Compare Final Report, §1805(1).

[1] The only other statutes dealing with sexual offenses in title 18 are 18 U.S.C. 1153, punishing rape, carnal knowledge of a female, not the offender's wife, who has not attained the age of sixteen, incest, and assault with intent to commit rape, committed by an Indian in Indian country; 18 U.S.C. 2198, punishing seduction of a female passenger by an employee of an American vessel during a voyage; and 18 U.S.C. 2421-2424, the White Slave Traffic Act, punishing principally prostitution. In addition the District of Columbia Code and the Uniform Code of Military Justice contain relatively complete sets of provisions dealing with sexual offenses.

This subchapter in intended to furnish solutions to the above problems by specifically defining a greater number of serious offenses of sexual misconduct so as to create appropriate grading distinctions and significantly reduce, but not eliminate, the necessity for reliance on the differing coverages of the various State laws.[3] In addition, this subchapter specifically addresses certain aspects of sexual offenses that have been a source of problems in the traditional statute. Examples are the discriminatory nature of most contemporary sex offenses in that they may be perpetrated only upon a female by a male (abolished under the proposed Code), the issues of penetration and emission, and the effect of a reasonable mistake regarding the age of a victim.

This subchapter is derived in part from the recommendations of the National Commission and the Model Penal Code.

SECTION 1641. AGGRAVATED RAPE

1. *In General and Present Federal Law*

This section sets forth the most serious of the crimes in this subchapter: aggravated rape. The conduct punished includes engaging in a sexual act (i) by force or threat, (ii) by the drugging of an unwitting victim, or (iii) with a child.

18 U.S.C. 2031 provides that whoever "within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life."[4]

This statute has been sustained as constitutional and interpreted to incorporate the common law definition of rape.[5] Applying this standard, the courts have held that rape involves carnal knowledge of a female (not the offender's wife) by force or threat of bodily harm and without her consent. It is not necesary to show that the defendant had an intent to put the victim in fear of death or serious bodily harm, nor is it necessary to show that the victim resisted with every ounce of strength.[6] Whether corroboration of the victim's testimony is required seems never to have been decided.[7]

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[2] See Working Papers, p. 867.

[3] See, in the latter respect, section 1861 (Violating State or Local Law in an Enclave). This subchapter, while setting forth a far more comprehensive series of sex offenses than present law, is not intended to represent a complete catalog of such crimes. For example, the Committee intends that sexual offenses for which assimilation of State law will be needed under the proposed Code include incest and bigamy, and other forms of consensual sexual activity among competent adults, not proscribed in this subchapter.

[4] The Supreme Court declared the death penalty for rape of an adult female unconstitutional. *Coker* v *Georgia*, 433 U.S. 584 (1977).

[5] See *United States* v. *Smith*, 574 F.2d 988, 990 (9th Cir. 1978); *Oliver* v. *United States*, 230 F. 971 (9th Cir. cert, denied, 241 U.S. 670 (1916).

Under 49 U.S.C. 1472(k), the offense of rape under 18 U.S.C. 2031 is made punishable when committed within the special aircraft jurisdiction of the United States, as defined in 49 U.S.C. 1301(32). Likewise, under 18 U.S.C. 1152, the offense of rape as defined in 18 U.S.C. 2031 applies within Indian country when committed by a non-Indian against an Indian.

Under 18 U.S.C. 1153, the Major Crimes Act, any Indian who commits, *inter alia,* rape in Indian country is guilty of an offense. The penalty and elements of the offense are the same as under 18 U.S.C. 2031.

2. The Offense

A. Elements

Subsection (a) of section 1641 provides that a person commits an offense if he engages in a sexual act with another person and (1) compels the other person to participate in such act (A) by force, or (B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping, or (2), with intent to engage in a sexual act, has substantially impaired the ability of the other person to appraise or control conduct by administering or employing a substance that he knows is a drug or intoxicant, or by other means, without the knowledge or against the will of the other person, or (3) the other person is, in fact, less than twelve years old.[8]

The term "sexual act" is defined in section 1646 to mean conduct between human beings consisting of contact between the penis and the vulva, the penis and the anus, the penis and the mouth, or the mouth and the vulva. Contact involving the penis occurs upon penetration, however slight. This definition clarifies the concept of "carnal knowledge" required under existing law, in a manner generally consistent with State decisions applying common law principles. Emission is not required.[9] The Committee's formulation combines the definition suggested by the National Commission for the terms "sexual intercourse" and "deviate sexual intercourse," thereby covering homosexual as well as heterosexual conduct by the offenses set forth in this subchapter.[10]

It should be noted that the Committee has deleted the common law limitation, embodied in present Federal statutory law, against interspousal rape.[11] Under this section, rape may be committed by one spouse against another.

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[6] See *Carlton* v. *United States,* 395 F.2d 10, 12 (9th Cir. 1968), cert. denied, 393 U.S. 1030 (1969); *Laughlin* v. *United States,* 386 F.2d 558 (9th Cir. 1966), cert. denied, 386 U.S. 1041 (1967), Cf. also *Mills* v. *United States,* 164 U.S. 644, 648 (1897).

[7] See Working Papers. p. 875. An indication that the Federal courts might not demand corroboration under 18 U.S.C. 2031 is the fact that corroboration has not ben held necessary under 18 U.S.C. 2032. *United States* v. *Shipp,* 409 F.2d 33 (4th Cir.). cert. denied, 396 U.S. 864 (1969). Likewise corroboration is no longer required under the District of Columbia rape statute, 22 D.C. Code 2801. *Arnold* v. *United States,* 358 A.2d 335 (D.C. App. 1976) *(en banc)* (abandoning the court's former adherence to the corroboration rule).

[8] Sections 1641–1644 substantially adopt the recommendation of the American Bar Association. Hearings, p. 5810.

[9] See Perkins, *Criminal Law,* pp. 154–156.

[10] See Final Report, § 1649 (a) and (b). The Commission defined rape as occurring only when sexual intercourse was performed (i.e., penetration, however slight, involving contact between penis and vulva); when "deviate sexual intercourse" occurred, the offense was labeled Aggravated Involuntary Sodomy. Both offenses were graded virtually identically. See Final Report, §§ 1641, 1643. The Committee, therefore, has consolidated them into a single offense.

The offense in paragraph (1) otherwise essentially restates the offense of rape as embodied in the cases that have arisen under 18 U.S.C. 2031. Threats of kidnapping are expressly added to the traditional coverage for threats of imminent death or serious bodily injury.[12] The term "serious bodily injury" is defined in section 111 and has been discussed in detail in connection with section 1611 (maiming).[13] As under current law, the Committee does not intend that resistance to the utmost be required to establish rape, or indeed any of the offenses in this subchapter.[14]

The offense in paragraph (2) extends the traditional rape offense to circumstances where a sexual act is performed after the perpetrator, with the intent to engage in such an act, has substantially impaired the ability of the victim to appraise or control either the victim's conduct or the actor's conduct by administering or employing a substance he knows is a drug or intoxicant, or by other means, without the knowledge or against the will of the victim. The Committee believes that an offender who performs a sexual act upon another individual, after drugging his unwitting victim is guilty of an offense of equal magnitude to forcible rape. This accords with the recommendation of the National Commission.[15] Note, however, that engaging in a sexual act with a person who is merely unaware of what is occurring (e.g., being unconscious) is not made punishable as rape but as a lesser offense of sexual assault (section 1642).

The offense in paragraph (3) proscribes the performance of a sexual act upon another person who is less than twelve years old. There is no question but that engaging in sexual intercourse with a prepubescent child, irrespective of consent constitutes serious misbehavior which should be severely punished.[16] Such conduct may cause great physical and psychological injury. The National Commission and the Model Penal Code included a similar offense, but selected ten as the age below which nonforceful sexual intercourse would be deemed rape.[17] State law in this country has not adopted a uniform age for these purposes, and senior counsel to the National Commission acknowledged that choosing the proper age is difficult.[18] The Committee has selected twelve as the appropriate age, believing that it represents the most common age in our society for the onset of puberty.[19] Significantly, mistake as to age of the victim will not be a defense under this section—in contrast to the offense of sexual abuse of a minor in section 1643—because any error that is at all likely to be made concerning the age of such a child will still place the victim as a youth.

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[11] See Perkins, *supra* note 9, at 156-157; cf. *United States* v. *Lone Bear*, 579 F. 2d 522, 525 (9th Cir. 1978).

[12] In terms of the nature of the threats required, this offense resembles that of extortion in section 1722, but is more limited in that threats to damage property are not included, nor are threats to cause non-serious bodily injury. Compelling another person to engage in a sexual act by lesser threats than those enumerated in this section is punished at a reduced (albeit still a felony) level in the following section (1642).

[13] The conduct of assaulting a person with intent to commit rape, currently punishable under 18 U.S.C. 113(a), will be carried forward in the proposed Code principally as an attempt (section 1001) to commit the offense in this section.

[14] See *Laughlin* v. *United States*, *supra* note 6; see also Hearings, p. 8615 (testimony of G. Robert Blakey).

[15] See Final Report, § 1641(1)(b).

[16] Notably, although ruling the death penalty for rape of an adult woman to be invalid as constituting cruel and unusual punishment, the Supreme Court specifically reserved the issue as to rape of a child. *Coker* v. *Georgia*, *supra* note 4.

[17] See Final Report, § 1641(c), and Comment, p. 188.

[18] See Working Papers, p. 869.

Under section 1646(b), unless the defendant is the victim's spouse, no corroboration will be required to prove aggravated rape or, indeed, to prove any of the offenses in this subchapter.[20] As to rape, this is probably consistent with current Federal law under 18 U.S.C. 2031 [21] and in any event is deemed by the Committee to be the better general rule. Although questions of credibility in rape cases are commonly critical, there seems no reason why the traditional protection of the reasonable doubt standard is not adequate to safeguard the rights of the accused. Rape victims should be treated as are victims of any other crime. The nature of sexual offenses is such that they are often carried out in a clandestine manner so that traditional kinds of corroboration (e.g., eyewitnesses) will not normally be available. The willingness of many courts to apply the corroboration requirement with extreme liberality [22] manifests the undesirability and artificiality of attempting to reduce an issue of credibility to a fixed rule. The exception for corroboration in the situation of an alleged interspousal rape is designed to reflect the fact that such new charges may be particularly subject to misuse in the course of domestic disputes so as to warrent a requirement (which as a practical matter will be present in any such rape case accepted by a prosecutor for presentation to a jury) of some corroboration of the victim's testimony.

The Committee similarly does not intend to require that a prompt complaint have been made as a prerequisite to a prosecution for rape, as suggested by the National Commission.[23] The fact of a prompt complaint is merely one item of evidence bearing upon the complainant's credibility, to be taken into consideration along with all the other evidence in the case.

B. Culpability

The conduct element in this offense is engaging in a sexual act. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the defendant was a ware of the nature of his actions.[24]

In paragraph (1), the element that the defendant compelled the other person to participate in the sexual act by force or by threatening or placing in fear, etc. is conduct. As no culpability standard is set forth therein, the requisite minimum mental state is "knowing."[25]

In paragraph (2), the element that the defendant had administered or employed a substance or had used other means is conduct, as to which the applicable mental state is at least "knowing." The element that the substance was a drug or intoxicant is an existing circumstance, as to which the applicable state of mind is specified in this instance as "knowing." The element of substantial impairment is a result of conduct, as to which no mental state is specified herein, thus requiring proof of at least recklessness as to that element. Likewise the element that the drug or intoxicant was administered or employed without the knowledge or against the will of the other person is an existing circumstance, as to which the requisite state of mind is, at a minimum, "reckless." Finally, the aspect that the conduct occurred with intent to engage in a sexual act states the particular purpose for which it must be proved that the conduct was performed.

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[19] See *id.*, at 870. Creating a subjective test regarding the child's capacity to give consent was likewise rejected as injecting too much uncertainty. See *id.*, at 870 n. 11.

[20] See the recommendations of Frederick J. Ludwig, Hearings, pp. 963-970.

[21] See note 7, *supra*.

[22] See Working Papers, p. 875, and cases cited therein. See also *Arnold* v. *United States, supra* note 7 at 350 (Mack, J.).

[23] See Final Report, § 1648(3); Working Papers, p. 874.

[24] See sections 303(b)(1) and 302(b)(1).

[25] See section 303 (b)(1).

In paragraph (3), the fact that the other person is less than twelve years old is an existing circumstance. However, since it is preceded by the phrase "in fact," no state of mind need be proved as to this element.[26]

3. Jurisdiction

There is Federal jurisdiction over an offense in this section in three circumstances. The first is if the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 and includes the special territorial, special maritime, and special aircraft jurisdiction. These in turn are defined in terms virtually identical to those in 18 U.S.C. 7 and 49 U.S.C. 1301(32), which together represent the territorial scope in which current 18 U.S.C. 2031 and related statutes apply.

The second basis for jurisdiction is if the offense is committed against a person in official detention in a Federal facility. This is designed to assure coverage of rape offenses committed against inmates of a Federal detention facility (including persons in the facility pursuant to a State sentence), whether or not the facility is located in the special jurisdiction of the United States.

The third circumstance is if the offense occurs during the commission of an offense, over which Federal jurisdiction exists, that is described in section 1323 (Tampering with a Witness, Victim, or an Informant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1631 (Aircraft Hijacking), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1843 (Engaging in a Prostitution Business), or 1844 (Sexually Exploiting a Minor). This represents an application of the ancillary jurisdiction concept discussed in connection with chapter 2. Where such an accompanying offense of aggravated rape is committed, the Federal interest flowing from the actor's commission of the underlying Federal offenses[27] is deemed sufficient to support Federal jurisdiction over the offense of rape as well. This has the advantage of permitting prosecution (and, in the event of conviction, punishment) based upon the actor's entire course of criminal conduct, rather than splitting the prosecutions between the Federal and local governments.

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[26] See section 303(a)(1).

[27] The term "commission of an offense" is defined in section 111 to include the attempted commission, consummation, and any immediate flight after the commission, of an offense.

4. Grading

An offense under this section is graded as a Class B felony (up to twenty-five years in prison). Although this is a level of punishment apparently reduced from that in present Federal law, in fact the twenty-five year maximum, given the elimination under the Code of parole, available after ten years to a person sentenced today to "life imprisonment", is at least comparable in severity to the grading of the offense under current law. Moreover, under the integrated operation of the Code the defendant will in most cases face additional liability for battery, kidnapping, or other Code offenses. Accordingly, the Committee believes that the sentence here prescribed is an adequate deterrent and punishment for the underlying offense itself, and that this approach, by providing for even greater punishment if any physical unjury befalls the victim, will serve to reduce the incidence of situations in which the victim is badly beaten or even killed. (Under the approach of current law, an offender is subject to the same statutory penalty whether or not he further brutalizes, or even kills, the victim.)

SECTION 1642. RAPE

1. In General and Present Federal Law

This section is designed to cover those situations, normally prosecuted as rape, where the actor engages in a sexual act knowing that the victim is in such a condition (whether of mind, body, or mistaken belief) that his or her ability to give meaningful consent is destroyed. This section also contains a lesser included offense to aggravated rape under section 1641(a)(1), where the victim's will is overborne through threats of any kind or by placing in fear by any means.

The first four offenses in this section—i.e., engaging in a sexual act with a person not one's spouse where the victim is (1) incapable of understanding the nature of the conduct, (2) physically incapable of resisting or of declining consent to it, (3) unaware that it is being committed, and (4) participating because of a mistaken belief that the actor is married to such person—are varieties of common law rape recognized in many States and hence probably punishable (although no such cases have arisen) under 18 U.S.C. 2031 and related statutes discussed in connection with the previous section. The final offense here proscribed—compelling he victim's participation by any threat or by placing him or her in fear—has no counterpart in present Federal law.

2. The Offense

Subsection (a) provides that a person commits an offense if he engages in a sexual act with another person who is not his spouse, and (1) knows that the other person is incapable of understanding the nature of his conduct; (2) knows that the other person is physically incapable of resisting, or of declining consent to the sexual act;[28] (3) knows that the other person is unaware that a sexual act is being committed; (4) knows that the other person participates because of a mistaken belief that the actor is married to such other person; or (5) compels the other person to participate by a threat or by placing such other person in fear other than by a means described in section 1641(a)(1).

The term "sexual act" is defined in section 1646. It has been discussed in relation to section 1641 and that discussion should be consulted here.

The term "spouse" is defined in section 1646 to mean a "person to whom the actor is legally married and from whom the actor is not legally separated." The element of a "legal" marriage is meant to refer to applicable State law and could include a so-called common law marriage if recognized as a legal form of marriage by the State. Reference to State law is also intended with respect to the concept of "legal" (as opposed to a merely *de facto*) separation of the spouses. The Committee, in this and subsequent sections in this subchapter, has chosen not to delete the interspousal exemption from the various offenses described therein, unlike in section 1641 (Aggravated Rape). There is less reason for such a deletion, in the Committee's opinion, as to the less serious kinds of sexual offenses described in sections 1642 through 1645.

As noted above, the offenses described in paragraphs (1) through (4) are recognized forms of rape prosecuted in many States.[29] One type of prohibited conduct, misrepresentation of marital relationship is worthy of special comment. Like the definition of "spouse" in section 1646, the reference to marriage in paragraph (4) is intended to mean a legal marital relationship. Thus the conduct prohibited by this offense occurs when the offender engages in a sexual act with someone who participates because of a mistaken belief that the offender is his or her lawful marital partner.

With respect to paragraph (5), an example of a type of threat covered here (but that would not be covered under section 1641) is obtaining intercourse by a threat of serious damage to irreplaceable property or of exposure of reputation. The word "by" in this offense connotes the concept of causation. Thus, if the threat did not "compel" (i.e., was not reason for) the other person's participation, no offense under this section (or section 1641) would be committed.[30] It is anticipated by the Committee that this paragraph will provide the means of bridging an unwarranted gap in current law by creating a general lesser-included offense in the nature of rape, that involves nonviolent coercion.

The general conduct element in this section is engaging in a sexual act. As no culpability level is set forth herein, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[31]

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[28] The Committee intends that this offense cover a case in which a person is rendered physically incapable of resisting or declining consent to a sexual act whether by artificial means, e.g., drugs, etc., or otherwise. If the defendant has caused the impairment of ability with intent to engage in a sexual act the offense would be covered under section 1641.

[29] See Perkins, *supra* note 9 at 163-167.

[30] The Committee has not, however, adopted the suggestion of the National Commission that the threat be such that a person of "reasonable firmness" would be incapable of resisting it. See Final Report, § 1642(c), § 1644(c). If the threat in fact compelled the victim's participation, then whatever the extent of such victim's capacity to resist, the defendant should be liable.

The element that the sexual act was with another person who was not the defendant's spouse is an existing circumstance. Since no culpability standard is specifically designated, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[32]

The content of paragraphs (1) through (4) consists entirely of existing circumstances. The culpability level is specified as "knowing," thus requiring proof that the actor was aware of or believed that the circumstance existed.[33]

Paragraph (5), like section 1641(a)(1), consists of a conduct element except for the phrase "other than by a means described in section 1641(a)(1)". Since no culpability criterion is specifically mentioned, the applicable state of mind is at least "knowing." The "except for" phrase requires no proof of a mental state, under the provisions of section 303(d)(1), since its purpose is to distinguish between types or gradations of threats and placings in fear, and it would serve no function to require a showing that the actor was aware that the particular prohibited means or threat he used was other than one described in the preceding section.

As under section 1641, no requirement of corroboration or fresh complaint is intended to apply with respect to the proof of the offenses described in this section.[34]

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if it is committed within the special jurisdiction of the United States, as defined in section 203 or against a person in official detention in a Federal facility. These bases have been discussed in connection with section 1641 and that discussion should be consulted here.

In addition Federal jurisdiction exists over an offense set forth in paragraph (5) if it occurs during the commission of any offense, over which Federal jurisdiction exists, specified in section 1641(c)(3). This gives to the offense in paragraph(5)—a lesser included offense of section 1641(a)(1)—the same jurisdictional purview as its parent offense.[35]

A further basis for Federal jurisdiction exists over an offense set forth in paragaphs (1) through (3) if it occurs during the commission of an offense, over which Federal jurisdiction exists, that is described in sections 1621-1623, 1644, 1711-1712, or 1842. This list is a shortened version of the offenses contained in section 1641(c)(2) as furnishing the basis for ancillary jurisdiction over rape. Thus the offenses referred to here have been described in relation to that section. The offenses enumerated were chosen because of the Committee's belief that they represented the most likely offenses to be committed in association with an offense described in paragraphs (1) through (3) of this section.

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[31] See sections 303(b)(1) and 302(b)(1).

[32] See sections 303(b)(2) and 302(c)(1).

[33] See section 302(b)(2).

[34] See sections 1646(b) and the discussion of evidentiary requirements in relation to the previous section.

[35] See the discussion of jurisdiction in section 1641.

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison). This accords with the recommendation of the National Commission. In comparison to the felonious conduct dealt with in section 1641, the behavior outlawed here does not result in as great a harm, if outrage to the feelings of the victim be regarded as the essential evil sought to be prevented. Such conduct does, however, constitute a substantial physical and psychological abuse of another human being. Accordingly, the Committee has graded this offense on a par with the offense of aggravated battery in section 1612.[36]

SECTION 1643. SEXUAL ABUSE OF A MINOR

1. In General

This section essentially brings forward the provisions of the carnal knowledge statute (18 U.S.C. 2032) in present law, but extends the scope of the offense to cover male as well as female victims, and homosexual as well as heterosexual acts.

One significant change from present law is the inclusion of a limited defense under this section based upon a reasonable but mistaken belief as to the victim's age.

2. Present Federal Law

18 U.S.C. 2032 provides that whoever, within the special maritime and territorial jurisdiction of the United States, "carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years."

Under 49 U.S.C. 1472(k), the provisions of this section are made applicable also within the special aircraft jurisdiction of the United States, as defined in 49 U.S.C. 1301(32). In addition, under 18 U.S.C. 1152 and 1153, the provisions of 18 U.S.C. 2032 apply within Indian country to all cases save where both the offender and the victim are non-Indians.

There have been few prosecutions under the above statutes. One recent instance is *United States* v. *Shipp,*[37] in which the court held that the uncorroborated testimony of the victim (the defendant's stepdaughter) was sufficient for conviction.

3. The Offense

Subsection (a) provides that a person commits an offense if he engages in a sexual act with another person who is not his spouse, who is in fact less than sixteen years old.

The term "sexual act" is defined in section 1646 and has been discussed in connection with section 1641. The definition is designed to furnish a more precise delineation of the common law concept of "carnal knowledge." The term "spouse" is also defined in section 1646. It has been discussed in connection with section 1642 and that discussion should be consulted here.[38]

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[36] See Working Papers, p. 871

[37] *Supra* note 7. See also *United States* v. *Bear Ribs,* 562 F.2d 563 (8th Cir.), cert. denied, 434 U.S. 974 (1977); *United States* v. *Wheeler,* 545 F.2d 1255 (9th Cir. 1976).

The conduct in this offense is engaging in a sexual act. Since no culpability standard is specifically designated, the applicable state of mind that must be shown is a least "knowing," i.e., that the defendant was aware of the nature of his action.[39]

The element that the sexual act was engaged in with a person not the actor's spouse is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[40]

The element that the victim is less than less than sixteen years old is also an existing circumstance. However, as this element is preceded by the phrase "in fact," no mental state need be established with respect thereto.[41]

4. *Affirmative Defense*

Under subsection (b), it is an affirmative defense to a prosecution for this offense that (1) the actor believed, and had substantial reason to believe, that the other person was sixteen years old or older; and (2) the course of conduct involving the other person did not also constitute an offense under section 1843 (Engaging in a Prostitution Business) or 1844 (Sexually Exploiting a Minor).

Although a defense based on a reasonable mistake as to age is not recognized in the current Federal statutes, some States have provided one.[42] The Committee considers that the defense is appropriate since a person who reasonably believed that he was having sexual relations with someone over the age of sixteen does not pose the danger to society sought to be proscribed by this statute.[43] However, the defense is circumscribed by the requirement that the mistaken belief must be founded on "substantial reason". Moreover, the defense will not be recognized unless the course of conduct involving the victim did not constitute an offense under section 1843 or 1844. The latter limitation is deemed appropriate in view of the relative ease with which a persom commercially exploiting a teenage victim may develop false documentary evidence indicating the victim's age to be over sixteen and thereby seek to manufacture a defense. The defense is denominated as "affirmative," thus requiring the defendant to prove it by a preponderance of the evidence.[44] This accords with the recommendation of the National Commission.[45]

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[38] Significantly, unlike current law and the proposal of the National Commission, this offense is drafted so as to punish heterosexual conduct by females as well as males, in addition to covering homosexual conduct.

[39] See sections 303(b)(1) and 302(b)(1).

[40] See sections 303(b)(2) and 302(c)(1).

[41] See section 303(a).

[42] See Perkins, *supra* note 9 at 168.

[43] See Working Papers, p. 873

[44] See the definition of "affirmative defense" in section 111.

[45] See Final Report, § 1648; Working Papers, p. 873.

5. Jurisdiction

There is Federal jurisdiction over an offense in this section if it is committed within the special jurisdiction of the United States, as defined in section 203. This maintains the current scope of jurisdiction enjoyed by 18 U.S.C. 2032.[46]

In addition, there is Federal jurisdiction if the offense occurs during the commission of certain enumerated offenses over which Federal jurisdiction exists. The offenses listed are the same as those furnishing the basis for ancillary jurisdiction over the offenses in paragraphs (a)(1) through (a)(3) of section 1642, discussed above.

6. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the defendant was eighteen years of age or older at the time of the offense; it is a Class A misdemeanor (up to one year in prison) in any other case.

SECTION 1644. SEXUAL ABUSE OF A WARD

1. In General and Present Federal Law

This section is directed at the performance of a sexual act with another person in official detention over whom the offender has a special responsiblity by virtue of his exercise of custodial, supervisory, or disciplinary authority. No counterpart for this offense exists under current Federal law. The section is derived from the recommendations of the National Commission.[47] However, unlike the proposal there, this section does not extend to the parent or guardian situation and thus does not encompass instances of incest and sexual abuse of a familial relationship. Such offenses are deemed to involve local mores and morals and therefore to be suitable for coverage under section 1862, permitting assimilation of State or local offenses in Federal enclaves.[48]

2. The Offense

Subsection (a) provides that a person commits an offense if he engages in a sexual act with another person who is not his spouse, who is in official detention, and who is under the custodial, supervisory, or disciplinary authority of the actor.

The terms "sexual act" and "spouse" are defined in section 1646 and have been discussed in connection with section 1641. That discussion is incorporated here.

The term "official detention" is defined in section 111 and includes detention by a public servant or person acting under his direction following arrest for an offense, following surrender in lieu of arrest for an offense, following a charge or conviction of an offense or an allegation or finding of juvenile delinquency, following commitment as a material witness, following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings, or pending extradition, deportation, or exclusion, as well as custody for purposes incident to the foregoing. The Commitee believes that sexual relations in such circumstances, even if consensual, constitute a breakdown in social order and an abuse of legal responsibility warranting criminal sanctions.

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[46] See the first paragraph of the discussion of jurisdiction in connection with section 1641, which is applicable here.

[47] See Final Report, § 1646.

[48] This is consistent with 18 U.S.C. 1153, which, among other offenses, punishes "incest" when committeed by an Indian in Indian country, but provides that the definition and punishement of that offense is to be governed by State law, See also 18 U.S.C. 13.

The conduct in this offense is engaging in a sexual act. Since no culpability standard is specified in this section the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of his action.[49]

The remaining elements are existing circumstances. As no culpability level is specifically designated, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the offender was conscious of but disregarded the substantial risk that the circumstances existed.[50]

3. Jurisdiction

There is Federal jurisdiction over an offense described in this section in four circumstances. The first is if the offense is committed within the special jurisdiction of the United States, as defined in section 203. This extends Federal jurisdiction to enclaves, various vessels on the high seas, and certain aircraft while in flight.

The second circumstance is if the offical detention is under the laws of the United States. Irrespective of the Federal status of the offender or the Federal location of the offense, the Committee considers that the fact that Federal law supplies the basis for the victim's detention is sufficient for vindication of the Federal interest against sexual abuse of its wards.

The third and fourth circumstances are if the official detention is in a Federal facility or the defendant is a Federal public servant. It should be noted that, with respect to the latter base, the definition of "Federal public servant" in section 111 excludes District of Columbia public servants.[51]

4. Grading

An offense under this section is graded as a Class A misdemeanor (up to one year in prison). This penalty level is deemed an adequate deterrent. Felony grading was rejected in view of the primary design of this section to proscribe consensual conduct. When force or coercion is used, the provisions of sections 1641 (Rape) and 1642 (Sexual Assault) may also be utilized in appropriate circumstances.

SECTION 1645. UNLAWFUL SEXUAL CONTACT

1. In General and Present Federal Law

This section has no counterpart in current Federal law. It is intended to inculpate those who have not committed a sexual act as that term is defined in section 1646 but who have, nonetheless, seriously infringed the sexual integrity of another person. The section in effect defines offenses that are lesser included offenses to each of the preceding offenses in this subchapter. It is drafted so that activity involving sexual contact short of a sexual act as defined in sections 1641-1664, is subject to criminal sanction. Although, in such circumstances, the offender will often be guilty of a criminal attempt (section 1001) to commit one of the foregoing offenses, this section is graded substantially lower than the criminal attempt offense, thus affording a basis for the exercise of prosecutorial discretion. Moreover, the act of engaging in sexual contact need not necessarily indicate an intent to engage in a "sexual act," in which event, but for this section, the conduct would not be a Federal offense. This section is derived in large measure from the recommendation of the National Commission.[52]

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[49] See sections 303(b)(1) and 302(b)(1).

[50] See sections 303(b)(2) and 302(c)(1).

[51] District of Columbia employees would be covered by the District of Columbia Code.

2. The Offense

Subsection (a) provides that a person commits an offense if he engages in sexual contact with another person who is not his spouse, under circumstances that would constitute an offense under section 1641, 1642, 1643, or 1644 if such contact involved a sexual act.

The term "sexual contact" is defined in section 1646 to mean a "touching of the sexual or other intimate parts of a person to arouse or gratify the sexual desire of any person."[53] That definition is satisfied, and the offense committed, whether the defendant touches such a part of the victim or causes the victim to touch such a part of the defendant. The term "spouse" is defined in section 1646 and has been discussed in connection with section 1642.

Thus, if such touching is accomplished, *inter alia,* by means of force or threat or placing of another person in fear, or if it occurs when the offender knows that the victim is mentally incapable of understanding the nature of the act or is unconscious, or is less than sixteen years old, or if the victim is in official detention and under the custodial, supervisory, or disciplinary authority of the offender, the act will fall within the scope of this section.

The conduct in this section is engaging in sexual contact. Since no culpability standards is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the defendant was aware that he was engaging in sexual contact.[54]

The element that the person with whom the sexual contact is engaged in is "another person who is not his spouse; is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[55]

The element that the conduct was performed "under circumstances that would constitute an offense under section 1641, 1642, 1643, or 1644 if such contact involved a sexual act," is also an existing circumstance. However, by the operation of section 303(d)(1)(A), no mental state need be established as to the element that those sections of the Code would apply. The mental states required as to the facts making one or more of those sections applicable are required here also. For example, as to the fact that the other person was less than twelve years old under section 1641, no state of mind need be shown, while as to the fact that the victim was in official detention under section 1644 the defendant must have been at least reckless, in order to prove an offense under section 1645.

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[52] See Final Report, § 1647

[53] The desire sought to be aroused or gratified might be, for example, that of the actor, of the person touched, or of an onlooker.

[54] See sections 303(b)(1) and 302(b)(1).

[55] See Sections 303(b)(2) and 302(c)(1).

3. Jurisdiction

There is Federal jurisdiction over an offense herein if there would be Federal jurisdiction over the corresponding offense described in sections 1641 through 1644.

4. Grading

An offense under this section is of a class two grades below that of the corresponding offense described in sections 1641 through 1644. This reflects the obvious fact that sexual contact is significantly less obstructive than a sexual act as those terms are defined in section 1646. In most cases, this grading will enable the offense to be tried before a United States magistrate.

SECTION 1646. GENERAL PROVISIONS FOR SUBCHAPTER E

Section 1646(a) contains definitions of the terms "sexual act," "sexual contact," and "spouse" applicable to the offenses in this subchapter.

Section 1646(b) has been discussed in detail in connection with section 1641 and that discussion should be consulted here. It should be mentioned that the elimination of a corroboration requirement (other than in an interspousal situation) would not, of course, preclude a judge or jury from acquitting a defendant because they did not believe the case could meet the "beyond a reasonable doubt" standard which is the normal test for directed verdicts or findings of acquittal with respect to all crimes (sex crimes as well as others) under existing law.

CHAPTER 17.—OFFENSES AGAINST PROPERTY

There are seven broad categories of offenses against property covered in this chapter. Arson and other property destruction offenses are covered in subchapter A; burglary and other criminal intrusion offenses in subchapter B; robbery, extortion, and blackmail in subchapter C; theft and related offenses in subchapter D; counterfeiting, forgery, and related offenses in subchapter E; commercial bribery and related offenses in subchapter F; and investment, monetary, and antitrust offenses in subchapter G.

SUBCHAPTER A.—ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

(Sections 1701–1704)

At common law, arson was the willful and malicious burning of the dwelling place of another, although the concept of dwelling house was gradually extended to include outbuildings within the curtilage and to barns.[1] The gravamen of the offense was not conceived to be the destruction of property, but rather the endangerment of human life.[2] No specific intent to destroy was necessary at common law, only an intent to burn,[3] and as an element of the offense an actual burning or charring of the property was required.[4] Because the emphasis was on security of another person in his dwelling, it was not an offense at common law to burn one's own habitation, whether as owner or tenant. This was the rule regardless of whether the purpose was to injure or defraud another.

The principal statutory modification of the common law arson doctrine in this country has been the shift in emphasis from protection of life to protection of property.[5] Moreover, many other types of property besides dwellings have been included in statutory formulations of the offense.[6] These statutes are usually keyed to a dollar amount relative either to the damage or the value of the property which is the subject of the offense. Finally, many State statutes have made it a crime for a property owner to burn his own property, provided it was done with an intent to defraud an insurance company or other person.[7]

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[1] See 2 Wharton, *Criminal Law*, section 388 (1951); 3 Coke Inst. 67.

[2] See *United States* v. *Cardish*, 143 Fed. 640, 643 (E.D. Wis. 1906); Curtis, *The Law of Arson*, section 3 (1936).

[3] See Curtis, *supra* note 2, at section 63.

[4] See Annotation, *Burning as an Element of the Offense of Arson*, 1 A.L.R. 1163 (1919).

[5] See 2 Wharton, *supra* note 1, section 400.

[6] See Ill. Rev. Stat., Ch. 38, section 21–1; Proposed Crim. Code Mass., Ch. 266, section 1(5).

In order to encompass these various acts, the typical statute currently in effect contains a hybrid of crimes all grouped under the appellation of "arson." [8] Although the common link of many State provisions in this area is the notion of burning as an instrument of destruction, the approach of the bill, as reported, is to define the crimes in series according to the nature of the harm done or contemplated. Thus, only property destruction is treated here in subchapter A of chapter 17. Where the purpose of the destruction is to endanger human life, the offense is covered also in chapter 16 (Offenses Against the Person), and where property is destroyed to defraud another, the offense is treated in subchapter D of chapter 17 (Theft and Related Offenses). Where the danger involves two or more kinds of harm other provisions of the proposed Code may be applied to reach all of the harmful results.

The scope of subchapter A of chapter 17 of the bill, as reported, is essentially the same as that which exists under present law insofar as property destruction is concerned. The chief virtues of the subject bill are (1) the elimination of the extensive overlap of existing statutes and a substantial reduction in the number of separate provisions in Federal law; (2) the harmonization of the multiple and seemingly arbitrary standards of culpability and penalty levels that exist throughout the current statutes; (3) the clarification of the offense; and (4) the systemization of grading by treating property destruction distinctly without regard to such other offenses as fraud or the endangerment of life.[9]

Existing Federal law covers a wide variety of situations, with the jurisdictional base of most statutes fixed according to the particular type of property protected. It is, nevertheless, possible to group the statutes according to the principal interest they are intended to protect. The following discussion briefly describes those existing statutes which would be replaced in whole or in part by enactment of sections 1701–1704 of the bill, as reported.

The Mails or Interstate or Foreign Commerce

18 U.S.C. 844(i) proscribes the attempted or actual malicious damage or destruction by means of an explosive of property used in or affecting interstate or foreign commerce. The penalty is fixed at up to ten years' imprisonment; enhanced penalties may be imposed if injury or death results. Insofar as the statute is aimed at damage to property, it is largely duplicative of other provisions in existing law.

18 U.S.C. 1364 prohibits the damage or destruction of goods by fire or explosion, with intent to interfere with their exportation. The penalty is up to twenty years' imprisonment.

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[7] See 2 Wharton, *supra* note 1, section 402.

[8] See, e.g., the laws of Hawaii (H.R.S. §§ 723-1—723-10) and New Jersey (N.J.S.A. 2A: 89-1—89-6), both of which include in the same series crimes of property destruction, danger to life, and theft by fraud.

[9] With respect to this latter aspect, as will be seen, many existing arson or property destruction statutes contain an enhanced penalty where serious bodily injury or death results. Under the bill, as reported, this conduct can be separately punished as homicide where, for instance, a death results from arson. See section 1601(a)(3) and (e)(6).

15 U.S.C. 1281 is a similar statute which punishes the willful destruction or injury to any property moving in interstate or foreign commerce in the possession of a contract or common carrier. The penalty is fixed at up to ten years in prison.

18 U.S.C. 1703 and 1705 both proscribe the destruction of mail. Section 1703(a) deals with mail other than newspapers and covers only postal employees. It carries a penalty of five years in prison. Section 1703(b) covers postal employees destroying newspapers and other persons destroying any kind of mail. The penalty is up to one year in prison. Section 1705, on the other hand, prohibits the destruction of mail deposited in a letter box. The penalty is up to three years' imprisonment.

18 U.S.C. 1951, commonly referred to as the Hobbs Act, punishes, among other things, physical injury to property affecting commerce in furtherance of a plan to commit robbery or extortion. The statute carries a maximum penalty of twenty years in prison.[10]

18 U.S.C. 1952 punishes, *inter alia*, those who travel in, or who use the facilities of interstate or foreign commerce, with intent to commit arson in violation of State or Federal law and who thereafter perform any of three specified types of overt act. The penalty is up to five years in prison. The reference to State law is merely generic and it is not necessary to prove that the State's arson law was or would have been violated.[11]

Facilities of Commerce and Transportation

Three provisions of existing law deal with offenses committed against vehicles or facilities of commerce and transportation.

18 U.S.C. 32 is confined to aircraft, their parts, supplies, and facilities. A general culpability level of "willful" applies to all of the designated offenses except for the actual damaging of an aircraft which requires a specific intent to "damage, destroy, disable, or wreck." Also included within the provision is the willful incapacitation of any crew member.

18 U.S.C. 33 provides similar coverage for motor vehicles engaged in interstate or foreign commerce as well as for terminals, garages, and other facilities for such vehicles. The section requires a specific intent to endanger the safety of a passenger or an act in reckless disregard of human life. Paralleling section 32 of current title 18 is a provision dealing with incapacitation of drivers and maintenance personnel. The general penalty in both statutes is a maximum of twenty years in prison. An enhanced penalty provision, where death occurs, is included in 18 U.S.C. 34.

18 U.S.C. 1992 deals with train wrecking and includes the damaging of trains themselves as well as tracks, bridges, tunnels, and

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[10] In addition several statutes punish related offenses not directly reached by sections 1701-1704 of the subject bill. Thus 18 U.S.C. 844(d) covers transportation and receipt in interstate or foreign commerce of explosives with the intent to damage property or persons. Such conduct is largely covered under section 1821 of the bill, as reported, but, under the proper circumstances, might constitute an attempt under this subchapter.

18 U.S.C. 1716 proscribes the mailing of enumerated types of materials, including flammables and explosives, that may injure life or property. If the mailing is done with intent to kill or injure another or to damage the mails or other property the maximum penalty is twenty years' imprisonment; if death results, the sentence is increased to life imprisonment or death. It is also conceivable that conduct violating this provision would in some circumstances amount to an attempt to commit one of the crimes in sections 1701-1704.

[11] See *United States* v. *Conway*, 507 F.2d 1047 (5th Cir. 1975).

the like.[12] Another part of the section prohibits tampering with signals, bridges, etc., with the intent to damage a train, track, bridge, tunnel, etc. The culpability, as in the previous two sections, is set at "willful" and the penalty is the same as under 18 U.S.C. 33.

18 U.S.C. 844(i), discussed *supra*, provides parallel coverage for all of these interests where the damage is caused by an explosive.

Special Maritime and Territorial Jurisdiction

Two groups of statutes in the present United States Code proscribe property destruction within the special maritime and territorial jurisdiction of the United States defined by 18 U.S.C. 7. 18 U.S.C. 81 and 1363 are of general applicability within this jurisdiction. Of the two, section 81 is the narrower, being confined to actual arson; that is, it requires burning or attempted burning. Section 1363, on the other hand, prohibits destruction or injury by any means. Both sections use the same standard of culpability, i.e., "willfully and maliciously" and both use the same words to describe the type of property covered: "any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping. . . ." The penalty provisions are likewise identical. Each carries a maximum sentence of five years in prison with an enhanced penalty, of twenty years' imprisonment, where a dwelling is involved or life is otherwise placed in jeopardy.

The second group focuses on vessels and their goods.

18 U.S.C. 2196 covers crew members who destroy property as the result of drunkenness or neglect. A maximum penalty of one year in jail is provided.

18 U.S.C. 2272–2276 cover damage to or destruction of vessels themselves. Section 2272 punishes (with a maximum sentence of life imprisonment) any owner of a vessel who destroys his vessel for the purpose of defrauding an insurance company or injuring a merchant or co-owner. Section 2273 punishes "willful" or "corrupt" destruction by a co-owner with a maximum sentence of ten years in prison. Section 2274 makes it a crime for the person in charge of a vessel to cause or permit its destruction or injury. A maximum penalty of ten years in prison may be assessed. Section 2275 covers the burning of vessels and their cargo as well as tampering with steering or power facilities and placing bombs or explosives on board. The section has been construed to cover acts tantamount to sabotage,[13] and carries with it a maximum penalty of twenty years in prison. Section 2276 is basically a burglary statute but also has provisions covering vandalism of vessels. The maximum penalty is five years' imprisonment.

In addition, other statutes in the series, 18 U.S.C. 2277 and 2278, deal with carrying explosives and dangerous weapons on board a vessel. To the same general effect is 46 U.S.C. 170. 18 U.S.C. 2271 provides coverage limited to conspiracies to destroy coupled with fraudulent intent. None of these sections is directly covered by sections 1701-1704, although conduct in violation of the former set of provisions might constitute an attempt to commit one of the section 1700 series of crimes.

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[12] It has been held under this statute that there need not be proof of an intent to cause a train wreck; it is sufficient that there be an intent to "disable" a train, even if not permanently. *United States* v. *Dreding*. 547 F.2d 471 (9th Cir. 1976), cert. denied, 429 U.S. 1108 (1977).

[13] See *United States* v. *Maratini*, 42 F. Supp. 502 (S.D. Ala. 1941); see also *United States* v. *Franicevoch*, 465 F. 2d 467 (5th Cir. 1972).

Property of the United States

Several statutes cover the general area of damaging property of the United States.

18 U.S.C. 844(f) is of the most recent vintage and is broadest in its coverage. It prohibits the malicious damage to or destruction of, by means of an explosive, any property owned, possessed, used, or leased by any branch or agency of the United States and any property of any institution or organization receiving Federal financial assistance.[14] The statute has a three-tiered penalty provision providing for ten years in prison if the property is damaged, twenty years imprisonment if personal injury results, and life imprisonment or the death penalty if death results.

18 U.S.C. 1361 covers willful damage to any property of the United States or to property "which has been or is being manufactured or constructed for the United States. . . ." The sentence varies according to the value of the property damaged with a maximum (where the property damage exceeds $100) of ten years in prison.

18 U.S.C. 1362 carries an identical penalty for willfully or maliciously damaging communication lines, cables, or systems which are operated or controlled by the United States or used for military or civil defense purposes.

18 U.S.C. 1706 deals with damage to mail bags and other devices used to convey the mail, where there is an intent to rob or steal the contents. The maximum sentence is set at three years in prison.

18 U.S.C. 41 covers injury to wildlife and their nesting places within any Federal refuge or sanctuary and damage to any property within such places. The offense carries a maximum sentence of six months in jail.

18 U.S.C. 1852, 1853, 1855, and 1856 are a series of misdemeanor provisions proscribing, with differing culpability levels, damage and arson to timber, underbrush, and grass on lands owned or leased by the United States and on Indian reservations. They each carry a penalty of one year in prison. 18 U.S.C. 1856 prohibits leaving a fire unattended on such lands and is a petty offense.

40 U.S.C. 193e prohibits stepping or climbing on the statutes, fountains, or other architectural features on the United States Capitol grounds and on the various plants, trees, and grass growing there. 40 U.S.C. 193f(a)(1)(B) prohibits discharging explosives or igniting incendiary devices on the Capitol grounds or in the Capitol buildings. Under the provisions of section 193h, the crimes are to be prosecuted in the Superior Court of the District of Columbia and carry a maximum penalty of six months in prison.

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[14] See, sustaining the constitutionality of this broad statute as to a Planned Parenthood Association receiving financial assistance from HEW, *United States* v. *Brown*, 384 F. Supp. 1151 (E.D. Mich. 1974), aff'd, 557 F.2d 541, 559 (6th Cir. 1977).

National Defense Property

The existing Federal laws covering property of a military nature are found in 18 U.S.C. 2152, 2153, and 2155.[15]

18 U.S.C. 2152 deals with harbor defense systems and mines, torpedoes, and fortifications. Willful damage to or interference with these items is punishable by a maximum of five years' imprisonment.

18 U.S.C. 2153 deals with damage to war materials, premises, or utilities with the intent to interfere with the carrying on, by the United States or one of her allies, of war or defense activities. The penalty is established at a maximum of thirty years in prison.

18 U.S.C. 2155 prohibits injury to national defense materials, premises, or utilities where there is an intent to obstruct the national defense of the United States. The maximum penalty is ten years in prison.

Property of Foreign Government or Official

18 U.S.C. 970, enacted in 1972, punishes whoever willfully injures, damages, or destroys, or attempts to do so, any real or personal property located within the United States, and belonging to or utilized or occupied by any foreign government or international organization, or by a foreign official or official guest. The penalty is imprisonment for up to five years.

SECTION 1701. ARSON

1. The Offense

This section is the general arson statute carrying the most severe penalty of the property destruction series. Subsection (a) provides that a person commits an offense if, by fire or explosion, he (1) damages a public facility, or (2) damages substantially a building or a public structure.

The term "public structure" is defined in section 111 to mean a structure, whether or not enclosed, where persons assemble for purposes of government, an occupation or a business or a profession, education, religion, or entertainment. It is meant to include churches, theatres, outdoor amphitheaters, gymnasiums, stadiums, schools, meeting halls, public squares and the like.

The terms "public facility" and "building" are also defined in section 111. The former embraces (a) a facility of communication (e.g., telephone and television), transportation (e.g., a railroad or highway), energy supply (e.g., an oil or gas pipeline, storage tank, or an electric transmission system or power plant), water supply (e.g., a reservoir or main), or sanitation (e.g., a sewer system); (b) a facility of a police, fire, or public health agency; (c) a facility designed for use, or used, as a means of national defense; and (d) any part of any such facility, as well as any structure, property, or apparatus used in connection with or in support of such facilities. The Committee considered and rejected limiting the coverage to "vital" public facilities. It was felt that the word "vital" might lead to varying interpretations and that the definition of the term "public facility" would afford ample notice as to what types of facilities were intended to be covered. The discussion of the word "public" in connection with section 1111 applies here as well.

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[15] See also 42 U.S.C. 2276. These statutes are primarily carried forward in subchapter B of Chapter 11 (Sabotage and Related Offenses).

The word "building" is defined in section 111 to mean an immovable or movable structure that is at least partially enclosed, or a separate part of such a structure, that is designed for use, or used, in whole or in part, as (a) an individual's permanent or temporary home or place of lodging; [16] (b) a place for individuals to engage in matters pertaining to government, an occupation, or a business or a profession, education, religion, or entertainment; or (c) a place for the storage of property within which, because of its size or other characteristics, it is apparent that an individual could be present.

Finally, the term "explosion" is defined in its variant form ("explosive") in section 111. Although the technical common law requirement of charring is not made part of the offense, some physical damage must occur to constitute a violation. Unsuccessful efforts resulting in either no damage or slight damage could also be charged as an attempt under section 1001 if warranted by the circumstances.

It should be noted that the definition of "building" excludes places for the storage of property in which, because of their "characteristics," an individual apparently could not be present.[17] This is designed to take account of the focus of this offense not only on the destruction of property but on the extreme danger to human beings normally implicit in this offense because of the means of destruction used and the fact that what is destroyed or damaged is an enclosed or partially enclosed structure. Where, however, the nature of a building used solely for storage (e.g., an underground gasoline tank) is such that it is not reasonably conceivable that a person would be present, it was felt that the relatively high penalty for arson should not be available; instead the offense will constitute aggravated property destruction under the following section.[18] Of course, if persons are killed or injured by arson or in the course of another property destruction offense, the offender may be punished for such results under other sections of the proposed Code.[19]

Under section 303(b)(1), the culpability level prescribed for the prohibited conduct i.e., damaging (or substantially damaging) by fire or explosion, is "knowing." Thus under the general principles of section 302(b)(1), the prosecution must establish that the offender was aware of the nature of his actions with regard to starting a fire or detonating explosives and was further aware that in so doing he was damaging or substantially damaging something. The objects damaged, i.e., a public facility, building, or public structure, are all existing circumstances. Because no culpability standard is designated with respect to these circumstances the mental state required to be proved is at least "reckless." [20] Accordingly what must be shown is that the offender was aware of but disregarded the substantial risk that the object damaged was one of the structures covered in the section.[21]

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[16] Thus far the definition repeats that of a "dwelling" in section 111.

[17] The word "characteristics" means that the apparent possibility of an individual being present is to be determined objectively by reference to the nature of the building alone; observation of the premises by the defendant is not relevant.

[18] See Final Report, § 1701, Comment, p. 194.

[19] See, e.g., sections 1601 (Murder), 1611 and (Maiming).

[20] See section 303(b)(2).

2. Jurisdiction

Under subsection (c), jurisdiction is limited to eleven situations. Jurisdiction will exist when the offense is committed: (1) within the special jurisdiction of the United States (see section 203); (2) against property owned by, or under the care, custody, or control of, the United States, or against property being produced, manufactured, constructed, or stored for the United States, or against property subject to a security interest of the United States; (3) against the property, located within the United States, of a foreign government or international organization, a foreign dignitary or member of his immediate family while in the United States, a foreign official while in the United States on official business or a member of his immediate family accompanying him, or an official guest of the United States;[22] (4) against property moving in interstate or foreign commerce or that is a part of an interstate or foreign shipment or in a pipeline system used in the transportation of gas or oil in interstate or foreign commerce; (5) against property used in an activity affecting interstate or foreign commerce (e.g., a national credit institution), and damaged by means of a destructive device;[23] (6) against property of an organization receiving financial assistance from the United States where the means used is a destructive device; (7) against property owned by, or under the care, custody, or control of, a public facility that operates in interstate or foreign commerce; (8) in a situation where the mail or a facility in interstate or foreign commerce is used in committing the offense; (9) in a situation where movement of a person across a State or United States boundary occurs in committing the offense; (10) on premises that are part of a facility that is involved in the production, storage, or distribution of electricity, fuel, or other forms or sources of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning; and (11) in a situation where the offense is committed in the course of other specified Federal offenses, such as civil rights offenses and interference with the administration of justice.

The only major differences in jurisdictional reach between this section and existing law are paragraphs (10) and (11). The former is designed, in conjunction with a similar base added to section 1712 to extend Federal jurisdiction over major crimes of property destruction or violence that involve the nation's energy production, storage, or distribution systems, and appurtenant research or development facilities, regardless of whether the premises constitute a "public facility" as defined in section 111 (as in base number 7) or whether a destructive device is used (as in bases 5 and 6). Although this base overlaps in part with the aforementioned bases and others (e.g., base number 4), it is included to underscore the Committee's determination that all offenses of arson and property destruction involving vital energy production, storage, or distribution systems should be subject to concurrent Federal jurisdiction. Paragraph (11) is a limited application of the ancillary jurisdiction concept discussed in reference to chapter 2.[24]

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[21] See section 302(c)(1); see also *United States* v. *Jones*, 19 CrL 2071 (Army Ct. Mil. Rev. 1976) (Knowledge that structure set ablaze was a dwelling not required for arson).

[22] The terms "foreign dignitary," "foreign official," "immediate family," and "official guest of the United States" are defined in section 111.

[23] The term "destructive device" is defined in section 111. It specifically includes, inter alia, an "incendiary material", so as to assure coverage of all kinds of flammable substances that may be used in the course of arson. This definition therefore encompasses explosive liquids such as gasoline and kerosene, which some courts have held are outside the ambit of the current definition of "explosive" in 18 U.S.C. 844(j). See, e.g., *United States* v. *Birchfield*, 486 F. Supp. 137 (M.D. Tenn. 1980). The inclusion of "destructive device" adopts a recommendation of the Attorney General's Task Force on Violent Crime (Task Force Final Report, pp. 35–36 (August 17, 1981)). With respect to the meaning and scope of the phrase "activity affecting interstate . . . commerce," taken from 18 U.S.C. 844(i), the Committee endorses the discussion and holding in *United States* v. *Sweet*, 548 F. 2d 198 (7th Cir.), cert. denied, 430 U.S. 969 (1977).

3. Grading

The offense is graded as a Class C felony (up to twelve years in prison).

SECTION 1702. AGGRAVATED PROPERTY DESTRUCTION

1. The Offense

Section 1702 covers damage by any means (not just fire or explosion as in section 1701). The offense is committed if a person damages (1) a public facility itself; (2) damages property and thereby causes a significant interruption or impairment of a function of a public facility; or (3) damages property in an amount which in fact exceeds $500.

As in section 1701, the culpability level for the conduct prescribed is "knowing." Thus, the offender must be aware that he is damaging something. No culpability level is specified with respect to the fact that what is damaged in paragraph (1) is a "public facility." That the property is a "public facility" is an existing circumstance. Therefore, by the operation of section 303(b)(2), the state of mind that must be proved is "reckless," i.e., that the offender was aware of the substantial risk that a public facility was being damaged but disregarded such risk.[25]

The element in paragraph (2) that the property damage "causes a significant interruption or impairment of a function of a public facility" is a result of conduct. As no culpability standard is expressly stated, the applicable state of mind is again "reckless"[26] connoting a conscious disregard of a substantial risk that such a result might occur. In paragraph (3) the circumstance that property damage exceeds $500, because preceded by the words "in fact," requires no proof of state of mind.[27]

The term "public facility" is defined in section 111 and has been discussed in connection with the preceding section. The term "property" is generally given an expansive definition in section 111, but does not extend to intangible property or services.[28] A method of evaluating the dollar amount of damage consistent with the general objectives of the Code may be found by referring to the definition of "value" in section 111. The $500 figure found in section 1702 is consistent with the minimum dollar value found in the sections dealing with theft.[29]

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[24] It should be noted that the travel base has been expanded to cover interstate movement by any person, not only the offender as in current law. Compare *Rewis* v. *United States*, 401 U.S. 808 (1971); *United States* v. *DeCavalcante*, 440 F. 2d 1264, 1268 (3d Cir. 1971).

[25] See section 302(c)(1).

[26] See section 303(b)(3).

[27] See section 303(a)(2).

[28] This is consistent with the recommendation of the National Commission. See Final Report, § 1705. Clearly, it is not appropriate to treat as property destruction an assault, e.g., on an employee which results in a loss of services to the employer. Similarly, damage to intangible property such as an injury to a business' right of legitimate competition is properly dealt with

2. Jurisdiction

The jurisdiction is the same as that found in section 1701 with the addition of a jurisdictional base where the property that is the subject of the offense is mail. This addition reflects the coverage in present 18 U.S.C. 1703 and 1705.

3. Grading

The offense is treated as a Class D felony (up to six years' imprisonment) when the damage is to a public facility or significantly interrupts or impairs a function of a public facility, or if the property damage exceeds $100,000. In all other cases the offense is treated as a Class E felony (up to three years' imprisonment.)

SECTION 1703. PROPERTY DESTRUCTION

1. The Offense

This section covers lesser forms of property damage and provides that a person is guilty of an offense if he damages property.[30]

The conduct is damaging "property" (defined in section 111 and discussed in connection with the preceding section). Since no culpability standard is specifically designated, the applicable state of mind that must be shown in at least "knowing," i.e., that the offender was aware of the nature of his actions.[31]

2. Jurisdiction

The jurisdiction is the same as that under section 1701 except that the ancillary jurisdiction provisions of section 1701(c)(10) are not carried forward and, as in section 1702, damage to mail is added to reflect coverage in present law.

3. Grading

In dealing with grading, the Committee considered but rejected making damage to mail (other than a newspaper, magazine, advertising matter, or circular) a Class E felony under this section. Coverage with that penalty for more costly damage to any kind of mail is already found in section 1702. Instead, damage to the mail (other than a newspaper, magazine, advertising matter, or circular) is treated here, without regard to the amount of damage, as a Class A misdemeanor (up to one year in prison) allowing prosecutors a choice where the damage to such mail is so minor as to warrant only misdemeanor treatment.[32] Also treated as a Class A misdemeanor is property damage exceeding $100. All other types of

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through offenses of extortion or fraud rather than property destruction. Compare Model Penal Code, § 220.3 (P.O.D. 1962).

[29] See section 1731 *et seq.*

[30] This section adopted the recomendations of the American Bar Association's Committee on Reform of the Federal Criminal Laws. Hearings, p. 58.

[31] See sections 303(b)(1) and 302(b)(1).

[32] Compare 18 U.S.C. 1703(b).

damage are treated as Class B misdemeanors (no more than six months' imprisonment).

SECTION 1704. GENERAL PROVISIONS FOR SUBCHAPTER A

This section contains an affirmative defense and a proof provision applicable to the offenses in this subchapter.

Subsection (a) provides that it is an affirmative defense to a prosecution under this subchapter that the actor's conduct was consented to by all holders of a legal interest in all property damaged or that the actor believed that his conduct was so consented to and was not reckless in such belief.

The defense, a similar version of which was included in the National Commission's recommendations,[33] is designed to exculpate an actor who had the consent of all persons with interests worthy of legal protection to destroy or damage the property at issue or reasonably believed that he had such consent. The concept of what constitutes a valid consent is covered by the definition of "consent" in section 111, and is generally intended to mean a consent both voluntarily and intelligently given.

Under this provision, the defendant would have to show that he reasonably believed that a landlord and a tenant, as well as persons holding any legally enforceable security interests in property, had approved the conduct before the defense could be successfully asserted. The phrase "legal interest" is meant to incorporate interests recognized under Federal or State law.

Note that, unlike in S. 1 in the 94th Congress, it is not made a further element of this defense that the actor establish his substantial compliance with all laws regulating the conduct. This could lead to unduly severe results in the situation, for example, in which a homeowner (or a contractor acting with a homeowner's consent), in violation of building codes, tears down a wall or commits other "damage" to his premises in the course of remodeling. The Committee believes that noncompliance with local laws regulating the destruction of property (e.g., fire laws and building codes) should be left for appropriate punishment under such laws rather than subjecting the actor to criminal liability under this subchapter.

The defense is made "affirmative" (i.e., the defendant has the burden of proving the elements thereof by a preponderance of the evidence),[34] since the actor would be much more likely to possess or have access to the relevant information, and since the defense essentially concedes the commission of all the elements of the offense but pleads consent, or a reasonable belief that consent had been given, by way of justification.

Subsection (b) provides that in establishing that property constitutes or is part of an interstate or foreign shipment under this subchapter, proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped as indicated by such document.

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[33] See Final Report §§ 608.

[34] See the definition of "affirmative defense" in section 111.

This provision is derived from 15 U.S.C. 1281(c). A similar proof provision, applicable to the theft and receipt of stolen property offenses (sections 1731–1733) and derived from 18 U.S.C. 659, is contained in section 1739. The consequences of a "presumption" are explained in Rule 25.1 of the Federal Rules of Criminal Procedure, set forth in Title II of the bill, as reported.

SUBCHAPTER B.—BURGLARY AND OTHER CRIMINAL INTRUSION OFFENSES

(Sections 1711–1716)

The offenses included within this subchapter are: burglary (1711); criminal entry (1712); criminal trespass (1713); stowing away (1714); and possessing burglar's tools (1715). In addition, section 1716 sets forth the definition for certain terms used throughout the subchapter. With the possible exception of the stowing away offense, these offenses have traditionally been grouped together. Although stowing away technically involves a theft of services, it is included in this subchapter because it is, in essence, a special form of criminal trespass which the Committee feels should be treated in a separate section.

With the exception of the possessing burglar's tools offense, the basic element common to these offenses is the unauthorized entry or remaining on the "property of another." The burglary, criminal entry, and criminal trespass offenses are set forth in the subchapter in descending order of severity depending on the presence or absence of additional factors. For burglary to be committed, the entry must take place at "night," must occur in relation to a "dwelling," and must be accompanied by an intent to engage in conduct constituting another offense. The lesser included offense of criminal entry retains the intent requirement but drops the limitations as to time of day and dwelling. The still lesser offense of criminal trespass eliminates further the element of an intent to engage in other criminal activity.

The offense of possessing burglar's tools is included within this series because it prohibits the possession of tools designed and commonly used for facilitation of a forcible entry to commit one of the other crimes under this subchapter.

SECTION 1711. BURGLARY

1. In General

At early common law, burglary was defined as the breaking and entering of a dwelling house of another in the night, with intent to commit some felony within the same.[1] It thus initially consisted of five elements: (1) a breaking; (2) an entering; (3) a dwelling house of another; (4) in the night; and (5) an intent to commit some felony. By its definition, burglary was a limited offense designed not to protect property in general but to safeguard a person's habitation. As the common law evolved, however, the different elements of the offense of burglary were construed in such a way that the offense was broadened. The element of breaking was expanded to include such conduct as the opening of a closed window or an unlatched door. Furthermore, the concept of "constructive breaking" developed covering situations where the offender gained entry by fraud, through persuasion of a child or innocent agent, by conspiracy with someone within, or through threats. The element of entering was satisfied if any part of the offender's body or tool penetrated the space within the dwelling. Similarly, the concept of "dwelling house of another" was extended to cover all outbuildings within the curtilage of the dwelling provided they were enclosed with the dwelling by a common fence.

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[1] See Perkins, *Criminal Law* p. 149 (1969).

Today all States have some sort of burglary statutes, although they are widely divergent. Some States have retained the common law definition of burglary in their statutes but, in addition, make it an offense if the breaking and entering was of premises other than dwellings, or in the daytime. Other States have enacted statutes which establish different degrees of burglary. In such States typically the highest degree of burglary occurs if the offender unlawfully enters a building at night with the requisite intent and is armed with a dangerous weapon, or if during the commission of the offense he injures or threatens to injure any person. Lesser degrees of the crime are prescribed for burglaries of unoccupied dwellings and other structures, unaggravated burglaries, and burglaries in the daytime. Still other States have only one provision and one penalty for all types of burglary.

Current Federal law contains no general offense of burglary applicable uniformly to Federal property or to Federal enclaves. Section 1711 proposes for the first time to create such a general offense. It should be noted that conceptually such a decision is not inevitable, even assuming a judgment that the conduct involved in burglary should be penally proscribed. Because an entry into a dwelling plus an intent to commit a crime must be proved for a burglary conviction, proof of the same elements would also suffice for a conviction for attempt to commit the intended offense. The Committee believes, however, that separate retention of the burglary offense is warranted. Entry into another's dwelling, with intent to commit a crime, constitutes in itself an invasion of secured property and privacy which endangers and frightens any person properly within the premises.[2] These interests are entirely apart from the interests protected by the criminal statutes the violation of which is attempted. Furthermore, enactment of a general burglary offense will facilitate the prosecution of those cases in which it is clear that the culprit intended to commit some crime, but it is unclear what offense was contemplated.[3]

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[2] Compare 18 U.S.C. 793(a), carried forth in section 1121(a) of the Code, punishing as espionage the entering of a restricted area with intent to obtain or collect national defense information for a foreign power. Although such conduct conceivably can be considered as an attempt to commit espionage, it has traditionally been treated as a completed offense.

2. Present Federal Law

As previously noted, Federal law contains no general offense of burglary. With respect to enclaves, Federal law relies, mainly through the Assimilative Crimes Act, 18 U.S.C. 13, on the definition and punishment of burglary in the law of the State in which the enclave is situated.[4] A special statute, the Major Crimes Act, 18 U.S.C. 1153, similarily provides that State law shall supply the definition and punishment of burglary when committed by an Indian within Indian Country. Only in the District of Columbia Code has Congress enacted a general burglary statute.[5] That provision departs from the common law definition in punishing an entry alone, without a breaking, and in providing that the entry need only be accompanied by intent to commit any crime, not necessarily a felony. If, however, the intent is formed after the entry, the statute does not punish the act as burglary.[6]

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if at night, with intent to engage in conduct constituting a Federal, State, or local crime other than a crime set forth in this subchapter, and without privilege, he enters or remains surreptitiously within a dwelling that is the property of another.

The first element is that the offense must occur at night. The term "night" is defined in section 1716 as the period between thirty minutes after sunset and thirty minutes before sunrise. A principal reason why burglary was considered a serious crime at common law was the natural fear and apprehension which might be caused in the minds of the inhabitants of a dwelling by an intruder in the night. The Code continues this policy, reserving the burglary label and the most severe grading for the nighttime intrusion into a dwelling.[7] Because of the proposed extension of the burglary offense to situations in which a person "remains surreptitiously" within a dwelling (discussed *infra*), an offense is committed under this section even though an offender entered during the day provided he remains at night. Thus, a would-be rapist who enters an apartment during the day and secretes himself in the bedroom closet waiting for the occupant to return for the night, at which time he intends to assault her, would be guilty of burglary. Likewise, a person commits an offense under this section if, with the requisite intent, he enters a dwelling at night but is not discovered until the daytime.

The second aspect of the offense is that the would-be burglar must enter or remain surreptitiously within the dwelling without privilege. The formulation dispenses with the common law requirement of a "breaking" or forcible entry. In so doing the provision is in accord with other modern criminal law revisions.[8] The Committee considers that the elimination of this element is justified on the ground that the mode of entry is irrelevant to the basic interest in protecting the security and privacy of a habitation.[9]

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[3] See Working Papers, pp. 892–893.

[4] See, e.g., *Bayless* v. *United States*, 381 F.2d 67, 75–76 (9th Cir. 1967); *Dunaway* v. *United States*, 170 F.2d 11 (10th Cir. 1948).

[5] 22 D.C. Code 1801.

[6] See *United States* v. *Cooper*, 473 F.2d 95 (D.C. Cir. 1972), and cases cited therein.

[7] Cf. Fed. R. Crim. P. 41(c), requiring an additional showing of reasonable cause to authorize nighttime execution of a search warrant.

The words "without privilege" are designed to exclude the situation of an owner or invitee who enters premises with intent to commit a crime. For example, it is not burglary for an individual to enter a house as a guest for dinner, even if he intends to steal the silverware.[10] The reason is, as mentioned above, that burglary and criminal entry offenses are designed to punish primarily for the breach of privacy and security caused by an unexpected entry or presence of another person within a dwelling or other building. Where the entry itself is licensed, no such breach of privacy or security is present. It should be noted that the National Commission included a similar phrase in its burglary provision, i.e., "the actor is not licensed, invited, or privileged to enter." The Committee intends that the term "without privilege" incorporate the concepts of without license or without invitation.

This section, as noted above, also expands the common law definition to include persons who remain surreptitiously within a dwelling. This too accords with modern treatment of the offense.[11] The qualifying term "surreptitiously" is used in order to prevent the statute from applying to the type of situation where an individual invited to one's home is subsequently asked to leave, but refuses and threatens to punch his host in the nose. Since the dwelling occupants, in the posited hypothetical, are aware of the person's presence, his stay on the premises in violation of his privilege does not pose the kind of threat caused by remaining on the premises in a clandestine manner.[12]

The third element of the offense is that the entry must occur in a dwelling which is the property of another. "Dwelling" is defined in section 111 as "an immovable or movable structure, that is at least partially enclosed, or a separate part of such a structure, that is designed for use, or used, in whole or in part as an individual's permanent or temporary home or place of lodging." Such things as mobile homes, houseboats, tents, and campers would fall within the definition, but a passenger car would not. There is no requirement that the dwelling must be occupied, or even intended to be occupied,[13] at the time of the entry, but the entry must be into that part of the structure which is designed for use, or used, in whole or in part as a person's home or place of lodging. Thus, a person who at night and with the requisite criminal intent enters a building which contains a business establishment as well as apartments would not be guilty of an offense under this section if he only enters the business establishment. If, however, part of a business establishment is also used as a place for lodging, entry into the business establishment would constitute burglary under this section.

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[8] See Working Papers, p. 892.

[9] As stated by the senior counsel to the National Commission:

> With the concept of burglary limited to those enclosed premises in which protection of the sanctity of persons and property is of prime consideration, there is no need to retain, as an element of the offense, the traditional requirement that the property be broken into to constitute burglary. The culprit who enters an open window or uses a key he has improperly obtained is just as dangerous. . . . *Id.* at 894.

[10] See *id.* at 895.

[11] See Final Report, § 1711(1).

[12] See Working Papers at 894.

[13] Compare *James* v. *United States*, 283 F. 2d 681 (9th Cir. 1956), dealing with a restrictive definition of "dwelling house" in the Alaska Criminal Code.

The second part of this element is that the dwelling must be the "property of another." This term is defined as "property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property."[14] Thus, under this definition, a person who enters or remains surreptitiously within his own home with intent to engage in conduct constituting a crime would not be guilty of burglary. However, a landlord who without the required consent of his tenants enters their apartment with the requisite criminal intent would be guilty of burglary even though he owns the apartment.

The fourth element of this offense is that the offender must have an intent to engage in conduct constituting a Federal, State, or local crime other than a crime set forth in this subchapter. The important point about this element is that the offender does not have to intend to commit a crime but only to engage in conduct which constitutes a crime in fact. Furthermore, unlike at common law, the intended conduct need not amount to a felony; it is sufficient if it would constitute any offense. This enlargement of the definition of burglary is consistent with recent criminal code revisions and with the District of Columbia Code.[15] The treatment of burglary as an entry with intent to engage in acts which, if performed, would only constitute a misdemeanor (e.g., petty larceny or criminal mischief) is warranted because the entry is an intrusion into the privacy of a dwelling.[16] There is, however, for obvious reasons, no intent to reach situations where the conduct intended is an offense under sections 1712 through 1715 (criminal entry, criminal trespass, stowing away, or possession of burglar's tools) and the specific exemption of an intent to commit an offense designated in this subchapter accomplishes this result.

B. Culpability

No state of mind is specifically assigned to the offender's conduct, i.e., entering or remaining surreptitiously. Consequently, by operation of section 303(b)(1), the government must prove at a minimum that the conduct was "knowing," in other words, that the offender was aware of his entering or remaining surreptitiously.[17] The elements of "at night," "without privilege," and that the premises in question were a "dwelling which is the property of another" are existing circumstances. Accordingly, because no specific culpability standard is supplied, the requisite state of mind with respect to each circumstance is "reckless."[18] That is, it must be proved that the defendant was aware of but disregarded a substantial risk that his conduct was "without privilege", that the place he was entering or remaining surreptitiously within was a dwelling which was the property of another, and that the time he was engaging in such conduct was at night. The purposive element of an intent to engage in conduct constituting a crime carries its own culpability standard and is self-explanatory. As noted above, the intent that must be proved extends only to the conduct itself and not that the conduct in fact constitutes a crime.[19]

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[14] See section 111.

[15] See 22 D.C. Code 1801; *United States* v. *Cooper, supra* note 6 at 97.

[16] See Working Papers, p. 893.

[17] See section 302(b)(1).

[18] See section 303(b)(2).

4. Jurisdiction

Subsection (c) of section 1711 sets forth three bases of Federal jurisdiction for this offense. The first is where the offense is committed within the special jurisdiction of the United States as defined in section 203. It includes, among other places, the high seas, as well as Federal enclaves such as military reservations, national parks and forests, and the Indian country. Burglary offenses committed in such locations would be uniformly prosecuted under this section instead of under the diverse laws of the respective States as in the current practice under the Assimilative Crimes Act.[20] Federal jurisdiction also exists if the subject of the offense is a dwelling owned by, or under the care, custody, or control of, the United States, and is occupied by a United States official. This is a limited extension of Federal jurisdiction to cover burglaries of dwellings occupied by important Federal officials (see the definition of "United States official" in section 111) where the dwelling is also owned by or under the care of the United States (e.g., the White House). It would not, however, extend the coverage of burglary offenses to houses rented by the military services for use by servicemen and their dependents. Unless occurring on a Federal enclave, burglary of such premises, as well as, for example, of a dwelling in a building owned by or under the care, custody, or control of, the Department of Housing and Urban Development, will continue to be solely within the province of State or local law. The final jurisdictional base is new and applies where the dwelling is located within the United States and is owned by, or is under the care, custody, or control of, a foreign power, a foreign dignitary who is in the United States, or an official guest of the United States. The Committee believes that the interests of international relations justify the existence of Federal jurisdiction over the burglary or criminal entry of a dwelling owned by a foreign power, foreign dignitary, or official guest. Significantly Congress, in 1976, enacted a statute punishing, at a misdemeanor level, certain types of trespasses[21] within or upon that portion of any building or premises within the United States, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by (A) a foreign government, including such use as a mission to an international organization, (B) an international organization, (C) a foreign official, or (D) an official guest."[22] In the Committee's view, it is anomalous to punish Federally a trespass involving such premises and not to reach more aggravated criminal entry offenses such as burglary. Accordingly, the Committee has included such coverage in this and the following section.

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[19] See section 303(d)(1).

[20] See 18 U.S.C. 13.

[21] I.e., those made "willfully with intent to intimidate, coerce, threaten, or harass," and where the actor "forcibly thrusts" himself into the premises.

[22] 18 U.S.C. 970(b). The terms "foreign government", "foreign official", "international organization", and "official guest" are defined by reference to 18 U.S.C. 1116(b). The terms "foreign power", "foreign dignitary", and "official guest of the United States" are defined in a substantially identical manner in section 111.

5. Grading

Subsection (b) grades this offense as a Class C felony which carries a maximum prison term of twelve years. This penalty reflects the seriousness of the offense and is consistent with penalties imposed for the same offense in States which have recently enacted criminal codes.[23]

SECTION 1712. CRIMINAL ENTRY

1. In General

This section is designed to provide a uniform criminal entry statute and departs from existing Federal law which focuses on specific types of property, e.g., post offices and credit unions. In keeping with its principal purposes, section 1712 does not apply to all entries into premises, but only to entries into buildings and into vehicles. The section conforms in terms of its scope to the recommendations of the National Commission.[24]

The purview of the section reflects the two principal reasons for retaining a criminal entry offense rather than simply letting the conduct of unlawful entry coupled with an intent to commit a crime be punished through the general attempt statute (section 1001). The foremost consideration is that the entry itself, as in the case of burglary, may breach interests in privacy and security that are not among those safeguarded by the section proscribing the intended offense (e.g., theft). This section is accordingly drafted so as primarily to cover those entries into premises where it is likely that people will be present and where fear or apprehension may be generated from an unexpected encounter with the defendant.[25] Thus under section 1712 proof of an unlawful entry into an area not a building (and not a vehicle), with intent to commit a crime, is not punishable as criminal entry. Likewise, the proposed section does not encompass situations where an entry was accomplished with consent (for example, walking into a bank during business hours with intent to commit robbery). Such entries may, in appropriate circumstances, be prosecutable under this Code as an attempt to commit the intended offense, or, at a misdemeanor level, as a trespass (section 1713), which does not require proof of an intent to commit another crime. Once again, the function of this section is only to cover the non-consensual kind of entry into places where fear or violence may result from an encounter with the offender, and where the invasion of privacy is most pronounced. Entries into vehicles are also covered because of the practical problem that would ensue, in many cases, of proving the precise crime intended if the general attempt statute had to be utilized. The Committee, like the National Commission, believes that there should be a means of charging an offense against a person who conceals himself in another's car to commit a crime, without the need for proving which crime—robbery, rape, kidnapping, etc.—he intended to commit.[26]

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[23] See Working Papers, pp. 895-896.

[24] See Final Report, §§ 1711 and 1713.

[25] See the definition of "building" in section 111; and see Final Report, § 1711. Comment, p. 200.

2. Present Federal Law

As is the case with burglary, there is currently no uniform statute punishing criminal entry on Federal enclaves or Federal property. Several statutes, differing from one another both in basic definition and in grading, exist with respect to particular types of property.[27] Thus, breaking or entering of railroad cars, vessels, trucks, airplanes, and other vehicles moving interstate, with intent to commit larceny therein, is punishable by up to ten years' imprisonment.[28] Breaking or entering a vessel within the maritime jurisdiction, with intent to commit any felony, is punishable by imprisonment up to five years.[29] The same punishment is prescribed for a "forcible" breaking into a post office with intent to commit "larceny or other depredation."[30] An entry "by violence," with no other requirement of intent, into a post office railroad car, car, steamboat, or vessel assigned to the use of the mail service is punishable by a maximum of three years in prison.[31] Any entry into a federally insured bank, credit union, or savings and loan association, with intent to commit larceny or any Federal felony "affecting such bank" or institution may be punished by up to twenty years' imprisonment.[32] And 18 U.S.C. 970(b) punishes by up to six months in prison whoever willfully with intent to intimidate, coerce, threaten or harass, "forcibly thrusts" any part of himself within or upon that portion of any building or premises within the United States used or occupied for official business or for diplomatic, consular, or residential purposes by a foreign government, an international organization, a foreign official or an official guest.

3. The Offense

A. Elements of the Offense

Section 1712 is a lesser included offense of section 1711 (burglary). It requires proof of three basic elements: that a person (1) without privilege entered or remained surreptitiously within; (2) a building or vehicle which is the property of another; (3) with intent to engage in conduct constituting a Federal, State, or local crime other than a crime set forth in this Subchapter.

The first element is identical to that found in the burglary provision, and the discussion there is applicable also in this context. It should be emphasized that not all persons who enter a building with the intent to commit a crime would be guilty of an offense under this section. As in the burglary provision, the entry or remaining surreptitiously within element is qualified by the concepts of "without privilege" and "property of another" defined in section

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[26] See Final Report, § 1713. Comment, p. 202.
[27] See Working Papers, p. 891.
[28] 18 U.S.C. 2117.
[29] 18 U.S.C. 2276.
[30] 18 U.S.C. 2115.
[31] 18 U.S.C. 2116.
[32] 18 U.S.C. 2113(a).

111 as "property in which a person or government has an interest which the actor is not privileged to infringe without consent." Thus, a person who enters a store or other business establishment which is open to the public would not be guilty of an offense hereunder even though at the time he enters he intends to commit a crime. Similarly, a person who enters a courthouse intending to commit perjury would not be guilty of an offense under this section. Rather, the proposed Code takes the position that when a person comes onto property by lawful means, he remains criminally accountable, in terms of his liability for a completed offense, only for the acts he thereafter commits on the property.[33] It is because of this philosophy that section 1712 does not carry forward the full extent of coverage of 18 U.S.C. 2113 (a). That statute makes it a crime, among other things, to enter a federally insured bank with intent to commit certain Federal felonies or larceny. Under section 1712, by contrast, if the entry were during regular business hours and thus consensual, there would be no crime. The entry would likely be punishable as an attempt to commit the intended offense (section 1001), but it would not be a completed offense in itself. On the other hand, if the actor without privilege entered the bank after business hours, or remained surreptitiously within until such time, with the requisite intent, he would be guilty under this section.

The second element of the offense is that the entry must occur in a building or vehicle which is the property of another. The terms "building" and "vehicle" are defined in section 111. The definition of "building" encompasses everything from a warehouse or other structure used to carry on a business to any manner of habitation, including a vessel, camper, tent, or house. Thus, a person who enters a dwelling, other than at night, with the requisite criminal intent, while not guilty of burglary under section 1711, would be guilty of criminal entry under this section. The term "building" is not defined to distinguish between entry into a place of business during regular business hours and such entry after business hours. The fact that the building is used for business purposes is itself sufficient to create a substantial risk that persons will be present, even during non-business hours or on a non-business day. Likewise, the fact that a building was abandoned at the time of a person's entry or remaining within is not a defense under this section. The definition of "building" also covers structures or vehicles used to store property, such as a railway boxcar or truck, where a risk of a personal encounter with the intruder is possible.

The second part of this element is that the building or vehicle must be the "property of another." As indicated previously, this term is defined in section 111 as "property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property." Under this definition it makes no difference that a person owned the building involved; if he had no authority to enter it, he could be guilty of unlawful entry.

The third element of the offense requires the offender to enter or remain surreptitiously within a building or vehicle "with intent to engage in conduct constituting . . . a crime". The presence of this element distinguishes this offense from the lesser crime of criminal trespass under section 1713. As under section 1711, the offender does not necessarily have to intend to commit a crime; rather he must merely intend to engage in conduct which constitutes a crime. Thus, in accordance with the principles of section 303(d)(1)(A), the prosecutor need not show that an offender knew that his intended acts would violate the law. Furthermore, unlike common law and some existing Federal statutes (e.g., 18 U.S.C. 2276), the acts the defendant intended to engage in need not constitute a felony. As in the proposed burglary section, the felony requirement is eliminated. An unlawful entry within a building, coupled with an intent to commit acts constituting a further offense therein, is deemed sufficient to warrant punishment at a level above that imposable for a completed misdemeanor because, in addition to the interest served by the misdemeanor offense, there is the interest in personal security that is threatened by an unlawful entry. The abolition of the felony-misdemeanor distinction also has the practical aspect of facilitating prosecutions where it is difficult to demonstrate which crime an offender's intended conduct would constitute (e.g., theft of property worth less than $500 versus theft of property of greater value).[34]

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[33] Unless, of course, he remains surreptitiously on the premises, after his privilege to do so has expired.

B. Culpability

The culpability required under this section is similar to that required for burglary in section 1711. Because there is no state of mind specified in the provision as to the conduct therein, i.e., "entering or remaining surreptitiously within," the prosecution must prove, as a minimum, that the actor's state of mind for this element was "knowing" [35] that is, that he was aware that he was entering or remaining surreptitiously within property.[36] The facts that the place entered or remained in surreptitiously was a building or vehicle which is the property of another, and that the conduct was performed "without privilege", are existing circumstances. Therefore, because no culpability standard is specified as to these elements, the state of mind of the offender which must be shown is at least "reckless" [37] i.e., that he was aware of but disregarded a substantial risk that the property entered or remained within surreptitiously was a building within which he had no privilege to enter or to remain. The purposive element of an intent to engage in conduct constituting a crime has been discussed previously in connection with section 1711.

4. Jurisdiction

There is Federal jurisdiction for offenses set forth in this section in six situations.

The first arises when the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 to include, *inter alia,* Federal enclaves, the high seas, and certain aircraft while in flight. This branch represents an extension of current Federal jurisdiction since there is no general Federal provision covering such offenses. Thus, under the proposed Code, criminal entry offenses committed on Federal enclaves will be prosecuted under this uniform section instead of under the laws of the State in which the enclave is located, which is the current practice under the Assimilative Crimes Act, 18 U.S.C. 13.[38] The Committee does not consider it desirable to perpetuate this existing state of affairs because local laws vary significantly both in definition of offenses and in grading, thereby resulting in needless inequality of treatment of conduct within the Federal system.[39]

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[34] See section 1731.
[35] See section 303(b)(1).
[36] See section 302(b)(1).
[37] See section 303(b)(2).

The second situation occurs if the subject of the offense is a building or vehicle owned by, or under the care, custody, or control of, the United States, even if not in a Federal enclave, and if the building or vehicle is occupied by a United States official (as defined in section 111). This provision has been discussed in relation to the previous section.

The third situation exists when the subject of the offense is a facility of a Federal government agency and, if the actor's entering or remaining was in a part of the building other than that in which the facility was located, the conduct intended would have affected the facility itself or anything therein. This provision retains the jurisdiction over such offenses involving post offices found in 18 U.S.C. 2115,[40] but enlarges it, at the suggestion of the Department of Defense, to cover facilities of other government agencies as well.

The fourth situation arises if the subject of the offense is a national credit institution, and, if the actor's entering or remaining was in part of the building other than that in which the credit institution was located, the conduct intended would have affected the credit institution itself or anything therein. This provision retains the jurisdictional scope over such offenses presently found in 18 U.S.C. 2113(a), although, as indicated before, substantive coverage is not as broad since the Code places greater reliance on a general attempt provision to cover consensual entries into such premises. The term "national credit institution" is defined in section 111 and includes such buildings as banks, savings and loan associations, and credit unions, as well as other financial institutions organized or operated under the laws of the United States.

Under the fifth situation, jursidiction extends to vehicles containing mail, or property which is moving in interstate or foreign commerce, or which constitutes or is a part of an interstate or foreign shipment. This provision essentially retains the jurisdictional reach currently found in 18 U.S.C. 2117.

Sixth, Federal jurisdiction exists if the building or vehicle is located within the United States and is owned by, or is under the care, custody, or control of, a foreign power, a foreign dignitary who is in the United States, or an official guest of the United States. This is derived from 18 U.S.C. 970(b) and is included for reasons discussed in connection with the similar jurisdictional base in the preceding section.

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[38] See *Dunaway* v. *United States, supra* note 4.

[39] The criminal entry offense is not in the realm of public morals crimes where it is often rational to resort to borrowed State laws to apply on Federal enclaves. See section 1861.

[40] See *United States* v. *Gibson*, 444 F.2d 275, 277 (5th Cir. 1971); *United States* v. *Clifton*, 91 F. Supp. 940 (D. Ark. 1950).

5. *Grading*

An offense under this section is a Class D felony which carries a maximum of six years' imprisonment. While this is considerably less than the twenty-year maximum authorized under 18 U.S.C. 2113(a) (entry into a bank with intent to commit a felony), it is similar to the sentence imposable under 18 U.S.C. 2116 and 2276 (breaking and entering a vessel with intent to commit a felony), and 18 U.S.C. 2115 (forcible breaking into a post office with intent to commit larceny).

SECTION 1713. CRIMINAL TRESPASS

1. *In General*

It is indisputable that a government, as well as a private owner, has the authority to restrict access to property under its control and to preserve it for the use to which it is lawfully dedicated.[41] The purpose, then, of a Federal criminal trespass statute is to protect property from unlawful intrusions regardless of whether the offender has an intent to commit any other offense. While most trespasses are relatively minor, some are more serious. For example, a trespass into a private dwelling is a serious matter, even if the trespasser intends no other crime, for it constitutes a gross invasion of privacy and may raise apprehension in the mind of the occupant. Likewise, a trespass in an area plainly restricted for atomic energy purposes is serious, even if the offender is harmless, because of the security risk involved. A less serious offense, but one that cannot be lightly regarded, occurs when a person, who, knowing that he is not authorized to do so, enters or remains in any building, not a dwelling, or in a place so enclosed as manifestly to exclude intruders. While such an offender may not be a burglar, since he has no intent to commit an offense, his presence may substantially interfere with the property rights of the occupant.

Section 1713 replaces the existing hodgepodge of Federal statutes with a single provision applicable, *inter alia,* to all United States property and to all property in Federal enclaves. Three levels of grading are provided depending on the seriousness of the offender's intrusion.

2. *Present Federal Law*

There is no Federal criminal trespass statute generally applicable to all government property. Current trespass statutes protect specified property with the penalty varying depending on the nature of the property involved. Thus, 18 U.S.C. 2152 prohibits trespasses upon fortifications, harbor defenses, or defensive sea areas established by Presidential order and carries a penalty of up to five years' imprisonment. 42 U.S.C. 2278a permits the Atomic Energy Commission to establish rules and regulations relating to the entry upon or into any atomic energy facility subject to the jurisdiction or administration of the Commission and provides that willful violation of such regulations with respect to enclosed premises subjects the offender to a maximum sentence of one year in prison and a fine of $5,000. 18 U.S.C. 1383 authorizes the Secretary of the Army or any designated Commander to promulgate regulations concerning the entry into a military area or zone and anyone who violates such restrictions and who knows or should have known of their existence, is made subject to a prison term of one year and a fine of $5,000. 18 U.S.C. 1382 prohibits the initial entry "upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation" and also prohibits the reentry onto such places of any person previously "removed therefrom or ordered not to reenter" by the officer in command; violators are subject to imprisonment for up to six months and a fine of $500. 18 U.S.C. 1862 prohibits trespasses upon the Bull Run National Forest and 18 U.S.C. 1863 prohibits entry into any national forest which is closed to the public pursuant to a regulation promulgated by the Secretary of Agriculture; each statute provides for a prison term up to six months and a fine of $500. 18 U.S.C. 970(b) punishes by up to six months in prison and a $500 fine whoever, willfully with intent to intimidate, coerce, threaten, or harass, (1) forcibly thrusts any part of himself into that portion of any building or premises located within the United States used or occupied for official business or for diplomatic, consular, or residential purposes by a foreign government, foreign official, or official guest, or (2) refuses to depart from such portion of such building or premises after a request by an individual in one of four categories enumerated in the statute as having authority to make such request. Similarly, unauthorized entry upon public or private property within the District of Columbia, or remaining thereon after the demand of the lawful occupant to depart, is punishable in the District of Columbia Code by up to six months in prison and a $100 fine.[42] 18 U.S.C. 1165 punishes by up to ninety days in prison and a $200 fine whoever without lawful authority "knowingly and willfully" goes upon any land belonging to an Indian tribe for the purpose of hunting, trapping, or fishing. In *United States* v. *Pollman,*[43] the court held that a good faith belief, on advice of counsel, that the land on which the defendant fished was not Indian land precluded a finding that the defendant acted "willfully". By contrast, the only penalty for trespass in Crater Lake National Park (16 U.S.C. 122), Glacier National Park (16 U.S.C. 161), Yellowstone National Park (16 U.S.C. 21), Mount Rainier National Park (16 U.S.C. 91), Sequoia National Park (16 U.S.C. 41), or Yosemite National Park (16 U.S.C. 61), is ejection.

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[41] *Adderley* v. *Florida,* 385 U.S. 39, 47 (1966). The principle prevails even if the government permits members of the public "freely to visit" a place, provided that there is no abandonment of a claim of special interest in the regulation of certain kinds of conduct (e.g., distributing political leaflets), which then may still be prohibited. *Greer* v. *Spock,* 424 U.S. 828 (1976). Compare *Flower* v. *United States,* 407 U.S. 197 (1972).

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, knowing that he is without privilege to do so, he enters, or remains within or on, premises that are the property of another.

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[42] 22 D.C. Code 3102.

[43] 364 F. Supp. 995 (D. Mont. 1973). 18 U.S.C. 1165 is carried forward in title 18 Appendix of the United States Code.

The requirement of an entry as a precondition to a trespass needs no elaboration. However, under proposed section 1713 a criminal trespass may also occur if a person who has lawfully entered premises remains thereon after he has been told to leave. Thus, for example, persons who refuse to depart from a national park or military reservation when properly ordered to do so[44] could be guilty of an offense under this section. The accused would, however, retain the right to challenge the validity of the request or order that he leave the area,[45] since this is directly pertinent to the element of privilege. Moreover, unlike sections 1711 and 1712, there is no requirement that the offender remain on the premises "surreptitiously." Thus, a person, who entered certain premises with the consent of the owner but who remained after the consent was withdrawn, would be guilty of an offense under this section.

Another aspect of this offense requires the trespass to occur on "premises that are the property of another." "Premises" is defined in section 1716 as including any building, structure, or other real property, or any vehicle. "Property of another" is defined in section 111 as "property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property." Thus, a person who has leased his premises to the United States could be guilty of trespass under this section if he enters such premises without authority.

B. Culpability

The culpability required under this section is similar to that required in sections 1711 and 1712. Because there is no culpability specified in the provision as to conduct, the government would, as a minimum, have to prove that the actor's state of mind as to his conduct, i.e., "entering or remaining within or on" property, was "knowing." [46] In other words, the government would have to prove that the offender was aware of his entering or remaining on property.[47] The element that the conduct was "without privilege" is an existing circumstance. The culpability level is prescribed as "knowing", thus requiring proof that the defendant was aware or believed that he lacked a privilege to enter or remain.[48] This is a somewhat higher culpability standard than prevails under most current Federal trespass laws, but is deemed justified on the ground that less culpable trespasses are subject to remedy through ejectment or civil suit for damages. Criminal liability should come into play only when an individual believes or is aware that he is acting without privilege or license. The National Commission reached a like judgment.[49] Although some opportunity is presented by the adoption of a "knowing" rather than merely "reckless" culpability level for the assertion of spurious claims by defendants that they believed they had a right to enter or remain on premises, the Committee is confident that juries will reject such claims and find the requisite awareness or belief of lack of privilege if the defendant is unable to advance any reasonable factual basis for his alleged state of mind. The element "premises that are the property of another" is also an existing circumstance. Since the provision does not specify a state of mind, the government would, as a minimum, have to show a culpability level in regard to this element of "reckless," i.e., that the offender was aware of but disregarded a substantial risk that he was entering or remaining on such premises.[50] Thus, a person who wanders mistakenly onto restricted Federal property would not be guilty of criminal trespass unless he was aware of the risk that such property was restricted and belonged to another and he disregarded such risk.

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[44] See, e.g., *United States* v. *Jelinski*, 411 F.2d 476 (5th Cir.), cert denied, 396 U.S. 943 (1969), and *Weissman* v. *United States*. 387 F.2d 271 (10th Cir. 1967), holding that under 18 U.S.C. 1382 a court will review a military commander's exclusion order to see if it is reasonable.

[45] The situation is different from that where an exclusion order occurs in the context of a proceeding in which its legality may be administratively or judicially reviewed. In such contexts, the courts have held that Congress may require that any attack on the order be made in the course of such proceeding and that the validity of the order is not subject to challenge in a prosecution for reentering in violation thereof. See, e.g., *United States* v. *Gonzalez-Parra*, 438 F.2d 694, 697–699 (5th Cir.), cert. denied, 402 U.S. 1010 (1971) (8 U.S.C. 1326, reentry of alien into the United States after having been deported), and cases cited therein.

[46] See section 303(b)(1).

[47] Final Report. § 1712.

[48] See section 302(b)(2). Note that this element requires both proof in fact of the absence of a privilege and proof of a "knowing" state of mind with respect thereto. The Committee does not intend that a person who believes, erroneously, that he was without privilege to enter or remain on premises be liable to prosecution for an attempt (see section 1001 (a), (c)).

4. Jurisdiction

There is Federal jurisdiction for offenses set forth in this section in five situations. The first arises when the offense is committed within the special jurisdiction of the United States, which is defined in section 203 to include, *inter alia,* Federal enclaves, the high seas, and certain aircraft while in flight. The second jurisdictional base exists if the subject of the offense is premises that are owned by, or under the care, custody, or control of, the United States, and that are occupied by a United States official (as defined in Section 111). Comparable coverage has been provided in the previous two sections proscribing burglary and criminal entry. Third, Federal jurisdiction exists if the premises are located within the United States and are owned by, or are under the care, custody, or control of, a foreign power, a foreign dignitary who is in the United States, or an official guest of the United States. This generally carries forward the offense in 18 U.S.C. 970(b). The terms "foreign power", "foreign dignitary", and "official guest of the United States" are defined in section 111. Fourth, jurisdiction extends to entering or remaining in a vehicle containing mail or property which constitutes or is a part of an interstate or foreign shipment. This represents an extension of present Federal jurisdiction, although there is currently a criminal entry offense of breaking and entering such vehicles with intent to commit larceny therein.[51] Finally, Federal jurisdiction exists where the premises consist of public domain land, National Park System land, or National Wildlife Refuge System land, that has been closed to the public pursuant to a regulation issued by the Secretary of the Interior, or consist of national forest land which has been closed to the public pursuant to a regulation promulgated by the Secretary of Agriculture. This retains the coverage presently found in 18 U.S.C. 1863 and also provides coverage over public domain and other lands that may not come within the definition of the special territorial jurisdiction. The inclusion of these lands in this provision embodies the recommendation of the Department of the Interior.

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[49] See Final Report, § 1712 comment.
[50] See sections 303(b)(2) and 303(c)(1).
[51] See 18 U.S.C. 2117.

5. Grading

Offenses under this section are graded, pursuant to the recommendation of the National Commission, according to the type of property involved. Thus, a trespass which occurs on a dwelling or on highly secured government premises is a Class A misdemeanor which carries a maximum sentence of one year in jail. The term "highly secured government premises" is defined in section 1716 as premises which are continuously guarded and where display of visible identification is required of persons while they are on the premises.

A lower level of grading is prescribed for a trespass on premises which are so enclosed or secured as manifestly to exclude intruders, which consist of a building other than a dwelling, or which consist of a military reservation or facility, and the entry or remaining is for a purpose prohibited by law, or occurs after the person was removed from the premises or ordered not to re-enter by a person in charge of the reservation or facility or by another authorized person. The offense in these circumstances is a Class B misdemeanor carrying a maximum penalty of six months in jail. A still lower grading level is reserved for a trespass which occurs on property as to which the offender was placed on notice, either through actual communication or by posting in a manner reasonably likely to come to the attention of intruders. The offense so committed is a Class C misdemeanor carrying a maximum penalty of one month in jail. All other offenses under this section are infractions carrying a maximum penalty of five days in jail. In the case of an infraction committed with respect to certain public lands and parks, a special provision precludes the imposition of a prison sentence and limits the amount of a fine to $100.

For the most part the penalties under this section are consistent with those under existing law, although the Committee decided not to punish trespass at a felony level as is the case under some present statutes. It is felt that, for such treatment to be warranted, the government should be required to show, in addition to an unlawful entry or remaining on premises, an intent to engage in conduct constituting a further offense.[52]

SECTION 1714. STOWING AWAY

1. In General

An offense somewhat analogous to criminal trespass is that of stowing away on board a vessel or aircraft. The principal distinguishing feature, however, is that stowing away involves theft of services. Another factor which makes stowing away a more serious offense than ordinary criminal trespass is that the offender may hide near and inadvertently damage equipment necessary to the proper operation of the vessel or aircraft. Although stowing away could probably be covered under the general theft of services provision, the Committee feels that, because of this special factor, a separate provision is more appropriate.

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[52] See sections 1711 and 1712.

2. Present Federal Law

18 U.S.C. 2199 makes it an offense to board, enter, or secrete oneself on a vessel or aircraft, without the consent of the owner or person in command, with intent to obtain transportation, and to be aboard at the time the vessel or aircraft departs. The statute also punishes the boarding of an aircraft owned or operated by the United States without the consent of the person in command, with intent to obtain transportation. The crimes are punishable by one year in prison and a $1,000 fine. It appears from the language of 18 U.S.C. 2199 that the statute reaches not only instances where a person has secreted himself on board an aircraft or vessel, but also cases where he has simply entered a vessel or aircraft and not paid for his passage.[53]

3. The Offense

Section 1714 is drafted so as to make clear that the gravamen of the offense is the *hiding* on board a ship or aircraft with intent to obtain transportation. One who merely enters a vessel without consent, with the requisite intent, and is on board when the ship departs would not be guilty of an offense under this section. Rather, he would be guilty of criminal trespass (section 1713) and theft of services. With this refinement in its coverage, section 1714 carries forward the major aspects of 18 U.S.C. 2199, although not the separate offense contained therein of boarding a United States aircraft without consent with intent to obtain transportation. Such latter conduct (which does not require the presence of the offender on board at the time the aircraft embarks) again would constitute criminal trespass (section 1713), and could also be punishable as an attempt under section 1001 to commit theft.

A. Elements

In order to prove an offense under this section the government must show that the defendant: (1) secreted himself aboard; (2) a vessel or aircraft which is the property of another; (3) with intent to obtain transportation; and (4) was aboard such vessel or aircraft when it left the point of embarkation.

In regard to the first element, the critical factor is that the defendant must hide himself on board the vessel or aircraft: that is, his presence must be unknown to the officials in charge of the vessel or aircraft before it embarks.

With respect to the second element, it is pertinent to point out that this section, like 18 U.S.C. 2199, is limited to "vessels," (defined in section 111 as "a self-propelled or wind propelled craft designed or used for transportation or navigation on, under, or immediately above water") [54] and "aircraft" (defined in section 111 to include "a craft designed or used for navigation or flight in air or in space). Thus, this section does not cover stowaways on motor vehicles and trains. The reason for this limitation on the scope of section 1714 is that such stowaways do not present the unique problems created by persons who secrete themselves in a vessel or aircraft. Once such a vehicle is underway, a stowaway cannot conveniently be evicted as he could if he were on a bus or train.

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[53] See *United States* v. *Russo*, 172 F.2d 553 (2d Cir. 1949).

[54] This would include a hovercraft.

The other part of this element is that the vessel or aircraft must be the "property of another." This term is defined in section 111 as "property in which a person or government has an interest which the actor is not privileged to infringe without consent." It is by means of this definition along with the concept of "secretes" that the element of non-consensual activity is retained in section 1714.

The third element is that the person must intend to obtain transportation. Thus, a person who secretes himself aboard a vessel for the sole purpose of finding a place to sleep for the night would not be guilty of an offense under this section.

The fourth element of the offense requires the offender to be on board the vessel or aircraft when it leaves the point of embarkation. A person, therefore, who is discovered prior to the departure of the vessel or aircraft would not be guilty of an offense under this section, although he could be charged with an attempt under section 1001. Implicit in this element is the defense of renunciation, that is, a person who secretes himself aboard an airplane or vessel with intent to obtain transportation, but who changes his mind and disembarks before the plane or vessel departs would not be guilty of stowing away under this section.

B. Culpability

The conduct in this section is secreting oneself aboard and being aboard a conveyance. As in other sections in this subchapter, the state of mind required is not specified. Therefore, by recourse to the principles of section 303(b)(1), the state of mind applicable to conduct is "knowing," i.e., the government must show, at a minimum, that the offender was aware that he was secreting himself aboard and was aboard at a subsequent time.[55]

The facts that the conveyance was a vessel or aircraft which was the property of another, and that the time when the offender was aboard was when the vessel or aircraft left the point of embarkation are existing circumstances. As no culpability standard is provided in the section with respect to these elements, the state of mind which must be proved is at least "reckless,"[56] i.e., that the offender knew of but disregarded a substantial risk that the circumstances existed.[57] The purposive element of an intent to obtain transportation is self-explanatory.

4. Jurisdiction

There is Federal jurisdiction over this offense if it is committed within the special jurisdiction of the United States or if in the commission of the offense the actor moves across a State or United States boundary. The special jurisdiction of the United States is defined in section 203 and includes, among other things, the high seas and certain vessels thereon and certain aircraft while in flight. The overall jurisdiction of this section is intended to be consistent with that found under present law.[58]

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[55] See section 302(b)(1).
[56] See section 303(b)(2).
[57] See section 302(c)(1).

5. Grading

An offense under this section is graded as a Class A misdemeanor, punishable by up to one year in prison. This reflects the relative seriousness of the offense the commission of which can endanger the safety of other passengers through inadvertent damage to some of the equipment which operates the vessel or aircraft. The penalty is consistent with that under existing law.

SECTION 1715. POSSESSING BURGLAR'S TOOLS

1. In General

There is no existing Federal provision prohibiting the possession of "burglar's tools." However, the great majority of States,[59] as well as the District of Columbia, have provisions prohibiting the possession of such tools.[60] The purpose of such provisions is to deter or prevent the commission of burglary and related offenses by enabling the authorities to apprehend the would-be burglar before he has had the opportunity to carry out the offense.[61] Although the language of the statutes differs widely, three essential elements are generally found to comprise the offense: (1) the adaptation and design of a tool or implement for criminal purposes (usually breaking and entering); (2) the possession thereof by one with knowledge of its character; and (3) the intent to use or employ such tool or implement for criminal purposes.[62]

In a number of States, challenges have been made against "burglar's tools" statutes on the ground that they are vague and indefinite. However, courts have uniformly rejected such arguments, holding that the provisions convey sufficient and definite warning as to the conduct prohibited when measured by common understanding and practice.[63]

2. The Offense

A. Elements

Section 1715 makes it an offense to possess an object which is designed for, or commonly used for, the facilitation of a forcible entry, with intent to use such object in the course of conduct constituting an offense under section 1711, 1712, 1713, or 1714. Thus, in order to prove an offense under this section the government must show that the defendant: (1) possessed an object designed for, or commonly used for, the facilitation of a forcible entry; (2) with intent that such object be used in a course of conduct constituting an offense under this subchapter.

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[58] See *United States* v. *Menere*, 145 F. Supp. 88 (S.D.N.Y. 1956), sustaining jurisdiction as to a stowaway on a foreign ship destined for American waters, who was aboard at the time the vessel docked in an American port.

[59] Every State, except Alaska, Delaware, Hawaii, Kentucky, Maine, Maryland, and West Virginia, has such a provision.

[60] While most State statutes use the term "burglar's tools," some jurisdictions, such as the District of Columbia, use a term like "implements of crime" which covers a broader spectrum of items. See 22 D.C. Code 3601.

[61] See generally 13 Am. Jur. 2d, Burglary §§ 74-77.

[62] The United States Court of Appeals for the District of Columbia has held that intent to use an implement to commit a crime is a constitutionally essential element of this kind of offense. *Benton* v. *United States*, 232 F. 2d 341, 343-344 (D.C. Cir. 1956); see also *State* v. *Hefflin*, 338 Mo. 236, 89 S.W. 2d 938 (1935), and *State* v. *Lorts*, 269 S.W. 2d 88 (Mo. 1954), in which the Missouri Supreme Court construed its statute in such a way as to make intent an essential element of the offense.

[63] See, e.g., *McKoy* v. *United States*, 263 A. 2d 649 (D.C. App. 1970); *Hogan* v. *Atkins*, 224 Ga. 358, 162 S.E. 2d 395 (1968); *State* v. *McDonald*, 74 Wash. 2d 474, 445 P. 2d 345 (1968).

In regard to the first element, such things as explosive devices, drills, lockpicks, false keys, wirecutters, crowbars, and jimmys would fall within the category of objects designed for or commonly used for the purpose of a forcible entry. It is the second element, however, which is the crucial factor limiting the scope of the offense. It requires the person to possess such an object with an intent to use it during the commission of an offense under section 1711, 1712, 1713, or 1714. If a person possesses such an object with no intent to use it for criminal purposes or even if he intends to use it for an offense other than the aforementioned offenses, his possession would not constitute an offense under this section.

B. Culpability

The conduct in this offense is the possession of an object. Since no state of mind is specified in the section, the state of mind that must be shown is, at a minimum, "knowing." [64] The fact that the object in question is designed or commonly used to facilitate a forcible entry in the course of a burglary, criminal entry, trespass, or stowing away offense is an existing circumstance. Because no culpability standard is set forth in the section with respect to this element, the applicable state of mind which must be proved is at least "reckless," i.e., that the offender was aware of but disregarded a substantial risk that the object possessed was so designed or commonly used. Thus, the unwitting possession of a lockpick, or its possession by one who had no inkling of its common use in criminal entry offenses would not be punishable under this section. The purposive element of an intent to use the object in the course of conduct constituting an offense under sections 1711 through 1714 is largely self-explanatory. It should be noted, however, that as in the burglary and criminal entry sections, the intent required does not necessitate a showing of an intent to commit a crime, but only of intent to engage in conduct that in fact constitutes a crime of the specified type.[65]

3. Jurisdiction

There is Federal jurisdiction over an offense described in this section only if the offense is committed within the special jurisdiction of the United States (e.g., a Federal enclave) as defined in section 203.

4. Grading

An offense under this section is a Class A misdemeanor, punishable by up to one year in prison. The punishment level is designed to reflect the inchoate nature of the offense, and is consistent with the grading of the similar offenses in the District of Columbia Code.[66]

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[64] See section 303(b)(1).
[65] See section 303(c)(1).
[66] See 22 D.C. Code 3601.

SECTION 1716. DEFINITIONS FOR SUBCHAPTER B

This section contains definitions for the subchapter on Burglary and Other Criminal Intrusion Offenses. These definitions are discussed in the context of the sections in which they appear.

SUBCHAPTER C.—ROBBERY, EXTORTION, AND BLACKMAIL

(Sections 1721–1724)

This subchapter defines offenses that are essentially the same as those under present Federal law. Robbery, potentially the most violent of the three, requires that the property be taken from the person or presence of another. Extortion is similar to robbery, but the property need not be "taken" from the person or presence of another. Blackmail is a less violent form of extortion, including threats other than subjecting a person to physical harm or property to physical damage.

The chief advantages achieved by this subchapter are: (1) elimination of the extensive overlap of existing statutes and a substantial reduction in the number of separate provisions in Federal law; (2) harmonization of the multiple and seemingly arbitrary standards of culpability and penalty levels that exist throughout the current statutes; (3) clarification of the offenses; and (4) the systematization of grading by treating these offenses without regard to other offenses, such as physically injuring other persons.[1]

SECTION 1721. ROBBERY

1. In General

At common law, robbery was the felonious taking of the goods or property of another of any value from his person or his presence, against his will, by violence or putting him in fear.[2] Absent statutory modification the constituent elements of the offense were: (1) a felonious taking (2) accompanied by an asportation of (3) personal property of value (4) from the person of another or from his presence (5) against his will (6) by violence or by putting him in fear (7) with the intent to deprive him permanently of the property.[3]

Section 1721 follows present Federal law in adopting the terminology of common law robbery and thus makes it a crime to take property from another by force and violence, or by threatening or placing another person in fear. The property need not belong to the person from whom it is taken. It is enough that the property is such that the actor is not privileged to infringe upon it without consent by an authorized possessor and that the property is taken by the prohibited means, i.e., force and violence, or by threatening or placing another in fear. If the taking is by threat or placing in fear, the fear need be only that any person, not necessarily the person from whom the property is taken, will imminently be subjected to bodily injury, unlike extortion where the threat may relate to the infliction of harm at some future time.

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[1] With respect to this latter aspect, many existing robbery or extortion statutes contain an enhanced penalty where serious bodily injury or death results. Under the bill, as reported, this conduct can be separately punished, as, for instance, homicide where death results from the act. See section 1601(e)(4).

[2] See *Collins* v. *McDonald*, 258 U.S. 416, 420 (1922); *United States* v. *Baker*, 24 Fed. Cas. No. 14501 (C.C.N.Y. 1861); *United States* v. *Jones*, 26 Fed. Cas. No. 15,494 (C.C. Pa. 1813).

[3] Wharton, *Criminal Law*, section 545 (1957).

2. Present Federal Law

The major Federal provisions covering robbery are contained in 18 U.S.C.2111-2114 and 1951.

18 U.S.C. 2111 applies within the special maritime and territorial jurisdiction of the United States and punishes by up to fifteen years in prison whoever, "by force and violence, or by intimidation, takes from the person or presence of another anything of value."

18 U.S.C. 2112 provides no definition of the term "rob" but simply provides that whoever "robs another of any kind or description of personal property belonging to the United States" may be imprisoned by up to fifteen years.[4]

Both of these enactments have been held to define the common law crime of robbery. It is clear that a taking by force and violence or by intimidation (i.e., threat) state alternative methods, so that it is not necessary to show both that force and violence were used and that the victim was placed in fear.[5]

18 U.S.C. 2113 is a complex statute covering various offenses against Federally insured banks, credit unions, and savings and loan associations. Section 2113(a) punishes by up to twenty years in prison whoever, "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or other thing of value belonging to, or in the care, custody, control, management, or possession" of one of the above institutions.[6]

Although worded in terms very similar to those of 18 U.S.C. 2111, this section differs from the common law concept of robbery by punishing an attempt to take property by force and violence or by intimidation.[7] In addition, the courts have held that in determining whether "intimidation" has occurred, actual fear of the victim need not be shown; rather, the test is whether the defendant's actions would have placed a reasonable man in fear of bodily harm.[8] This statute has also been held to vary from the common law crime of robbery in that it does not require a specific intent by the offender to take property that does not belong to him.[9] As under 18 U.S.C. 2112, it is clear that "force and violence" and "intimidation" state alternative ways in which the offense can be committed.[10]

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[4] It is not necessary to prove knowledge that the money belongs to the United States. *United States* v. *Roundtree,* 527 F.2d 16 (8th Cir. 1975), cert. denied, 424 U.S. 923 (1976).

[5] See *Norris* v. *United States,* 152 F. 2d 808, 809 (5th Cir.), cert. denied. 328 U.S. 850 (1946).

[6] The penalty is increased if, during the offense, the actor assaults or puts in jeopardy the life of any person by means of a dangerous weapon, or if he kidnaps or kills any person during the commission of the offense. See section 2113 (d) and (e).

[7] Compare *United States* v. *Rivera,* 521 F.2d 125 (2d Cir. 1975) (no crime of attempted robbery, absent proof of asportation element, under 18 U.S.C. 2112).

[8] *United States* v. *Alsop,* 479 F. 2d 65, 66–67 (9th Cir. 1973); see also *United States* v. *Jacquillon,* 469 F. 2d 380 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973).

[9] See *United States* v. *Porter,* 431 F. 2d 9–10 (9th Cir. 1970), cert. denied, 400 U.S. 960 (1970): *United States* v. *De Leo,* 422 F. 2d 487, 490–491 (1st Cir.), cert. denied, 397 U.S. 1037 (1970).

18 U.S.C. 2114 punishes by up to ten years in prison whoever, *inter alia,* robs any person having lawful custody of mail matter, money, or other property of the United States of such mail matter, money, or property. The penalty increases if in the course of the robbery the robber wounds or places the life of the custodian in jeopardy by means of a dangerous weapon.

18 U.S.C. 1951, the so-called Hobbs Act, prohibits, *inter alia,* whoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section. The term "robbery" is defined to mean the "unlawful taking or obtaining of personal property from the person or presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining." [11] The penalty is up to twenty years' imprisonment. This section intermingles the concepts of robbery and extortion by defining robbery to include future threats of force. It also expands the common law notion of robbery by its inclusion of threats or injury to property as well as of bodily harm. With these exceptions, however, the statute has been said to carry forward the common law robbery offense, including a specific intent to steal and permanently keep the property of another.[12]

In addition to these statutes, robbery is also proscribed in some little used sections of title 18.

18 U.S.C. 1652 punishes by imprisonment for life and defines as a "pirate" any citizen of the United States who commits, *inter alia,* robbery against the United States or a citizen of the United States on the high seas under color of any commission from any foreign prince or state.

18 U.S.C. 1661 also punishes by imprisonment for life and defines as a pirate whoever, being engaged in a piratical cruise or enterprise or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore. The meaning of "robbery" under this section is to be ascertained from the common law.[13]

18 U.S.C. 1153, the so-called Major Crimes Act, punishes fourteen felonies committed by Indians in Indian country, one of which is "robbery." The definition of and punishment for the offense is the same as that under 18 U.S.C. 2111.[14]

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[10] *United States* v. *Jacquillon, supra* note 8.

[11] The definition comes from New York law. See *United States* v. *Nedley,* 255 F. 2d 350, 355–357 (3d Cir. 1958).

[12] *United States* v. *Nedley, supra* note 11.

[13] See *United States* v. *Jones, supra* note 2.

[14] 18 U.S.C. 1991 penalizes entry upon a train with intent to commit robbery. This statute is carried forward in section 1712 (Criminal Entry). 18 U.S.C. 2384 punishes a conspiracy "by force to seize, take, or possess any property of the United States contrary to the authority thereof". This offense is carried forward under section 1002 (Criminal Conspiracy) in conjunction with this section.

3. *The Offense*

A. Elements

Subsection (a) provides that a person commits an offense "if he takes property of another from the person or presence of another by force and violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury."

This definition of the offense closely tracks the common law concept of robbery. In contrast, the National Commission proposed to define robbery as the infliction or attempted infliction of bodily injury upon another, or threatening or menacing another with imminent bodily injury "in the course of a theft," which was in turn defined to include the immediate flight from the commission of a theft.[15] Under this version a thief who knocks down a policeman in an effort to flee the scene would be guilty of robbery. In the view of the Committee, this takes the conduct covered too far afield from the main concern of robbery, *viz.*, taking property from the person or presence of another by violence or threat of imminent bodily injury. The National Commission, citing Model Penal Code comments, stated that extension of the robbery offense to situations where the violence does not accompany the act of theft but occurs during the escape from the scene of the theft is justified on the theory that the thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it in the theft if necessary.[16] However, this seems of dubious validity, for what a person may do in the panic of attempting to avoid imminent capture does not necessarily indicate what he would do in an effort to take another's property.

Section 1721 requires, as an element of the offense, the use of "force *and* violence" or the act of threatening or placing another person in fear. The traditional requirement of a violent (as opposed to merely forceful) taking is designed to exclude those situations such as pickpocketing or removing property from a drunk or unconscious person, which do not pose special dangers of violence and, thus, are more appropriately dealt with as theft.[17]

The limitations of imminence and bodily injury [18] (as opposed to injury to property) are intended to distinguish this offense from extortion, defined in the following section.

The Committee has defined the offense so that the threat or placing another in fear is not confined to imminent bodily injury of the victim but may relate to the subjection of "any person" to such injury. Current Federal statutes do not specify whether threats to injure another may constitute intimidation of the victim of the robbery.[19] However, the Committee, as did the National Commission, deems that such coverage is proper under the rationale of the robbery offense.

The concept of a threat is intended, as under current law, to include nonverbal and implicit threats, such as the silent display of a weapon, surrounding the victim with hostile persons, or brandishing a fist. Even a menacing tone of voice accompanied by a demand for property can be sufficient to prove a threat of the use of violence for the purpose of overcoming resistance to relinquishment of the property.[20]

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[15] See Final Report, § 1732.

[16] See Working Papers, p. 906.

[17] See *id.* at 905.

[18] The term "bodily injury" is defined in section 111.

[19] See, e.g., 18 U.S.C. 2111; but compare 18 U.S.C. 1951.

The Committee also endorses the line of cases under 18 U.S.C. 2113 to the effect that a threat or intimidation need not actually place the victim in fear. If the case were otherwise, robbery by threat to a fearless bank teller, for example, could never be committed. Rather, the Committee believes that the proper test is whether the threat was such as to have placed a reasonable person in the circumstances in fear that any person would be subjected to imminent bodily injury.

B. Culpability

The conduct in this section is taking property from the person or presence of another by force and violence or by threatening or placing another person in fear that any person will be subjected to bodily injury. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his conduct.[21]

The element that the property is "property of another" is an existing circumstance. Since no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the property was "property of another."[22] That term is defined in section 111 as "property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property."[23] This definition makes it clear that it is not a valid defense to a charge of robbery that the person charged also had or thought he had an interest in the property taken. Thus, the common law exceptions to the offense—that a creditor taking money from his debtor to satisfy a debt or a person retaking his gambling losses is not guilty of robbery[24]—are rejected. On the other hand, a person would not be guilty of robbery if he used violence to recover his own property from the thief who took it, since the thief could not acquire a legitimate interest in the property *vis-a-vis* the true owner.

4. Jurisdiction

Subsection (c) lists a variety of circumstances under which there is Federal jurisdiction over an offense described in this section.

The first exists if the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 and includes, in essence, Federal enclaves, various vessels on the high seas, and certain aircraft while in flight. The special jurisdiction in this proposed Code is very similar to the special maritime and territorial jurisdiction in existing law, and this provision thus carries forward the basic jurisdictional scope of 18 U.S.C. 2111.

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[20] See Working Papers, p. 905.

[21] See sections 303(b)(1) and 302(b)(1).

[22] See sections 303(b)(2) and 302(c)(1).

[23] The terms "property" and "property of another" are explained more extensively in connection with the theft offense (section 1731).

[24] See 2 Wharton, *supra* note 3, sections 550, 551.

The second circumstance occurs if the property is owned by, or is under the care, custody, or control of, the United States, or is being produced, manufactured, constructed, or stored for the United States, or is subject to a security interest held by the United States. This continues the general jurisdictional reach of 18 U.S.C. 2112 but refines the concept in that statute of property "belonging to the United States."

The third circumstance exists when the property is owned by, or is under the care, custody, or control of, a national credit institution.[25] This carries forward the jurisdictional purview of 18 U.S.C. 2113. However, the Committee disapproves the extensive interpretation given to the term "care, custody, and control" in *United States* v. *Dix*,[26] in which a majority held that a bank still had care, custody, or control over property in a bank box removed by the owner from the bank's vault and taken to a private room for his inspection. In such a situation, the interference with any Federal interest is wholly attenuated so far as this jurisdictional branch is concerned, and the Committee considers that the offense should be prosecutable by State authorities.

The fourth circumstance occurs if the property is mail. This perpetuates the jurisdictional scope of 18 U.S.C. 2114.[27]

The fifth circumstance exists when the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of any article or commodity in interstate or foreign commerce. This codifies the existing purview of 18 U.S.C. 1951, as recently determined unanimously by the Supreme Court in *Culbert.*[28] Although the jurisdiction conferred is very broad, it has not been abused and is necessary to permit the Federal Government the opportunity to initiate a robbery prosecution in circumstances in which there is a clear Federal interest. In fact, the number of Federal Hobbs Act robbery prosecutions is small as a result of a Department of Justice policy that the act's robbery provisions are to be utilized only in "cases which involve organized criminal activity or which are part of some wideranging scheme".[29] The question has been raised whether, in light of this Executive policy of restraint in the exercise of jurisdiction, the Congress should limit the affecting commerce basis of Federal robbery jurisdiction to robberies that involve "racketeering". The Committee believes that such a restriction would have adverse consequences and accordingly has rejected the suggestion. As one recent commentator has observed: [30]

> Such a change would be inadvisable because if a statutory limitation, rather than prosecutive discretion, is used

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[25] The term "national credit institution" is defined in section 111.

[26] 491 F. 2d 225 (9th Cir. 1974).

[27] Although 18 U.S.C. 2114 also purports to cover robbery of "money or other property of the United States" in addition to mail matter, it has been established that the statute is limited to robberies having a postal nexus. *United States* v. *Reid*, 517 F.2d 953, 956–958 (2d Cir. 1975) and authorities therein cited

[28] *United States* v. *Culbert*, 435 U.S. 371 (1978).

[29] Title 9, United States Attorneys' Manual, § 131.110.

[30] R. Pauley, *An Analysis of Some Aspects of Jurisdiction under S. 1437, the Proposed Federal Criminal Code*. G. Wash. L. Rev. (1979) reprinted in Hearings, Part XV, pp. 11072–11089.

> to effectuate the desired limitation, the Government would need to prove the presence of "racketeering" activity as an element of the offense. As the Supreme Court noted in *Culbert,* this element might pose constitutional difficulties because of the vagueness of the concept of racketeering.
>
> Even if Congress could devise a meaningful and constitutional definition of racketeering, the addition of this element of proof would significantly impede successful prosecution, thus possibly causing some defendants to be acquitted who are currently convicted. Although Congress confronts this type of choice frequently in defining the boundaries of Federal offenses, the generally satisfactory experience with the Hobbs Act suggests that Congress has acted wisely in drafting the statute broadly and leaving to the Executive Branch broad flexibility and discretion in deciding which violations to prosecute.

The sixth circumstance occurs if the property is moving in interstate or foreign commerce, or constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system, or a storage facility of such a system that extends across a State or United States boundary. This represents a slight extension of Federal robbery jurisdiction to situations where there is currently Federal jurisdiction over theft. The Committee deems this to be a logical extension in an area where the Federal interest is readily apparent.

The seventh circumstance exists if the offense is committed against a foreign dignitary, or a member of his immediate family, who is in the United States, a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with such visit, an official guest of the United States, or an internationally protected person. This represents an extension of present law, but one that the Committee deems justified in the interests of international relations. Significantly, Congress in 1976 enacted a statute, 18 U.S.C. 878(b), punishing by up to twenty years in prison whoever, *inter alia,* "makes any extortionate demand" relating to a violation of 18 U.S.C. 112, 1116, or 1201 (punishing assaults, murders, and kidnappings of essentially the same categories of foreigners described in this paragraph). In the Committee's view, it would be anomalous to continue such coverage with respect to extortion (as has been done in the following section), while not extending it to the related and equally or more serious offense of robbery.

The final circumstance is if the property is a controlled substance consisting of a narcotic, amphetamine, or barbituate, that is listed in Schedules I through IV established by section 202 of the Controlled Substances Act (21 U.S.C. 812) and that has a value in excess of $500, and the offense consists of robbery of a pharmacy or of a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822). A variant of this jurisdictional base was added during the Senate floor consideration of S. 1437 in the Ninety-Fifth Congress and was derived from a bill (S. 509) that had been introduced under the principal sponsorship of Senator Church. Although the affecting commerce branch would ordinarily encompass crimes involving the robbery of drugs worth more than $500 from a pharmacy or person registered with the Drug Enforcement Administration, the Committee believes the specific base is useful as a means of emphasizing the particular Federal interest that appropriately attaches to such crimes, especially when they appear to be beyond the capability of local authorities to successfully investigate and prosecute.

5. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison). This is similar to the penalties provided under 18 U.S.C. 2111 and 2112. Although less than the penalty under 18 U.S.C. 2113, the provisions of the proposed Code relating to the use of a dangerous weapon in the course of an offense (section 1823) and affording ancillary jurisdiction over violent felonies (e.g., murder (section 1601) and maiming (section 1611)) will permit aggregate penalties to be imposed in appropriate circumstances.

SECTION 1722. EXTORTION

1. In General

At common law, if a public officer under the color of his authority took money or property to which neither he nor his office was entitled, he was guilty of extortion.[31] In many jurisdictions the crime of extortion has been expanded to include the obtaining of any money, property, or thing of value by any person, by means of force, fear, or threats. In some jurisdictions the offense is described as "blackmail" when committed by a private person.[32]

Section 1722 adopts the modern expansive definition and does not limit extortion to Federal public officials. The section parallels the robbery statute (section 1721) by making it a crime to obtain the property of another by threatening or placing another in fear that any person will be subjected to bodily injury or kidnapping or that property will be damaged. While it overlaps section 1721 to some extent, the extortion offense also reaches clearly distinguishable conduct, since, unlike the robbery offense, the property need not be taken from the person's presence nor must the taking involve violence, the threat need not be of imminent harm, and the threat may involve either damage to property or bodily injury. In addition, the section continues the common law coverage of extortion by public officials, by making it an offense (as under the Hobbs Act today) to obtain property of another "under color of official right".

2. Present Federal Law

A. The Hobbs Act

Perhaps the single most important extortion provision in current Federal law is the Hobbs Act, 18 U.S.C. 1951. The statute penalizes by up to twenty years in prison whoever "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The term "extortion" is defined to mean the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

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[31] 3 Wharton, *supra* note 3, section 1392.

[32] *Ibid.*

The statute has in the main been construed broadly. Thus, the Supreme Court has held that, in using the language "in any way or degree . . . affects commerce," the Hobbs Act manifested a "purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." [33] Similarly the courts held that the term "fear" encompasses not only fear of violence but also fear of economic harm to the victim's property; [34] and the term "property" has been interpreted expansively to include a threat of interference with a potential right to solicit business.[35] Likewise, it is settled that one need receive no personal benefit from the conduct to be guilty under this section (for example, a union officer may be guilty if he uses extortionate means to secure payments to union members for superfluous services).[36] The Hobbs Act has also been held applicable to a bank extortion offense, notwithstanding that the conduct was also punishable under the bank robbery statute, 18 U.S.C. 2113.[37]

With respect to the branch of the statute defining extortion as the "obtaining of property from another, with his consent, . . . under color of official right," the courts have held that this proscribes a distinct crime, applicable only to public officials or potential public officials (i.e., candidates), requiring no proof of the wrongful use of actual or threatened force, violence, or fear.[38] In recent years, this branch of the statute has been increasingly utilized, with considerable success, in rooting out and punishing instances of official corruption.[39] However, as a practical matter, where a public official receives property to which neither he nor his office is entitled [40] from persons who pay, e.g., because of an understanding or custom that every person doing business with the city has to pay, it can usually be shown that the payment was made unwillingly because of an implicit threat of force or fear. Where threats *are* used by a public official to extort money, it does not matter that the official action threatened was action that the official could legally take or even was duty-bound to take; the threat itself was wrongful and constituted extortion, since it deprived the victim of the right to an impartial determination of the issue on the merits.[41]

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[33] *Strione* v. *United States*. 361 U.S. 212, 215 (1960); see also *United States* v. *Spagnolo*, 546 F.2d 1117 (4th Cir. 1976); *United States* v. *Pranno*, 385 F.2d 387 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968).

[34] The fear, however, must be reasonable and not the product of a particularly timid heart. See *Carbo* v. *United States*, 314 F. 2d 718, 740–741 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964); *United States* v. *Critchley*, 353 2d 358 (3d Cir. 1965).

[35] See, e.g., *United States* v. *Tropiano*, 418 F. 2d 1069, 1075–1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *United States* v. *Pranno*, *supra* note 33.

[36] See *United States* v. *Green*. 350 U.S. 415 (1956): *United States* v. *Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972).

[37] *United States* v. *Golay*, 560 F.2d (8th Cir. 1977); *contra*, *United States* v. *Beck*, 511 F.2d 997 (6th Cir 1975). Cf. *United States* v. *Culbert*, *supra* note 28 at 372 n. 1.

[38] See *United States* v. *Kenny*, 462 F.2d 1205. 1229 (2d Cir. 1972), cert. denied, 409 U.S. 914 (1973); *United States* v. *Meyers*, 529 F.2d 1033 (7th Cir. 1976).

[39] See e.g., *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States* v. *Crowley*, 504 F.2d 992 (7th Cir. 1974); *United States* v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (*en banc*), cert. denied 423 U.S. 837 (1975); *United States* v. *Mazzei*, 521 F.2d 639 (3rd Cir.) (*en banc*), cert. denied. 423 U.S. 1014 (1975); *United States* v. *Hall*, 536 F.2d 313 (10th Cir.), cert denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir.), cert. denied, 428 U.S. 819 (1976); *United States* v. *Price*, 507 F.2d 1349 (4th Cir. 1974).

[40] This has been held to be the common law definition of the offense, which 18 U.S.C. 1951 adopts. See *United States* v. *Kenny*, *supra* note 38, at 1229; *United States* v. *Nardello*, 393 U.S. 286, 289 (1969).

There is one area, however, in which the courts have narrowly construed the reach of the Hobbs Act. The Supreme Court has held that it does not proscribe extortionate activities by employees or union officials in the course of a collective bargaining dispute where the objective of the extortion is to secure a benefit that legitimately could have been attained through collective bargaining.[42]

Until recently no case had been prosecuted involving activities by unions, in the course of a dispute with an employer, designed to obtain property which could legitimately have been sought through the collective bargaining mechanism (e.g., higher wages for desired work). *United States* v. *Enmons* [43] was such a case. It involved acts of violence (including shooting weapons at transformers and blowing up a transformer station) committed by union officers in the course of a labor dispute with the company as to the terms of a new contract for genuine and desired services. The Supreme Court, dividing 5 to 4, held that the Hobbs Act did not reach such activity, on the ground that, since the objectives of the labor activity were legitimate (albeit the means to accomplish them were not), the extortion did not constitute "wrongful" use of actual or threatened force, violence, or fear. This holding, which was based on the majority's reading of the legislative history concerning the extent of the Act's intended application to unions (a reading strongly disputed by the minority),[44] is apparently to be read as confined solely to the employer-employee context.[45]

The Committee has concluded that for the purposes of this bill the *Enmons* decision should not be modified. On the other hand, the Committee believes that the thrust of an extortion statute should be to punish violent extortionate means to obtain the property of another regardless of the legality of the ends sought and has carried forward current law to that effect in situations not involving a labor dispute.

B. Other Federal Extortion Statutes

In addition to the Hobbs Act, Federal law contains a number of other extortion provisions which would be replaced in whole or in part by proposed section 1722.

18 U.S.C. 665 punishes by up to one year in prison whoever, by threat of procuring dismissal of a person from employment or of refusal to employ or renew a contract of employment in connection with a grant or contract of assistance under the Comprehensive Employment and Training Act, induces any person to give up any money or thing of value to any person.

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[41] See *Carbo* v. *United States, supra* note 34; *United States* v. *Howe,* 353 F. Supp. 419 424 (W.D. Mo. 1973).

[42] See *United States* v. *Enmons,* 410 U.S. 396 (1973).

[43] *Supra* note 42.

[44] Indeed one member of the majority in *Enmons* expressly indicated his belief that the conduct prosecuted therein "deserve(d) to be dignified as (a) federal crime" and noted that Congress had the power to achieve that result. See 410 U.S., at 412 (Blackmun, J. concurring).

[45] Compare *United States* v. *Pignatelli,* 125 F.2d 643 (2d Cir. 1942), disallowing a "claim of right" defense for extortion threats transmitted through the mails.

18 U.S.C. 872 punishes by up to three years in prison extortion by any officer or employee of the United States, or person representing himself to be such, acting under color of office.[46] The concept of extortion in this statute has been held to involve the obtaining of anything by illegal compulsion and to imply unwilling payment.[47] The statute has been strictly construed with respect to the classes of persons covered, and has been held, for example, not to include a special master appointed in a single case.[48]

A similar but more specific statute, 26 U.S.C. 7214(a), punishes by up to five years in prison any officer or employee of the United States acting in connection with any revenue law of the United States "who is guilty of any extortion or willful oppression under color of law."

18 U.S.C. 874 punishes by up to five years in prison the use of force, intimidation, threats of procuring dismissal from employment, or any other manner of inducement to obtain kickbacks from employees engaged in public works financed in whole or in part by loans or grants from the United States. This statute was designed to insure that workers on Federal projects receive the full wages to which they are entitled from their employers. It is clearly broader than ordinary extortion in reaching "any other manner" or inducement to obtain part of the employee's compensation. The statute has been held to reach a foreman with authority to hire and discharge, and even one with the power only to recommend discharge.[49] It also reaches union officials [50] but was held by the Supreme Court not to reach the legitimate conduct of union officials threatening to procure the discharge of any workers failing to make required weekly payments to the union until their union initiation fees were paid in accordance with the union's closed shop agreement with the employer.[51]

A similar statute of more recent vintage is 42 U.S.C. 7203(b), which is designed to protect beneficiaries of the Economic Opportunity Act of 1964 from extortion in relation to grants or contracts of assistance thereunder. That section makes it a misdemeanor punishable by up to one year in prison for whoever "by threat of procuring dismissal of any person from employment or of refusal to employ or . . . renew a contract or employment in connection with a grant or contract of assistance under this chapter, induces any person to give up any money or thing of any value to any person."

18 U.S.C. 875(a) punishes by up to twenty years in prison whoever transmits in interstate or foreign commerce any communication containing a demand or request for a ransom or reward for the release of any kidnapped person.

18 U.S.C. 876 and 877 make it a crime to use the domestic or foreign mails to commit the offenses prohibited by 18 U.S.C. 875(a) and (b). The penalty prescribed is identical to that under those provisions.

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[46] The penalty declines to a maximum of one year if the value of the property extorted is less than $100.

[47] See *Daniels* v. *United States,* 17 F.2d 339 (9th Cir.), cert. denied, 274 U.S. 744 (1927); cf. *United States* v. *Miller,* 340 F.2d 421 (4th Cir. 1965).

[48] See *United States ex rel. Lotsch* v. *Kelly,* 86 F.2d 613 (2d Cir. 1936).

[49] See *United States* v. *Laudani,* 320 U.S. 543 (1944); *United States* v. *Price,* 224 F.2d 604 (6th Cir.), cert. denied, 350 U.S. 876 (1955).

[50] See *United States* v. *Alsun,* 219 F.2d 72 (5th Cir.), cert. denied, 348 U.S. 982 (1955).

[51] *United States* v. *Carbone,* 327 U.S. 633 (1946).

18 U.S.C. 878, enacted in 1976, punishes by up to twenty years in prison whoever "makes any extortionate demand" in connection with a violation of 18 U.S.C. 112, 1116, or 1201 (penalizing assaults, murders, and kidnapings, of foreign officials, official guests, and internationally protected persons.

18 U.S.C. 894, enacted in 1970 as part of chapter 42 of title 18 punishing extortionate credit transactions, provides that whoever knowingly participates in any way, or conspires to do so, in the use of extortionate means to collect or attempt to collect any extension of credit,[52] or to punish any person for the nonrepayment thereof, is subject to imprisonment for up to twenty years. The term "extortionate means" is defined in 18 U.S.C. 891 as any means which "involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of another." Section 894 also contains an evidentiary provision permitting the court, in certain circumstances, to receive evidence "tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempted collection," "for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat."

This statute was sustained by the Supreme Court as within the powers of Congress under the Commerce Clause, notwithstanding the statute's elimination of the need for proof in an individual case that interstate commerce was affected by the transaction, on the ground that Congress could rationally conclude—as it did in special findings accompanying the legislation—that extortionate credit transactions generate a substantial part of the income of organized crime, the activities of which in turn have an adverse effect on commerce.[53]

Notwithstanding its focus on organized crime, the statute is not limited to extortionate collections of credit by an organized criminal element and proof of a connection of the offender with organized crime is not required.[54]

Section 1722 carries forward only that part of 18 U.S.C. 894 which proscribes the use of extortionate means to collect an extension of credit; [55] the use of extortionate means to punish a person for the nonrepayment of an extension of credit is dealt with in proposed section 1804 (Loansharking).

18 U.S.C. 1952, the Travel Act, is a type of limited Assimilative Crimes Act, punishing interstate travel or the use of interstate facilities to engage in various unlawful activities defined by State law. Specifically, 18 U.S.C. 1952 punishes by up to five years in prison whoever travels in interstate or foreign commerce or uses any facility thereof (including the mail), with intent to (1) distribute the proceeds of any unlawful activity, (2) commit any crime of

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[52] This has been interpreted broadly to reach, e.g., a gambling debt and is not limited to loansharking activities. *United States* v. *Schaffer,* 539 F.2d 653 (8th Cir. 1976).

[53] See *Perez* v. *United States,* 402 U.S. 146 (1971); section 201 of P.L. No. 70-321, 82 Stat. 159 (1968).

[54] See *United States* v. *Perez,* 426 F.2d 1073, 1080-1081 (2d Cir. 1970), aff'd. 402 U.S. 146 (1971); *United States* v. *Andrino,* 501 F.2d 1373, 1377 (9th Cir. 1974).

[55] Section 1723, rather than this section, would apply where the threat was to injure someone in his reputation.

violence to further any unlawful activity, or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, etc., of any unlawful activity, and who thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), or (3). The term "unlawful activity" is defined to include, among other things, "extortion . . . in violation of the laws of the State in which committed or of the United States." The courts have interpreted the reference to State law as generic and for definitional purposes only, so that State offenses proscribing extortionate conduct are covered whether denominated as extortion, or otherwise, such as "blackmail" or "theft." [56] In addition, it matters not that at the time of the Federal prosecution, the conduct is no longer prosecutable in the State because of the running of the State statute of limitations.[57]

The major problem with this statute is that State laws dealing with extortion vary enormously, making for a singular lack of uniformity in Federal enforcement in terms of the conduct proscribed. Not deeming this an appropriate area in which the Federal role should be relegated to one of reliance on State laws, the Committee, in this section and section 1723, has rejected the Travel Act's approach, opting instead for provisions containing a uniform Federal definition of extortion and blackmail.

3. The Offense

A. Elements

Subsection (a)(1) of section 1722 provides that a person commits an offense if he obtains property of another by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged.

Unlike the prior section proscribing robbery, this section contains no requirement that the property be taken from the person or presence of another or that the fear involve "imminent" subjection of another to bodily injury. In addition, threats or fear directed at damage to property are included here,[58] consistent with existing Federal extortion statutes, whereas the robbery section is limited to threats or fear of bodily harm. The express use of the terms "actual . . . force, (or) violence" to obtain property (included in the Hobbs Act definition of extortion) as an extortionate means, has likewise been deleted from this section in order to more clearly demarcate the conceptual boundaries between, and to reduce the overlap with, the robbery section (section 1721), which is applicable when force and violence are used, and theft (section 1731), which punishes the obtaining of another's property by a variety of means, including the application of force. The Committee further considers that, if violence or force is used in an extortionate context, it will always be possible to show that such conduct carried an implicit or explicit threat that a person would be subjected, in the future, to bodily injury or that property would be damaged unless the extortionate demands are met. Thus, the actual use of force or violence designed to coerce another person to part with his property will, as a practical matter, still be covered under this section. That portion of the definition of extortion in the Hobbs Act, providing that the property be obtained from the victim "with his consent," has been eliminated as meaningless. Since it is clear that the property is surrendered against the will of the victim, it seems pointless to still refer to such act as a "consent" induced by, *inter alia*, actual or threatened force, violence, or fear.

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[56] See *United States* v. *Nardello*, 393 U.S. 286 (1969); *United States* v. *Karigiannis*, 430 F.2d 148 (7th Cir.), cert. denied, 400 U.S. 904 (1970).

[57] See *United States* v. *Cerone*, 452 F.2d 247 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972).

[58] The concept of damaging property is meant to reach acts of physical damage to property such as are punishable under subchapter A of this chapter. The broader scope of the Hobbs Act involving economic loss or injury are brought forward in the next section as blackmail.

The term "property of another" is defined in section 111 to mean property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property. This definition has ramifications with respect to the so-called "claim of right" defense in which the actor alleges that he was merely seeking to repossess his own property.[59] The term "property" is also given an expansive definition in section 111, in accordance with the broad construction placed upon the same concept under the Hobbs Act.[60]

With respect to the element of placing in fear, the Committee intends that existing law be continued, permitting evidence of the victim's state of mind as proof of his fear and the reasonableness thereof.[61] Moreover, as to the threat aspect of the offense, subsection (b) of section 1724 expressly authorizes the introduction in a prosecution under this section (as well as under certain parts of section 1723(a)) of evidence concerning the reputation of the defendant in any community of which the victim was a member at the time of the offense charged, "for the purpose of showing that words or other methods of communication employed as a means of obtaining the property in fact carried a threat." This provision, which is derived almost verbatim from 18 U.S.C. 894, also carries forward current practice under the Hobbs Act.[62]

Subsection (b) of section 1724 is particularly significant, since section 1722, like the Hobbs Act and 18 U.S.C. 894 can be predicted to have extensive application to organized crime and other similar extortion situations where, not infrequently, fear is induced although few if any words are spoken. For example, if a known "hit" man is used to secure money or property, express threats may be entirely unnecessary, the reputation of the "hit" man (with the implicit threat carried by his presence) being sufficient to achieve the desired effect.[63]

The Committee has chosen in subsection (a)(2) to continue the present Hobbs Act offense of extortion by public servants under color of official right, without regard to proof of any actual or threatened force, violence, or fear. As noted earlier, this offense has proven in recent years to be of significant utility in ferreting out and punishing official corruption.[64] Its retention, therefore, seems eminently justified. Although no element of coercion is expressly included in the offense, the coercion factor is implicit in the misuse of public office,[65] which normally gives rise to an implicit threat (e.g. resulting from longstanding corrupt custom) that economic or other harm will result if a payment to the corrupt official is not made. As under present law, it is not intended to be necessary for conviction under this offense that the defendant actually possessed the power to perform the acts desired by the victim.[66] The element that the obtaining of property occur through a misuse of office, that is, wrongfully, is (as under the Hobbs Act) inherent in the crime;[67] obviously, a proper use of office to obtain property under color of official right would entitle the defendant to invoke the defense of exercise of public authority, carried forward in section 501.

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[59] See the discussion of this defense, *infra*, in connection with culpability.

[60] See *United States* v. *Tropiano*, *supra* note 35 at 1075–1076.

[61] See e.g., *United States* v. *Sirone*, 311 F.2d 277, 280 (3d Cir. 1962), cert. denied, 372 U.S. 935 (1963): *Nick* v. *United States*, 122 F.2d 660. 671 (8th Cir. 1940), cert. denied, 314 U.S. 687 (1941); *Carbo* v. *United States*, *supra* note 34 at 727; *United States* v. *Kennedy*, 291 F.2d 457 (2d Cir. 1961).

[62] See, e.g., *United States* v. *Tropiano*, *supra* note 35 at 1081, and cases cited therein; *United States* v. *Curcio*, 310 F. Supp. 351 (D. Conn. 1970). As under section 1721, the Committee intends that the threat branch of this statute not require proof that the victim was actually placed in fear.

[63] Contrast the National Commission's proposal, which the Committee rejects, to define threat as "expressed purpose, however communicated." See Final Report, § 1741(k).

B. Culpability

The conduct in section 1722 is obtaining property by force or by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged, or obtaining property under color of official right. Under the rules of construction provided in section 303(b)(1), the requisite culpability level is "knowing," thus requiring proof that the offender was aware of the nature of his conduct.[68]

The element that the property obtained is "property of another" is an existing circumstance. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[69]

The Committee believes that the overall culpability requirements under this section are sufficient to deal appropriately with the situations involving the so-called "claim of right" defense, which the National Commission proposed to define for all forms of theft, including extortion. Under the Commission's suggested definition, it would be a defense to a prosecution for extortion that the actor "honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him." The Commission reasoned that if A and B are involved in an automobile accident and A threatens to press criminal charges against B should B refuse to pay for the damages to A's car. A, although technically guilty of theft if he obtains the payment (blackmail as defined in the instant bill), should not be subject to a successful prosecution because "he was acting under a claim of right to the property and he believed that he was entitled to act as he did in order to get it.[70] While not disagreeing with the particular result, the Committee concluded that no such defense should be available where the criminal conduct is extortion, as here defined (i.e., threatening or placing another person in fear that another person will be subjected to bodily injury or kidnapping or that any property will be damaged).

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[64] See, strongly arguing for the preservation of this defense as it is currently embodied in the Code, a letter of February 19, 1976, from the then Assistant Attorney General Richard Thornburgh to Senator John L. McClellan, reprinted in Hearings, pp. 9240–9241.

[65] See, e.g., *United States* v. *Hathaway, supra* note 39 at 393.

[66] See *United States* v. *Hall, supra* note 39.

[67] See, e.g., *United States* v. *Mazzei, supra* note 39 at 645, where the court stated that a "violation of (18 U.S.C. 1951) may be made out by showing that a public official through the *wrongful* use of office obtains property not due him or his office" (emphasis supplied).

[68] See section 302(b)(1).

[69] See sections 303(b)(2) and 302(c)(1).

A defense based on a similar claim or belief is afforded, to the extent deemed appropriate, by the culpability requirements of the offense. Thus, if the defendant is unaware of the risk that the property he obtains is that of another and believes it is his, he has a defense to extortion—even though his belief was incorrect—because he lacks the requisite recklessness. Where, however, the defendant is aware of a substantial risk that the property may be that of another (in the sense that the other has an interest which the defendant is not privileged to infringe without consent) yet disregards that risk, then he would, and should, be guilty for threatening bodily injury or property damage in order to obtain the property. To afford a "claim of right" defense in this latter instance (even if the defendant honestly believed the property was his alone) would be unjustified and would encourage individuals to forego legitimate means for pressing contested property or money claims in favor of more immediately effective illegitimate means.

5. Jurisdiction

Subsection (c) of section 1722 provides Federal jurisdiction over an offense described in this section in a variety of circumstances.

The first such circumstance exists if a circumstance set forth in subsection 1721(c)(1), (c)(2), (c)(3), (c)(4), (c)(6), or (c)(7) (defining all but two of the jurisdictional bases for robbery) exists or has occurred. These bases are discussed in relation to section 1721, and that discussion is applicable here. For the most part, the bases referred to carry forward the scope of current laws punishing extortion. However, incorporation here of the enumerated jurisdictional bases applicable to robbery is designed also to eliminate present gaps in jurisdictional coverage over extortion which the Committee regards as irrational. For example, although existing law contains an elaborate statutory scheme applicable to the robbery of Federally insured banks and other financial institutions, there is no corresponding prohibition of extortion directed at such institutions. Because of the increased incidence of extortion offenses, which often cannot currently be satisfactorily prosecuted,[71] and the Committee's inability to perceive a reason for retaining this potential hiatus in Federal jurisdiction, this subsection proposes to extend Federal cognizance over extortion offenses to instances where the property obtained is that of a national credit institution, or is in its care, custody, or control. Similarly, there seems no reason not to extend extortion jurisdiction to Federal enclaves (where jurisdiction for robbery offenses presently exists), rather than rely on the Assimilative Crimes Act concept to incorporate the disparate extortion provisions of State law.

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[70] See Working Papers, p. 943. It should be noted that even for blackmail of the nonviolent type, the "claim of right" defense departs from present Federal law. See *United States* v. *Pignatelli, supra* note 45.

[71] In such cases the robbery provisions of 18 U.S.C. 2113(a) are often not applicable since the extortionist may not take the money or property directly from any "person." See *United States* v. *Culbert, supra* note 28: cf. *United States* v. *Marx,* 485 F.2d 1179 (8th Cir. 1973), cert. denied, 416 U.S. 986 (1974). Moreover the larceny provision of 18 U.S.C. 2113(b) is of limited value since, after directing that money be left at a designated drop some distance from the bank, the extortionist may not pick up the money. Likewise, many of these offenses are not subject to prosecution under the limited Federal extortion statutes (18 U.S.C. 875 and 876). As a consequence, the Hobbs Act, 18 U.S.C. 1951, has often been relied upon in such cases, albeit with mixed results. See *United States* v. *Golay, supra* note 37, but see *United States* v. *Culbert, supra* note 28; *United States* v. *Beck, supra* note 37. Under proposed section 1722(c)(1), the jurisdictional base that the money or property is owned by or under the care, custody, or control of the institution will be considerably easier to establish than the "affecting commerce" requirement of the Hobbs Act.

The second jurisdictional base exists if the offense is under subsection (a)(1), the property is obtained by wrongful use of actual or threatened force, violence, or fear, and the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of any article or commodity in interstate or foreign commerce. This provision is intended to carry forward without change the current scope of Federal jurisdiction over extortion under the "use of . . . force, violence, or fear" branch of the Hobbs Act, 18 U.S.C. 1951.

The third jurisdictional base carries forward existing Federal jurisdiction contained in the "under color of official right" branch of the Hobbs Act. It provides that Federal jurisdiction over extortion exists if the offense is committed under subsection (a)(2) and in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of any article or commodity in interstate or foreign commerce.

The fourth predicate of Federal jurisdiction exists if the offense constitutes a violation of the extortion or blackmail laws of the United States and (A) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense, or (B) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense. This carries forward the interstate travel branch of the Travel Act, 18 U.S.C. 1952, as applicable to extortion, as well as embracing the use of the mails jurisdiction of 18 U.S.C. 876 and 877, and the use of interstate or foreign commerce facilities jurisdiction of 18 U.S.C. 875 and 1952.[72]

The fifth jurisdictional basis exists if the offense is committed by a Federal public servant [73] acting under color of office. This carries forward the jurisdictional purview of 18 U.S.C. 872 and 26 U.S.C. 7214(a).

The sixth nexus exists if the offense is committed by a person pretending to be a Federal public servant, a former Federal public servant, or a foreign official.[74] This in part carries forward the scope of 18 U.S.C. 872 but expands that jurisdiction to include persons pretending to be former Federal public servants or present foreign officials [75] as well as present Federal public servants.

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[72] It is not necessary that such use be "substantial." See *United States* v. *LeFaivre*, 507 F. 2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).

[73] The term "public servant" is defined in section 111.

[74] The term "foreign official is defined in section 111.

[75] See notes 73 and 74, *supra*.

The seventh circumstance arises if the offense is committed to collect an extension of credit, as defined in subsection 1806(c). This carries forward part of the coverage of current 18 U.S.C. 894(a).

The eighth and last circumstance exists if the property obtained consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a Federal public building, Federal public work, or a building financed in whole or in part by a loan or grant from the United States, and is obtained by threatening or placing any person in fear in relation to that person's employment. This continues coverage of public work kickbacks proscribed by 18 U.S.C. 874 and parallels the National Commission's formulation in Final Report § 1740(4)(f) with certain minor exceptions. The phrase "in relation to that person's employment," used by the National Commission, has been incorporated. It is intended to cover both threats directed to the loss of employment and the "any other manner whatsoever" language of 18 U.S.C. 874. While there are no cases interpreting the latter phrase, it is clear that although the threat need not involve the loss of employment, it nevertheless must have some relationship to it (refusal to hire or promote, demotion, transfer to another project, less desirable assignment on the same project, etc.). If the extortion were not restricted to some aspect of the victim's employment, jurisdiction would exist in every case so long as the victim was employed on one of the projects enumerated in the statute.[76]

6. Grading

An offense under subsection (a)(1) is graded as a Class C felony (up to twelve years in prison). This is somewhat below the maximum penalty presently provided in 18 U.S.C. 875–877, 894, and 1951, but aggregate penalties may be meted out if the offender carries a dangerous weapon during the extortion offense (see section 1823), or if he commits certain crimes of violence (e.g., murder (section 1601) or maiming (section 1611)). An offense under subsection (a)(2), the "under color of official right" branch, is graded as a Class D felony (up to six years in prison). This is designed to recognize the fact that no proof is required that the property was obtained by means of a threat or placing of another person in fear.

SECTION 1723. BLACKMAIL

1. In General and Present Federal Law

Blackmail is a property-obtaining offense similar to extortion. It is defined in widely differing ways throughout the States, sometimes being limited to private persons (as opposed to extortion which involves public officials). Section 1723, however, is not designed to be limited to private persons. It differs from extortion (section 1722) in the nature of the threat or fear-inducing conduct which is used to obtain property. Whereas extortion is confined to the use of a threat or placing in fear that any person will be subjected to bodily injury or kidnapping or that property will be damaged, this section covers a threat or placing in fear that principally concerns non-violent conduct, e.g., accusing a person of a crime, adversely affecting his employment, subjecting a person to economic loss, exposing a fact that will injure a person's reputation, or taking or withholding action as a public servant or causing a public servant to take or withhold such action.

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[76] See *Slater* v. *United States*, 562 F.2d 58, 59 (1st Cir. 1976), for this clarification of the required relationship between the extortion and the employment. The Committee, however, intends to override the *Slater* court's holding that the kickback Act does not apply to independent contractors. Under this jurisdictional base such contractors are protected from extortion in relation to their employment to the same extent as other employees.

Present Federal law contains a number of offenses which this section would replace, many of which were discussed in connection with the previous section.

18 U.S.C. 873 punishes by up to one year in prison whoever, "under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing."

18 U.S.C. 874 punishes by up to five years in prison whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever, induces any person employed in a public works project financed in whole or in part by loans or grants from the United States to give up any part of the compensation to which he is entitled under his contract of employment.

A similar statute, 42 U.S.C. 2703(b), makes it an offense punishable by up to one year in prison to induce any person to give up any money or thing of value to any person by threat of procuring the dismissal of any person from employment or of refusal to employ or renew a contract of employment in connection with a grant or contract of assistance under the Economic Opportunity Act of 1964.

18 U.S.C. 875, 876, and 877 contain a two-year felony provision proscribing identical conduct but geared to the protection of a different jurisdictional interest. Thus, 18 U.S.C. 875(d) prohibits the transmission, with intent to extort, of a communication in interstate or foreign commerce containing any "threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime." 18 U.S.C. 876 and 877 prohibit the same conduct where the communication is sent via the domestic or foreign mails.[77]

The Hobbs Act, 18 U.S.C. 1951, which was discussed at length in relation to the previous section, punishes blackmail to the extent that it has been held to encompass placing persons not only in fear of personal injury or property damage but also in fear of economic loss or injury to their business or profession.[78] Jurisdiction is linked to obstruction, delay, or effect upon commerce, or the movement of any article or commodity in commerce "in any way or degree."

18 U.S.C. 872 penalizes by up to three years in prison whoever, being an officer or employee of the United States, or representing himself to be the same, under color or pretense of office, commits or attempts to commit an "act of extortion." The penalty decreases

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[77] Since these statutes are not directed to the obtaining of property but punish the more inchoate conduct of communicating the threat, with intent to extort, they would be carried forward under section 1001 (Criminal Attempt) as an attempt to commit blackmail under this section.

[78] See, e.g., *United States* v. *Tropiano, supra* note 35: *United States* v. *Addonizio,* 451 F.2d 49 (3d Cir. 1971), cert. denied. 405 U.S. 936 (1972).

to a maximum of one year in prison if the value of the property obtained does not exceed $100.

26 U.S.C. 7214(a) punishes by up to five years in prison any officer or employee of the United States acting in connection with any United States revenue law "who is guilty of any extortion or willful oppression under color of law." The term "extortion" in the above two statutes has not been authoritatively construed and may include conduct defined in this section as blackmail.

18 U.S.C. 894(a)(1), discussed at length in the analysis of the preceding section, punishes by up to twenty years in prison whoever knowingly participates in any way in the use of any extortionate means to collect or attempt to collect an extension of credit. The term "extortionate means" is defined in 18 U.S.C. 891 as a means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

2. The Offense

A. Elements

Subsection (a) of section 1723 provides that a person commits an offense if he "obtains property of another by threatening or placing another person in fear that any person will" act in the manner described in six enumerated paragraphs. The language is phrased to parallel that of section 1722, and the discussion there of the elements "property of another" and "threatening or placing another person in fear" are applicable in this context.

Paragraph (1) proscribes the obtaining of property of another by threatening or placing another person in fear that any person will "engage in conduct constituting a Federal, State, or local crime other than a crime described in section 1722." This is conceptually similar to the current proscription of 18 U.S.C. 894(a) which punishes the use, or threat of the use, of any criminal means to collect an extension of credit. Under proposed section 1723, any property, not only an extension of credit, is the item subject to blackmail. As stated before, this paragraph complements the prior section dealing with extortion. When the crime committed or threatened is kidnapping or involves the infliction of bodily injury, prosecution will be under section 1722, thus reserving this section for threats or placings in fear concerning other kinds of criminal conduct.[79]

Paragraph (2) punishes the obtaining of property of another by threatening or placing another person in fear that any person will "accuse any person of a Federal, State, local, or foreign crime." This carries forward the essential prohibitions of 18 U.S.C. 873, as well as the branches of 18 U.S.C. 875, 876, and 877 dealing with accusations of a crime.

Paragraph (3) punishes the obtaining of property of another by threatening or placing another in fear that any person will procure the dismissal of any person from employment, or refuse to employ or renew a contract of employment of any person. This brings forward the offenses in 18 U.S.C. 874 and 42 U.S.C. 2703(b). This paragraph does not prohibit the enforcement of conditions of employment such as the payment of union dues and initiation fees.[80]

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[79] The conduct must constitute a "crime" as defined in section 111. Thus, obtaining property by a threat to engage in conduct constituting a mere infraction (e.g., a simple trespass (section 1713)) does not violate this section.

Paragraph (4) proscribes the obtaining of property of another by threatening or placing another person in fear that any person will "improperly subject any person to economic loss or injury to his business or profession." This carries forward, for purposes of section 1723, the present reach of the Hobbs Act, 18 U.S.C. 1951, as interpreted by judicial decisions. It is designed to make clear that this section does not reach legitimate activity, such as strikes, boycotts, or picketing activity undertaken in support of such objectives as increased wages or improved working conditions for employees.

Significantly, subsection 1724(b) provides that, in a prosecution under paragraphs (1), (3), or (4) of this subsection, the court may permit the introduction of evidence concerning the reputation of the defendant in any community of which the victim was a member at the time of the offense charged "for the purpose of showing that words or other methods of communication employed as a means of obtaining the property in fact carried a threat." As pointed out in connection with section 1722 (Extortion), this provision codifies existing statutory and case law under 18 U.S.C. 894 and 1951 (carried forward herein in paragraphs (1) and (4)). Only the application to paragraph (3) represents a possible expansion of current law, but one which the Committee deems justified by the strong policy of protecting the employees covered by section 1722(c)(8) and section 1723(d)(2) from extortionate inroads on their salaries.

Paragraph (5) prohibits the obtaining of property of another by threatening or placing another person in fear that any person will "expose a secret or publicize an asserted fact, whether true or false, with intent to subject any person, living or dead, to hatred, contempt, or ridicule, or to impair his personal, financial, professional, or business reputation." This carries forward the threat to reputation aspects of 18 U.S.C. 875, 876, and 877, but clarifies the elements of those offenses.

Paragraph (6) punishes the obtaining of property of another by threatening or placing another person in fear that any person will "take or withhold official action as a public servant, or cause a public servant to take or withhold official action."[81] This continues the essential proscriptions of 18 U.S.C. 872 and 26 U.S.C. 7214(a). The term "official action" is defined in section 111 to mean a "decision, opinion, recommendation, judgment, vote, or other conduct involving an exercise of discretion by a public servant in the course of his employment."

B. Culpability

The conduct in this section is obtaining property by threatening or placing another person in fear that any person will engage in any of the types of acts enumerated in paragraphs (1) through (6). Since no culpability level is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his conduct.[82]

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[80] See *United States* v. *Carbone, supra* note 51.

[81] This language and that of the preceding paragraph is derived from the recommendation of the National Commission. See Final Report, § 1617(1) (c) and (d).

The element that the property obtained is "property of another" is an existing circumstance. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the property was of the type referred to.[83]

In paragraph (5), the clause beginning with the words "with intent" states the particular purpose with which the conduct there described (i.e., exposing a secret or publicizing an asserted fact, whether true or false) must be shown to have been engaged in.

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section, other than a prosecution under subsection (a)(1), that the defendant: (1) reasonably believed his conduct to be justified; (2) intended solely to compel or induce the other person to take lawful and reasonable action to prevent or remedy the asserted wrong that prompted the defendant's conduct; and (3) with respect to an offense under subsection (a)(2), reasonably believed that the threatened accusation was true.

As indicated in the discussion of the previous section, this provision (which is not included for the crime of extortion) is intended to provide a type of "claim of right" defense for certain kinds of threats arising out of and relating to a bona fide dispute between parties where the sole intent of the accused was to compel or induce the other party to take legal and reasonable action to prevent or remedy an asserted wrong. The defense is not available in a prosecution under paragraph (1), involving a threat or placing of another in fear that any person will engage in a crime. It would apply in a limited way to a situation, for example, where a party to an automobile accident threatens to press criminal charges against the other party (whom he believed to have committed an offense relating to the accident), unless the other party promptly paid for the damage to his car. It would also apply to a situation where a housewife in an apartment infested by roaches threatened her landlord that she would send pictures of the roaches to a newspaper of interstate circulation unless the exterminators were called. Other illustrations would include a situation in which a person threatened to picket a store unless the proprietor refunded money paid by the defendant for allegedly defective goods. Where, by contrast, the party making the threat had no honest complaint of his victim and issued the threat only to coerce the other party into parting with his property, the defense would not lie, since the defendant could not "reasonably" believe his conduct to be justified,[84] and the maker of the threat would be guilty under this section.[85] Nor would the defense apply to threats unrelated to the bona fide claim asserted by the defendant, such as threatening a landlord with exposure of embarrassing personal affairs in order to coerce him to respond to the complaint about roaches. To a limited extent, therefore, the defense retreats from the decision in *Pignatelli, supra.*

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[82] See sections 303(b)(1) and 302(1). In paragraph (1), however, there is no need to prove any state of mind as to the fact that the conduct constituted a crime, only that the actor knew he was engaging in the conduct. See section 303(d)(1)(A).

[83] See sections 303(b)(2) and 302(c)(1). The term "property" and "property of another" are more fully discussed in relation to theft, section 1731, *infra*. That discussion is applicable here.

[84] The adverb "reasonably," which did not appear in earlier versions of the bill, has been added to permit an objective assessment of the defendant's conduct. As previously drafted without the modifying term, the defense was subject to abuse since only the genuineness of the

A somewhat comparable provision, which was included as an affirmative defense to the National Commission's proposed criminal coercion offense,[86] was strongly criticized by bar and consumer groups as likely to have a chilling effect on legitimate activity.[87] The Committee, apart from refining the elements of the defense as compared with the National Commission version, has transformed the defense from an "affirmative" one to an ordinary one. This has the effect of removing the burden from the defendant of proving the elements of the defense by a preponderance of the evidence.[88] Rather, all that will be required is that the issues comprising the defense be sufficiently raised; the prosecution will then have the burden of disproving the defense beyond a reasonable doubt. Although the Committee is aware that this may pose particular prosecutive difficulties in light of the focus of the defense on the defendant's subjective belief and intent, it deems this allocation of the burden of proof warranted in order to counteract the inhibiting effect on legitimate activities which might flow from a contrary characterization of the defense as "affirmative."

The Committee also considers that its formulation is an improvement over the provisions of section 1723 of S. 1400, which required that a threat to impair personal, professional, or business reputation be made "unjustifiably," and that any taking or withholding of official action or the causing of either of the same be done "unjustifiably" for the statute to apply. The quoted term is less precise than the defense set forth here in subsection (b). Moreover, by not making the "justifiability" of the conduct an element of the offense, the requirements of proof have been streamlined so that lack of justification need not be negatived in every case.

4. Jurisdiction

Subsection (d) provides that there is Federal jurisdiction over an offense under this section in four circumstances.

The first arises if a circumstance specified in section 1721(c)(1) through (c)(7) or section 1722(c)(3) through (c)(8) exists or has occurred. These references bring forward the same scope of coverage as applies to the extortion offense in the preceding section. Since the only difference between extortion and blackmail as defined in this section is the type of harm threatened or inflicted by the defendant to obtain the property of another, no less jurisdictional coverage is warranted for the latter offense than for the former.

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defendant's belief in the legitimacy of his actions was at issue, and the government would have little basis in most instances to dispute the bona fides of his belief.

[85] See e.g., *Keys* v. *United States*, 126 F.2d 181, 1892 (8th Cir.), cert. denied, 316 U.S. 694 (1942) (threat by defendant to distribute an "educational" pamphlet concerning dangers of cooking with aluminum unless he received contributions from the aluminum association, held to constitute an offense under a forerunner of 18 U.S.C. 875); see also Working Papers, p. 844.

[86] See Final Report § 1617; Working Papers, pp. 843–845.

[87] See the testimony of Richard A. Givens. Hearings, p. 1557.

[88] See definition of "affirmative defense" in section 111.

The discussion of the jurisdictional bases in connection with section 1722 is applicable here.

The second circumstance arises if the property is obtained by threatening or placing a person in fear in relation to any person's employment under a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act (42 U.S.C. 2701, *et seq.*). This carries forward the jurisdictional extent of 42 U.S.C. 2703(b).

The third and fourth circumstances exist if the fear in subsection (a)(1) or (a)(2) involves a Federal crime, or if the fear in subsection (a)(6) involves Federal official action. A statement of these additional bases is necessary in order to permit this section to implement its specific prohibitions regarding such offenses.

5. Grading

A complicated grading structure, virtually identical to that for theft (section 1731), has been provided for this offense, based principally on the value of the property obtained. Under subsection (c), an offense described under this section is a Class C felony (up to twelve years in prison) if the property has a value in excess of $100,000. It is a Class D felony (up to six years in prison) if the property has a value between $500 and $100,000. An offense under this section is a Class A misdemeanor (up to one year in prison) if the property has a value between $100 and $500, and a Class B misdemeanor (up to six months in prison) in any other case. The Committee considers the above scheme to be an equitable way to grade the offenses in this section, which deal principally with peaceful, albeit criminal, methods of obtaining property. Similar offenses in present Federal law range from up to twenty years in prison (18 U.S.C. 894, 1951) to one year (e.g., 18 U.S.C. 873), and at least one section uses a petit-grand larceny approach to grading (18 U.S.C. 872).

SECTION 1724. GENERAL PROVISIONS OF SUBCHAPTER C

This section contains a proof subsection and a defense precluded for this subchapter.

Subsection (a) permits proof concerning the reputation of the defendant for certain purposes in a prosecution under section 1722 or 1723(a)(1), (3), or (4). This evidentiary provision has been discussed in connection with those sections. It should be pointed out that this proof provision has no application to the bar to prosecution under 1722(b) because the bar requires an act against the person and does not cover mere statements or threats.

Subsection (b) provides that it is not a defense to a prosecution under section 1722 or 1723 that the defendant, by the same conduct, also committed an offense described in section 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1353 (Trading in Government Assistance), 1354 (Trading in Special Influence), 1355 (Trading in Public Office), or 1731 (Theft). This provision, which is derived from New York law, is explained in this report in connection with section 1321, and that discussion should be consulted here. It is designed to obviate a potential problem under this proposed Code concerning a technical defense which Federal courts have uniformly rejected with respect to current comparable statutory provisions.

SUBCHAPTER D.—THEFT AND RELATED OFFENSES

(Sections 1731–1739)

This subchapter deals with offenses involving theft and theft-related activities. At present, there are approximately one hundred Federal statutes purporting to deal with the misappropriation of property belonging to another. The purpose of this subchapter is to consolidate and simplify these existing statutes and to propose in their stead a relatively straightforward group of seven sections covering crimes that may broadly be denominated as "theft" and "fraud."

Section 1731 collects in one section most of the common forms of theft, such as larceny, embezzlement, fraud, false pretenses, and the like. Section 1732 creates a new offense covering trafficking in stolen property. It is designed to create a distinction between the trafficker in stolen goods (the so-called professional "fence") and the individual who receives stolen goods for his own use. The trafficker is subject to a sentence equivalent to that for theft of the same property while the receiver is subject to a sentence one grade lower. Receiving stolen property is covered in section 1733.

Section 1734 essentially simplifies and reenacts the current mail and wire fraud statutes. It also creates a new offense, based on a Senate-passed bill, of engaging in a pyramid sales scheme. The next sections are more specific in coverage. Section 1735 deals with bankruptcy fraud; section 1736 covers conduct that fraudulently interferes with a security interest held by another individual; sections 1737 and 1738 reenact, *inter alia,* the fraud provisions of the Federal Insecticide, Fungicide and Rodenticide Act of 1972, the Housing and Urban Development Act of 1970, the Interstate Land Sales Full Disclosure Act and the copyright laws. Finally, section 1739 contains definitions of the major terms used in subchapter D and also sets forth provisions relating to proof of certain elements of the offense.

SECTION 1731. THEFT

1. In General

This section is the proposed Code's general prohibition against theft in all its many forms. Section 1731 epitomizes probably more than any other section the advantages to be gained by a thorough revision of the Federal criminal laws. There are several score statutes in existing law covering theft, each describing the offense in its own terms and setting forth its particular jurisdictional nexus usually in the description of the offense. Furthermore, the grading of the offenses is, conservatively speaking, less than uniform. As the National Commission explained the bewilderment presented by existing law: [1]

> Present Federal law includes a wide and unmanageable variety of overlapping and confusing terms to deal with various forms of acquisitive conduct—"embezzle," "steal," "purloin," "convert," "conceal," "retain," "take," "carry away," "abstract," "misapply," "use," "buy," "secrete," "possess," "receive," "obtain by fraud or deception," "take by device, scheme, or game," "obtain, dispose of, commit or attempt an act of extortion"—and so on at considerable length. Such variety adds nothing but color to the law, and at the same time builds in serious disadvantages. It is practically impossible to develop an overview of the kinds of conduct reached by Federal law, for the purpose of measuring the extent to which it is in accord with modern economic circumstances or for the purpose of assuring consistency of sanction for comparable conduct.
>
> Such diversity is an open invitation to the technical defense—to the argument that "the indictment charges stealing but what I was really doing was purloining and therefore my conviction should be reversed." There are undoubtedly hidden gaps in coverage as well, gaps which would be apparent if there were some consistency of language and approach.

Section 1731 consolidates in a single provision the conduct prohibited by the current statutes dealing with forms of theft. The purpose of the section is to simplify and unify in one section all of the forms of conduct covered by the colorful list of words used in present Federal law. Except in one or two instances, most notably by the creation of jurisdiction over theft from federally funded programs generally, there is no intent measurably to alter the present scope of Federal law in this respect, other than by following the lead of other modern reform efforts to make criminal the theft of services as well as property. Thus, where it can be supported by a fair reading of the section, the theft provision should be construed to be at least as inclusive of the various forms of theft as the statutes now in effect.

Another major reform also sought to be accomplished by this provision—as elsewhere throughout the Code—is the separation of the jurisdictional nexus from the description of the offense. The list of jurisdictional bases in subsection (c) is intended to cover the scope of jurisdiction of each of the existing theft or theft-related provisions replaced by this section.

2. Present Federal Law

Current Federal statutes in the theft area may be conveniently grouped into different categories, as follows.

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[1] Working Papers, p. 914.

A. Statutes covering theft of property owned by, or in the care, custody, and control of, the Government

(i) 18 U.S.C. 285. This statute makes the unauthorized taking of any paper representing a claim against the United States a crime, whether or not the claim has been paid in part or in whole. The section also prohibits the presentment of any such paper for payment. Both acts subject the offender to a term of imprisonment of not more than five years.

(ii) 18 U.S.C. 641. This section *inter alia,* makes it a crime to steal, purloin, or knowingly convert "any record, voucher, money or thing of value of the United States," or knowingly to receive or conceal such property. If the value of the property does not exceed $100, the offense is a misdemeanor, punishable by incarceration not to exceed one year. If the value of the property is in excess of $100, the penalty is imprisonment for up to ten years.[2]

(iii) 18 U.S.C. 642. This enactment covers the theft of items that can be used for counterfeiting. It prohibits wrongfully taking either tools or materials used in the making of notes, certificates, stamps, or currency of the United States, for the purpose of counterfeiting. The offender is subject to imprisonment for not more than ten years.

(iv) 18 U.S.C. 657. This is the basic banking institution embezzlement statute. It makes it a crime for an officer, agent, or employee to take funds belonging to a lending, credit, or insurance institution of the United States, or any private lending, credit, or insurance institution which is authorized under the laws of the United States or the accounts of which are insured by an agency of the United States. If the value of the property taken is less than $100, the offense is a misdemeanor punishable by imprisonment for not more than one year. If the value of the property taken exceeds $100, the offense is a felony punishable by up to five years in prison.

(v) 18 U.S.C. 658. This law differs from section 657 not in thrust but in scope. It makes it a crime to take any property which has been mortgaged or pledged to a farm credit agency of the United States Government, or to a production credit association or a bank for cooperatives. Violation carries a penalty of imprisonment for not more than five years.

(vi) 18 U.S.C. 1702, 1704, 1706–1710, and 1721. These statutes all deal with theft of the mails. Section 1702 makes it a crime to take or open any correspondence in the custody of the Post Office before its delivery to the named addressee, with the purpose of obstructing correspondence or to invade the privacy of another. The penalty is imprisonment for not more than five years.

(vii) Section 1704 makes it a crime to take or deliver a key which is designed to fit any lock used by the Post Office Department or Postal Service to secure mail. The offense is punishable by imprisonment for not more than ten years.

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[2] In a seminal opinion dealing with *scienter* in criminal statutes the Supreme Court held that intent to steal or convert the property (i.e., belief that it belonged to another and was not abandoned) is an essential element under this statute. See *Morissette* v. *United States,* 342 U.S. 246 (1952).

(viii) Section 1706 makes it a crime to damage a mail bag with intent to steal mail contained therein. An offender is subject to imprisonment for not more than three years.

(ix) Section 1707 makes it a crime to take any property which is used by the Postal Service. If the property has a value of less than $100, the offense is punishable by imprisonment for not more than one year. Otherwise, the offense is a felony punishable by imprisonment not to exceed three years.

(x) Section 1708 makes it an offense to take any letter, post card, or package from the mails, or knowingly to receive such stolen property. The penalty is imprisonment for not more than five years.

(xi) Section 1709 makes it a crime for any officer or employee of the Postal Service to take any mail entrusted to his possession. An offense is punishable by imprisonment for not more than five years.

(xii) Section 1710 punishes by up to one year in prison any officer or employee of the Postal Service who takes newspapers from the mails.

(xiii) Section 1721 makes it a crime for an officer or employee of the Postal Service to sell or pledge postage stamps entrusted to his care, except as authorized by law or departmental regulations. Unlawful conduct includes the use of stamps to pay a debt or to purchase merchandise, and sale of stamps at a higher or lower price or at an unauthorized location. The penalty is imprisonment for not more than one year.

(xiv) 18 U.S.C. 1851-1854. These laws deal with theft of certain natural resources found on United States property. Section 1851 makes it a crime to mine or remove coal from lands of the United States with wrongful intent to appropriate. Punishment is fixed at imprisonment for not more than one year.

(xv) Section 1852 makes it a crime to cut, remove, or wantonly destroy any timber growing on public lands of the United States, or knowingly to transport any timber so cut. The section does not prevent a miner or farmer from clearing land or using timber to make necessary improvements. Violations are punishable by imprisonment for not more than one year.

(xvi) Section 1853 makes it a crime unlawfully to cut or wantonly destroy any tree growing on any land of the United States or upon an Indian reservation. A violation is punishable by imprisonment for not more than one year.

(xvii) Section 1854 prohibits both cutting or boxing any tree on United States land for the purpose of obtaining pitch or turpentine and receiving such substances with the knowledge that they have been unlawfully obtained. An offense is punishable by imprisonment for not more than one year.

(xviii) 18 U.S.C. 2071. This statute covers the concealment, removal, or mutilation of any records or documents filed with any judicial or public officer of the United States. Subsection (a) makes it a crime for anyone to engage in such conduct, while subsection (b) specifically punishes persons having custody of such papers who engage in the proscribed conduct. The penalty is imprisonment for not more than three years, plus possible forfeiture of office and disqualification from holding future office if the offense is under subsection (b).

(xix) 18 U.S.C. 2233. This enactment makes it a crime for anyone forcibly to rescue any property seized by an officer of the United States pursuant to any revenue law, or by a search and seizure. An offender is subject to imprisonment not to exceed three years.

(xx) 18 U.S.C. 2197. This law imposes a penalty of not more than five years' imprisonment upon whoever steals or knowingly possesses a license, certificate, or document issued to vessels, officers, or seamen by the United States.

B. Statutes covering embezzlement or misapplication of money owned by, or under the care, custody, or control of the United States

Nineteen statutes deal with the embezzlement or misapplication of money owned by or under the control of the United States. By and large, the statutes differ only with respect to the office of the actor or the type of money embezzled or misapplied.

(i) 18 U.S.C. 153. This statute makes it a crime punishable by up to five years' imprisonment for a trustee, receiver or officer, *inter alia,* to embezzle any property belonging to the estate of a bankrupt.

(ii) 18 U.S.C. 332. This law makes it a crime for any officer or employee to debase United States coinage, to alter an official scale, or to embezzle metals used for coinage or coins. The section prescribes a penalty of imprisonment for not more than ten years.

(iii) 18 U.S.C. 641. This statute imposes a maximum penalty of ten years' imprisonment for, *inter alia,* embezzlement of any record, money or thing of value of the United States. If the value of the property is less than $100, the offense is a misdemeanor punishable by imprisonment for not more than one year.

(iv) 18 U.S.C. 643. This enactment provides that any officer, agent, or employee of the United States who receives public money, which he is not entitled to retain as salary, is guilty of embezzlement if he fails to render an account for it. The maximum penalty, if the value of the money does not exceed $100, is imprisonment for not more than one year. Otherwise, the penalty is up to ten years in prison.

(v) 18 U.S.C. 644. This enactment makes it a crime for a bank official to receive an unauthorized deposit of public money, or to use public deposits for a purpose not prescribed by law. Such embezzlement is punishable by not more than ten years in prison, unless the value of the money embezzled does not exceed $100, in which case the offense is a misdemeanor punishable by up to one year's imprisonment.

(vi) 18 U.S.C. 645. This statute provides that any officer or employee of a United States court who unlawfully retains any money coming into his possession by virtue of his office is guilty of embezzlement. The penalty is not more than ten years in prison, unless the amount taken is less than $100, in which case the offense is punishable by imprisonment for up to one year.

(vii) 18 U.S.C. 646. This statute provides that a court officer who fails to deposit promptly any money belonging to the registry of the court is guilty of embezzlement. An offender is subject to imprisonment for not more than ten years, unless the amount taken is less than $100, in which event the offense is a misdemeanor punishable by imprisonment for up to one year.

(viii) 18 U.S.C. 647. This section makes anyone receiving a loan from a court officer liable for embezzlement if that person knows that the money involved belongs to the registry of the court. The actor is subject to the same penalties as the offending court officer under section 646.

(ix) 18 U.S.C. 648. This statute makes it a crime for a person to misuse public funds over which he was given custody by an Act of Congress. An offender is liable to imprisonment for not more than ten years unless the amount of money taken is less than $100, in which case, the penalty is imprisonment for up to one year.

(x) 18 U.S.C. 649(a). This law provides that anyone having funds of the United States under his control is guilty of embezzlement if he fails to deposit them as required. The maximum sentence is imprisonment for not more than ten years. If the amount taken is less than $100, the offense is a misdemeanor punishable by imprisonment for not more than one year. Section 649(b) provides that this section as well as sections 643 and 653 apply whether the person is charged as a receiver or depositary of public money.

(xi) 18 U.S.C. 650. This statute provides that any public depositary who fails to keep all moneys safely deposited is guilty of embezzlement. An offender is subject to imprisonment for not more than ten years unless the amount of money is less than $100, in which event the offense is punishable by imprisonment not to exceed one year.

(xii) 18 U.S.C. 651. This enactment provides that it is a crime for a disbursing officer to certify falsely to the General Accounting Office the full payment of a creditor of the United States. A violator is liable to imprisonment for not more than two years, unless the amount withheld is less than $100, in which case the offense is a misdemeanor punishable by not more than one year's imprisonment.

(xiii) 18 U.S.C. 652. This statute prohibits any disbursing officer who is required to pay any clerk or employee of the United States pursuant to a Congressional appropriation from paying less than required in lieu of the lawful amount. A violator may be imprisoned for not more than two years, unless the amount withheld is less than $100, in which case the offense is a misdemeanor punishable by imprisonment for not more than one year.

(xiv) 18 U.S.C. 653. This law provides that any disbursing officer who misuses funds entrusted to him is guilty of embezzlement. A violator is subject to imprisonment not to exceed ten years, unless the amount embezzled is less than $100, in which event the penalty is not more than one year in prison.

(xv) 18 U.S.C. 654. This statute punishes any officer or employee of the United States who wrongfully converts the property of another to his own use by virtue of his office (either in its execution or under color of authority). The penalty is identical to that under section 653.

(xvi) 18 U.S.C. 663. This statute penalizes by up to five years in prison whoever solicits money or property for the use of the United States, and converts such gift to another purpose, or who converts property which has come into the possession of the United States as a gift.

(xvii) 18 U.S.C. 1023. This statute makes it a crime for a person, having possession of money or property to be used in the military or naval service, with an intent to defraud, to deliver to an authorized receiver less than that for which he took a receipt. A violator may be imprisoned for up to ten years.

(xviii) 18 U.S.C. 1421. This law makes it a crime for any court officer authorized to receive money in proceedings relating to citizenship, naturalization, or registration of aliens, to "wilfully neglect" to account for or pay over any balance of such moneys to the United States within thirty days after coming due. The penalty is imprisonment for not more than five years.

(xix) 18 U.S.C. 1711. This enactment prohibits the misappropriation of postal funds by an officer or employee of the Postal Service, either by an appropriation of money or property which comes into his hands (whether or not it belongs to the United States), or by failing to make required deposits of government funds in a designated depository. An offender is liable to imprisonment for not more than ten years, unless the value of the property embezzled is less than $100, in which case the offense is punishable by imprisonment for up to one year.

C. Statutes covering obtaining property from the United States by fraudulent methods

Included here are a series of laws covering obtaining property by false statements, a series of laws covering obtaining property by impersonation, and a group of statutes covering other divergent fraudulent activities engaged in for the purpose of obtaining property.

(i) *False Statements*

18 U.S.C. 286. This law forbids conspiracies to defraud the United States by "obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim." The maximum punishment is imprisonment for ten years.

18 U.S.C. 287. This enactment punishes by up to five years' imprisonment anyone who knowingly presents a false claim to an officer of the United States for payment.

18 U.S.C. 288. This statute makes it a crime knowingly to present any false claim for postal losses for payment; to support any postal claim with false statements, certificates, or affidavits; or to conceal any material fact in respect to such a claim. The penalty is a fine not to exceed $500 or imprisonment for not more than one year, or both, but if the amount of the false claim is less than $100, only the fine may be imposed.

18 U.S.C. 289. This law makes it a crime knowingly and willfully to submit any false statement or writing concerning a claim for a pension within the jurisdiction of the Administrator of Veterans' Affairs. It is also a crime for a person to certify falsely that the writing was sworn to and witnessed before him. Violation carries a penalty of imprisonment of not more than five years.

18 U.S.C. 550. This statute makes it a crime, punishable by a prison term of up to two years, to file a false or fraudulent entry or

claim for the payment of a refund of duties on the exportation of merchandise.

18 U.S.C. 1002. This enactment makes it a felony to possess, with intent to defraud the United States, any false document for the purpose of enabling another to obtain money from the United States. The penalty is up to five years' imprisonment.

18 U.S.C. 1003. This law makes it a crime for a person knowingly and fraudulently to make a demand for any public stocks of the United States, or to have any pension, wage, or other debt paid by virtue of a false instrument. An offender is liable to imprisonment for not more than five years unless the sum or value obtained is less than $100, in which event the offense is a misdemeanor punishable by imprisonment for not more than one year.

18 U.S.C. 1006. This statute prohibits anyone connected with certain enumerated Federal credit institutions from making false statements, with intent to defraud the United States. It also makes criminal the receiving of property from such institutions with intent to defraud the United States. The penalty is imprisonment for up to five years.

18 U.S.C. 1007. This enactment makes it a crime for anyone either knowingly to make a false statement to secure payment of a claim by the Federal Deposit Insurance Corporation, or willfully to overvalue a security so insured. An offender is subject to imprisonment for not more than two years.

18 U.S.C. 1012. This law punishes whoever, *inter alia,* with intent to defraud the Department of Housing and Urban Development, receives any compensation or reward. The penalty is imprisonment for not more than one year.

18 U.S.C. 1712. This statute makes it a crime for an officer or employee of the Postal Service to make false returns to an officer of the United States for the purpose of increasing his compensation. It is also a crime for an officer or employee of the Postal Service to induce others to deposit mail at the office where he is employed for the purpose of increasing his compensation. Violations are punishable by imprisonment for not more than two years.

18 U.S.C. 1722. This law punishes by a fine of up to $500 whoever submits false evidence to the Postal Service in an effort to secure second-class mail rates.

18 U.S.C. 1919. This enactment punishes whoever makes a false statement to obtain unemployment compensation for Federal service under chapter 85 of title 5, United States Code. A violator is subject to imprisonment for not more than one year.

18 U.S.C. 1920. This law proscribes the making of a false statement for the purpose of obtaining Federal employees' compensation for partial disability, authorized by 5 U.S.C. 8106. An offender is subject to imprisonment for not more than one year.

18 U.S.C. 2073. This statute makes it a crime for officers, clerks, agents, and employees of the United States to make a false entry in any record relating to their duties, with intent to defraud. It is also a crime for any person who is charged with the duty of receiving, holding, or paying moneys or securities for the United States to make false reports. Both acts are punishable by imprisonment not to exceed ten years.

(ii) *Impersonation*

18 U.S.C. 912. This statute makes it a crime, *inter alia,* for a person pretending to be an officer or employee of the United States to demand or obtain anything of value. The punishment is up to three years imprisonment.

18 U.S.C. 915. This law provides that whoever falsely personates an official of a foreign government, with intent to defraud the United States by obtaining anything of value, shall be liable to imprisonment for not more than ten years.[3]

18 U.S.C. 663. This enactment punishes by up to five years in prison anyone who solicits money or property for the use of the United States, and converts such gifts to another purpose.

(iii) *Other Frauds*

18 U.S.C. 1719. This provision makes it a misdemeanor punishable by a fine of not more than $300 for anyone to make use of a franking privilege for private purposes.

18 U.S.C. 1720. This law makes it a crime for anyone to use a canceled postage stamp as payment of postage, or to remove the canceling marks from a postage stamp. A violator is subject to imprisonment for not more than one year. However, if the offender is employed by the Postal Service, he may be imprisoned for not more than three years.

18 U.S.C. 1723. This statute makes it a crime for anyone to enclose higher class mail in lower class matter in order to obtain lower postal rates. The penalty is a fine of up to $100.

18 U.S.C. 1921. This enactment makes it a crime to receive Federal employees' compensation, pursuant to 5 U.S.C. 8107–8113 and 8133, after a marriage of the employee or a dependent, which would act to reduce or terminate compensation. An offense is punishable by imprisonment for not more than one year.

18 U.S.C. 1923. This provision penalizes by up to one year in prison whoever receives payments fraudulently for missing persons pursuant to the provisions of 5 U.S.C. 5561–5568, or chapter 10 of title 37, United States Code.

D. Statutes covering misuse of official position to obtain property

(i) 18 U.S.C. 912. This statute, as discussed in connection with the immediately preceding category of offenses, prohibits any person from impersonating an officer or employee of the United States to demand or obtain anything of value.[4] The penalty is up to three years in prison.

(ii) 18 U.S.C. 914. This law punishes whoever falsely personates a creditor of the United States, in order to transfer public stock or receive payment for a debt due. The penalty is imprisonment for not more than five years.

(iii) 18 U.S.C. 1422. This enactment makes it a crime to demand unauthorized fees or moneys in proceedings related to citizenship, naturalization, or registration of aliens. A violation is punishable by imprisonment not to exceed one year.

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[3] See the discussion of 18 U.S.C. 912 and 915 in connection with section 1303 (Impersonating an Official).

[4] But see *United States* v. *Grewe,* 242 F. Supp. 826 (W.D. Mo. 1965); *United States* v. *York,* 202 F. Supp 275 (E.D. Va. 1962).

(iv) 18 U.S.C. 1901. This provision makes it illegal for any officer of the United States charged with the collection or disbursement of revenues to carry on a business in the funds or property of the United States. An offender may be imprisoned for not more than one year and shall forfeit his office and be barred from holding a future office.

(v) 18 U.S.C. 1916. This law provides that an Executive department employee may be employed only for services actually rendered for the purposes of the appropriation from which he is paid. A violation is punishable by imprisonment for not more than one year.

(vi) 22 U.S.C. 1179. This statute states that a consular officer who accepts an appointment to an office of trust, following the death of an American citizen in a foreign country, and who fails to account properly for any property received in that capacity, is guilty of embezzlement and is subject to a penalty of up to five years' imprisonment.

(vii) 22 U.S.C. 1198. This enactment makes it a crime for a consular officer who has received custody of the property of a United States citizen to fail to account properly for and return such property. The penalty is a prison term not to exceed five years.

(viii) 26 U.S.C. 7214. This statute makes it a crime, *inter alia,* for an officer or employee of the United States, acting in connection with any revenue law of the United States, to conspire to defraud the United States. The punishment consists of imprisonment for a term of up to five years, as well as dismissal from office or employment.

E. Statutes covering thefts affecting interstate commerce

(i) 18 U.S.C. 659. This law makes it a crime, *inter alia,* for anyone to steal any goods, baggage, express, or freight moving in or which constitutes a shipment in interstate or foreign commerce, or to steal from or defraud a passenger who is on a carriage moving in interstate commerce. The section also penalizes the receipt of any property so obtained. The maximum penalty is imprisonment for not more than ten years, unless the value of the property is less than $100, in which case the offense is a misdemeanor punishable by imprisonment for up to one year.

(ii) 18 U.S.C. 660. This provision prohibits an officer or manager of a common carrier, or an employee riding on a carrier moving in interstate commerce, from taking any of the moneys, securities, or property of such firm which are derived from or used in commerce. An offender is subject to imprisonment for not more than ten years.

(iii) 18 U.S.C. 2312. This statute, the so-called Dyer Act, makes it a crime, punishable by up to five years' imprisonment, to transport in interstate or foreign commerce a motor vehicle or aircraft known to have been stolen.[5]

(iv) 18 U.S.C. 2314. This enactment makes it a crime to transport in interstate or foreign commerce any goods, security, or money having a value of $5,000 or more, which was obtained by theft or fraud. The section also makes it a crime to utilize interstate or foreign commerce in any manner to effectuate a scheme to defraud.[6] A violation is punishable by imprisonment for not more than ten years.

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[5] See also 18 U.S.C. 2316, a comparable offense covering cattle. The word "stolen" has been given an expansive interpretation embracing all types of felonious takings (not merely common law larceny) involving an intent to deprive the owner of rights and benefits. See *United States* v. *Turley,* 352 U.S. 407 (1957).

(v) 7 U.S.C. 13(a). This section, a part of the Commodity Exchange Act, makes it an offense punishable by a term of imprisonment of up to five years for any futures commission merchant, or his agent or employee, to steal any money, securities, or property having a value in excess of $100, which has been received to secure the trades or contracts of any customer, or accruing therefrom.

(vi) 7 U.S.C. 270. This statute, part of the United States Warehouse Act, makes it a crime for a person to convert to his own use agricultural products stored in a licensed warehouse. The penalty is a prison term of up to ten years.

(vii) 15 U.S.C. 78jjj(c)(2). This provision, part of the Securities Investor Protection Act of 1970, makes it a crime punishable by imprisonment for up to five years for any one, directly or indirectly, to steal, embezzle, or fraudulently, or with intent to defeat that Act, abstract or convert to his own use or to the use of another any of the moneys, securities, or other assets of the Securities Investor Protection Corporation, or otherwise defraud SIPC or a trustee by any means.

(viii) 15 U.S.C. 80a-36. This law, part of the Investment Company Act of 1940, provides that anyone who steals or embezzles any money, securities, or assets of a registered investment company shall be subject to the penalties contained in 15 U.S.C. 80a-48, i.e., imprisonment for up to two years.

F. Statutes covering theft within the special jurisdiction of the United States

(i) 18 U.S.C. 661. This statute makes any theft of property within the special maritime and territorial jurisdiction of the United States a crime. If the value of the property exceeds $100, the offense is punishable by imprisonment for not more than five years; in all other cases, by imprisonment for not more than one year.

(ii) 18 U.S.C. 1025. This law makes it a crime for anyone to obtain anything of value from a person by means of fraud or false pretenses, upon any waters within the special maritime and territorial jurisdiction of the United States. An offender is subject to imprisonment for five years, unless the value of the property does not exceed $100, in which event the offense is a misdemeanor punishable by up to one year in prison.

(iii) 18 U.S.C. 2271. This enactment makes it a crime to conspire to destroy any vessel on the high seas or within the United States in order to collect insurance proceeds on the vessel or on goods on board. An offender may be imprisoned for not more than ten years.

(iv) 18 U.S.C. 2272. This statute imposes a maximum penalty of life imprisonment for an owner of a vessel who causes its destruction, with the purpose of collecting insurance proceeds, upon the high seas or within the special maritime jurisdiction of the United States.

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[6] This aspect of the statute is carried forward in section 1734.

G. Statutes covering theft and embezzlement from named financial institutions

Five statutes cover, with some overlap, theft and embezzlement from financial institutions.

(i) 18 U.S.C. 655. This provision makes it a crime for a bank examiner to take or conceal unlawfully any property of value in the possession of a bank which is a member of the Federal Reserve System or is insured by the Federal Deposit Insurance Corporation. This section does not apply to private examiners employed by a clearinghouse association or bank. A violator is subject to imprisonment for not more than five years, unless the amount taken is less than $100, in which case the offense is a misdemeanor punishable by imprisonment of not more than one year. In either case, the offender is disqualified from serving again as a bank examiner.

(ii) 18 U.S.C. 656. This statute makes it a crime for any officer or employee of the Federal Reserve Bank, a member bank, a national bank, or an insured bank, to steal, embezzle, or misapply bank funds. An offender may be punished by imprisonment for not more than five years, unless the value of the property taken is less than $100, in which event the offense is punishable by imprisonment for not more than one year.

(iii) 18 U.S.C. 1006. This law provides, *inter alia,* that anyone connected with various credit institutions acting under the authority of the United States who, with intent to defraud such institution, receives any property thereof, is guilty of a crime. The penalty is imprisonment for up to five years.

(iv) 18 U.S.C. 2113(b). This section punishes by up to ten years in prison whoever takes and carries away with intent to steal or purloin, any money or property in excess of $100 belonging to, or in the care, custody, control, management or possession of any Federally insured bank, credit union, or savings and loan association. If the property is worth less than $100, the offense is a misdemeanor punishable by up to one year in prison. Section 2113(a) punishes the receipt, concealment, or possession of any property known to have been taken in violation of subsection (b). The penalty is the same as that provided for the taker.

H. Statutes covering theft from designated Federal programs or from Federally regulated institutions or organizations other than financial institutions

There are a number of present statutes that are keyed to specifically designated Federal programs. Some of these provisions deal with Federal agencies involved in administering Federal programs or with corporations subject to Federal regulation and, accordingly, can with equal logic be placed in categories (A) or (B), *supra.*

(i) 18 U.S.C. 153. This enactment, considered also in connection with the category (B), *supra,* makes it a crime, *inter alia,* for a trustee, receiver, or officer of the court to embezzle any property of the estate of a bankrupt which has come into his charge. An offender may be imprisoned for up to five years.

(ii) 18 U.S.C. 657. This statute makes it a crime for an officer, agent, or employee of any lending, credit, or insurance institution (including H.U.D.) which is authorized or acting under the laws of the United States, to embezzle or misapply funds or property of the institution. An offender is subject to imprisonment for not more than five years, unless the value of the property is less than $100, in which case the offense is a misdemeanor punishable by imprisonment for not more than one year.[7]

(iii) 18 U.S.C. 664. This law makes it a crime for anyone to steal or embezzle any funds of an employee welfare or benefit plan established pursuant to the provisions of Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*). The penalty is up to five years' imprisonment.

(iv) 29 U.S.C. 501(c). This section, part of the Labor-Management Reporting and Disclosure Act of 1959, provides that anyone who embezzles or unlawfully takes the property of a labor organization of which he is an officer or employee shall be imprisoned not longer than five years.

(v) 18 U.S.C. 874. This statute makes it a crime for anyone to induce a person employed on a public building or work project, or a Federally financed project, by means of force, intimidation, or threats of dismissal from employment, to give up part of his compensation. An offender is liable to imprisonment for not more than five years.

(vi) 18 U.S.C. 1010. This enactment makes it a crime for anyone to make false statements, pass false instruments, or willfully overvalue any security for the purpose of obtaining a loan to be used in a Department of Housing and Urban Development or Federal Housing Administration transaction. A violator is subject to imprisonment for not more than two years.

(vii) 18 U.S.C. 1163. This statute makes it a crime to take any property belonging to or entrusted to the care of an Indian tribal organization, or to knowingly receive property stolen from such an organization. The penalty is imprisonment for up to five years, unless the property has a value less than $100, in which case the offense is a misdemeanor punishable by imprisonment for not more than one year.

(viii) 7 U.S.C. 2023. This statute, part of the Food Stamp Act of 1964, makes it a crime to acquire, possess, or use coupons or authorization to purchase cards in violation of law. The penalty is a prison term of up to five years, unless the value of the property in question is under $100, in which event the penalty is imprisonment for up to one year.

(ix) 15 U.S.C. 645(b). This law, part of the Small Business Investment Act of 1958, provides that any person connected in any capacity with the Small Business Administration who embezzles or misapplies funds or property, makes false entries with intent to defraud, or who fraudulently profits through an S.B.A. transaction, shall be liable to imprisonment for not more than five years. Section 645(c) makes it a crime for anyone to take or conceal property mortgaged or pledged to the S.B.A. An offender may be imprisoned for up to five years, unless the value of the property taken is less than $100 in which case the offense is punishable by imprisonment for not more than one year.

(x) 15 U.S.C. 714m(b). This enactment, part of the Commodity Credit Corporation Charter Act, provides that anyone connected in any capacity with the Corporation who steals or embezzles any assets either owned by or pledged to the Corporation shall be imprisoned not more than five years. Section 714m(c) provides that anyone who steals any property owned or held by, or mortgaged or pledged to, the Corporation is subject to a similar penalty, unless the value of the property is $500 or less in which case the penalty is up to one year in prison.

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[7] See also 42 U.S.C. 3531 *et seq.*

(xi) 16 U.S.C. 831t(a). This statute, part of the Tennessee Valley Authority Act of 1933, provides that the general penal laws of the United States relating to larceny, embezzlement, or conversion of the property of the United States apply to the property of the Tennessee Valley Authority.[8]

(xii) 33 U.S.C. 990. This statute, part of the Saint Lawrence Seaway Development Corporation Act, provides that all general penal laws of the United States relating to larceny, embezzlement, or conversion of public moneys or property of the United States apply to the moneys and property of the Corporation. Likewise the crimes described in 16 U.S.C. 831t (b) and (c) are duplicated in 33 U.S.C. 990 (b) and (c).

(xiii) 38 U.S.C. 3501. This law makes it a crime for anyone having custody in a fiduciary capacity of money paid under any of the laws administered by the Veterans' Administration for the benefit of any minor, incompetent, or other beneficiary, to embezzle or otherwise misappropriate such money. The penalty is up to five years' imprisonment.

(xiv) 38 U.S.C. 3502. This enactment provides that anyone who fraudulently accepts payment of monetary benefits under any of the laws administered by the Veterans' Administration after his right to receive payments has ceased, or anyone who obtains or receives such money without being entitled to it, with an intent to defraud the United States, shall be imprisoned not more than one year.

(xv) 42 U.S.C. 408(e). This statute, part of the Social Security Amendments of 1960, provides that anyone who applies for and receives payments for the use and benefit of another and converts such payments to any other use shall be imprisoned not more than one year.

(xvi) 42 U.S.C. 2703. This provision, part of the Economic Opportunity Act of 1964, makes it a crime for anyone connected with an agency receiving financial assistance under the Act to steal, embezzle, or misapply any funds which are the subject of a grant or contract of assistance. The penalty is imprisonment for up to two years, unless the value of the property does not exceed $100, in which case the penalty is up to one year in prison.

(xvii) 42 U.S.C. 3220(b). This law, part of the Public Works and Economic Development Act of 1965, provides that anyone connected with the administration of the Act who steals or embezzles funds shall be imprisoned not more than five years.

(xviii) 42 U.S.C. 3791, part of the Omnibus Crime Control and Safe Streets Act of 1968, punishes whoever embezzles, steals, or fraudulently obtains any funds or property which are the subject of a grant under the Act, whether received directly or indirectly from the Law Enforcement Assistance Administration. The penalty is imprisonment for not more than five years.

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[8] In addition subsections (b) and (c) of section 831t make it a crime, punishable by a prison term of up to five years, for anyone to make a false entry or report with intent to defraud the Tennessee Valley Authority Corporation, or to conspire or collude with intent to defraud the Corporation.

(xix) 25 U.S.C. 450d, part of the Indian Self-Determination and Education Assistance Act, penalizes whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to that Act or the Act of April 16, 1934, as amended (25 U.S.C. 452 *et seq.*), embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract. The penalty is up to two years in prison, unless the value of the property is $100 or less, in which case the maximum penalty is one year in prison.

(xx) 42 U.S.C. 1395 *et seq.*, and 1396 *et seq.*, chapters XVIII and XIX of the Social Security Act, provided for grants, payments and benefits for health insurance programs and State medical assistance programs. 42 U.S.C. 1395nn(a)(4) and 42 U.S.C. 1396h(a)(4), in identical language, make it an offense for a person who has made application to receive a benefit or payment under the respective chapters of the Act for the use of another, knowingly and willfully to convert such benefit or payment or any part thereof to a use other than for the use of such other person. A violation is punishable by up to five years in prison.

(xxi) 42 U.S.C. 1760(g). This statute punishes whoever embezzles, steals, willfully misapplies, or obtains by fraud any funds or property that is the subject of a grant or other form of assistance under the National School Lunch Act (42 U.S.C. 1751 *et seq.*) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq.*). The section also punishes whoever receives, conceals, or retains such funds or property knowing them to have been embezzled, stolen, willfully misapplied, or obtained by fraud. A violation is a five-year felony if the value of the property is $100 or more and is a one-year misdemeanor otherwise.

(xxii) 18 U.S.C. 665(a). This statute punishes whoever, being an officer, director, agent, employee, or person connected in any capacity with an agency receiving financial assistance under the Comprehensive Employment and Training Act, embezzles, steals, willfully misapplies, or obtains by fraud any of the monies, assets, or property which are the subject of a grant or contract of assistance under the Act. The general penalty is up to two years' imprisonment but if the amount stolen is $100 or less the penalty is only one year in prison.

I. Miscellaneous Statutes

26 U.S.C. 9012(c), part of the Presidential Election Campaign Fund Act, as amended, punishes by up to five years in prison whoever receives any payment under section 9006 (i.e., payments from the Presidential Election Campaign Fund to eligible candidates [9] of a political party), or to whom any portion of any payment received

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[9] The terms "eligible candidates" is defined in section 9002(4) to mean the candidates of a political party for President and Vice President of the United States, who have met the conditions set forth in section 9003 for eligibility to receive payments under chapter 95 of title 26.

under such section is transferred, and who knowingly and willfully uses or authorizes the use of such payment or such portion for any purpose other than to defray the qualified campaign expenses as to which such payment was made, or to repay loans the proceeds of which were used, or otherwise to restore funds that were used, to defray such expenses.

26 U.S.C. 903(a), part of the Presidential Primary Matching Payment Account Act (Public Law 93-443, October 15, 1974), provides that the Secretary of the Treasury shall maintain, in the Presidential Election Campaign Fund established by 26 U.S.C. 9006(a), a separate account to be known as the Presidential Primary Matching Payment Account, and that the Secretary shall deposit into that account, for use by the candidate [10] of any political party who is eligible to receive payments under 26 U.S.C. 9033, the amount available after the Secretary determines that amounts for payments under section 9006(c) and 9008(b)(3) are available for such payments. 26 U.S.C. 9037(b) provides, *inter alia,* that upon receipt from the Federal Election Commission of a certification from the Commission under section 9036, the Secretary or his delegate shall promptly transfer the amount certified by the Commission from the matching payment account to the candidate.

26 U.S.C. 9042(b) punishes by up to five years in prison any person who receives any payment under section 9037, or to whom any portion of such payment is transferred, and who knowingly and willfully uses, or authorizes the use of, such payment or such portion for any purpose other than (A) to defray qualified campaign expenses, or (B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses.

3. The Offense

Subsection (a) of section 1731 provides that a person commits an offense if he obtains or uses the property of another with intent: (1) to deprive the other of a right to the property or a benefit of the property; or (2) to appropriate the property to his own use or to the use of another person.

For the purpose of analysis, the offense is broken down into its several component elements and issues.

A. Obtains or Uses

The phrase "obtains or uses property" [11] constitutes the prohibited conduct. It is intended to bear the major burden now carried by concepts such as larceny, embezzlement, stealing, purloining and the like. The phrase "obtains or uses" is defined in section 1739 to mean "any manner of":

(i) taking or exercising control over property;

(ii) making an unauthorized use, disposition, or transfer of property; or

(iii) obtaining property by fraud;

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[10] The term "candidate" is defined in 26 U.S.C. 9032(2) to mean an individual who seeks nomination for election to be President of the United States

[11] The term "property" is discussed *infra.*

> and includes conduct heretofore known as theft, stealing, larceny, purloining, abstracting, embezzlement, misapplication, misappropriation, conversion, obtaining money or property by false pretense, fraud, deception, and all other conduct similar in nature.

Within the operative phrase "obtains or uses," all of the major forms of acquisitive behavior are meant to be covered, without inquiry into essentially irrelevant factors such as whether a capture or asportation has occurred, whether the defendant committed a trespassory taking or had custody of the property, and the like.[12] The focus is shifted away from the issue of how the defendant obtained control of the property, e.g., by trickery, stealing, embezzlement, or deception, to the issue of whether the defendant had control over the property. This is the criminologically significant element.[13] As the consultants to the National Commission on theft offenses explained this type of approach: [14]

> The important inquiry is not the particular legal category of the theft with which the offender can be tagged. The attempt is to describe comparable and essentially fungible conduct and to attach a single label—theft—to the offender who engages in it.

In the definition of the phrase "obtains or uses," the terms "taking or exercising control over property" are used to connote any form of control over property including taking control by force and control formerly punished under the heading "conversion." [15] The discussion of "force" in connection with robbery (section 1721) and extortion (section 1722) should be consulted in considering the term as used here. "Taking" control is meant, principally, to include the typical larceny situation, whereas "exercising" control is meant to include the typical embezzlement situation, in which the defendant already has lawful control of the property but exceeds his authority in some material way.

The second description of the phrase "obtains or uses," *viz.*, "making an unauthorized use, disposition, or transfer of property," is intended to cover such acts as misapplying, using, concealing, or secreting property. Covered by this definition would be such Federal statutes as 18 U.S.C. 643 which makes it a crime for any Federal employee to receive public money which he is not entitled to retain as salary; 18 U.S.C. 644, which prohibits unauthorized deposits of public money; and 18 U.S.C. 650, which punishes one who "fails to keep safely" public money entrusted to him.[16] In each of these instances, the conviction is for "embezzlement." Under this proposed section, the conviction for such conduct would be for theft provided that the misapplication, use, transfer, concealment, disposition, etc., is accompanied by the intent "to deprive the other of a right to the property or a benefit of the property, . . . or to appropriate the property to (the defendant's) own use or to the use of another person."

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[12] See Working Papers, p. 915. The National Commission used the phrase "takes or exercises unauthorized control over" to accomplish this same purpose. See Final Report, § 1732. The concepts of taking and exercising control are encompassed within the definition of "obtains or uses."

[13] The National Commission added an extra element to the issue—whether that control was authorized. See Working Papers, pp. 914–915. The Committee has included the concept of consent to the defendant's control over property not in the conduct element. *viz.*, obtaining or using, but in paragraphs (1) and (2) which define the intent elements of the offense. See *infra.*

[14] Working Papers, p. 916.

[15] See *Morissette* v. *United States, supra* note 2; *United States* v. *Tijerina*, 407 F.2d 349 (10th Cir.), cert. denied, 396 U.S. 843, 867 (1969).

[16] See also, e.g., 18 U.S.C. 642, 643, 656, 657, 659.

Finally, the phrase "obtains or uses" is defined in terms of taking control of property by fraud. The term "obtaining property by fraud" is meant to be broadly construed to reach a wide variety of different types of fraudulent acquisition of property, much of which is now covered by the existing mail fraud statute, 18 U.S.C. 1341.[17] It is intended to cover the situation where the possessor or owner transfers control of property to the defendant but such transfer is effected by false pretenses, deception, artifice, etc.

Fraud is included within this section because a considerable segment of conduct traditionally considered as theft is, in fact, a taking perpetrated by means of fraud.[18] Thus, this section, insofar as the obtaining of property is concerned, incorporates a substantive version of that portion of 18 U.S.C. 371 which prohibits conspiracies to defraud the United States. This results in more consistent coverage, permitting prosecution for the substantive crime of defrauding the United States, which is not covered generally under present law. The present offense of conspiracy to defraud the Federal government is not, however, limited to obtaining government property or funds, but extends also to schemes to interfere with or obstruct government functions by "deceit, craft or trickery." [19] Therefore, separate statutory coverage is necessary to reach this type of conduct, which is outside the realm of traditional concepts of theft. This has been accomplished by section 1301 (Obstructing a Government Function by Fraud). Furthermore, separate treatment is accorded to schemes to defraud by the use of the mail or wire facilities, under proposed section 1734, discussed subsequently.

Under the Committee's approach to fraud, therefore, every species of fraud, whether directed at the Federal government or otherwise, receives statutory treatment. Theft of money or property by fraud is covered by section 1731. Schemes to defraud by the use of the mails or wire facilities (whether or not property is actually obtained) are covered under section 1734.[20] Interference or obstruction of government functions by fraud is dealt with by section 1301.

To some extent there is an overlap in the definitions of "obtains or uses" in section 1739, particularly between paragraph (a), "taking or exercising control" and paragraph (b) "making an unauthorized use, disposition, or transfer of property." The concept of embezzlement, for example, is encompassed to a certain extent in both paragraphs. Any redundancy, however, poses no particular harm. Whether certain conduct is placed in paragraph (a) or (b) is of no consequence because in either case the conduct will fall within the definition of "obtains or uses" which is the conduct element in this section.

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[17] Technical loopholes derived from the common law definition of offenses are meant to be eliminated. Thus, for example, the Committee intends to reverse the result in cases such as *Chaplin* v. *United States*, 157 F.2d 697 (D.C. Cir. 1946), holding that false pretense must relate to a past event or existing fact, not to a future transaction.

[18] See e.g., 18 U.S.C. 659, 2312, and 2314.

[19] See *Hammerschmidt* v. *United States*, 265 U.S. 182, 187 (1924); *United States* v. *Peltz*. 433 F.2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971).

[20] That section also covers the second paragraph of 18 U.S.C. 2314 which makes it a crime to transport or cause to be transported any person in interstate or foreign commerce in connection with a scheme to defraud that person of money or property.

Because no state of mind is designated in this section with respect to the conduct, the level of culpability that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[21]

B. Property

The subject matter that must be obtained or used in the proposed section is property. The term "property" is defined in section 111 to mean: anything of value, and includes (a) real property, including things growing on, affixed to, or found in land; (b) tangible or intangible personal property, including rights, privileges, interests, or claims; and (c) services.

"Anything of value," in turn, is defined in section 111 as: any direct or indirect gain or advantage, or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to any other person.

As is evident, these terms are defined broadly. The purpose of these extensive definitions is to make clear that all forms of property are to be protected against an unauthorized taking or using.

By defining property to include real property, the section avoids distinctions between what is real property and what is personal property—and if characterized as real property what is movable and what is immovable [22]—in order to determine whether an offense has been committed under this section.

Intangible personal property is also meant to be broadly construed. It is intended to cover contract rights, including insurance, guarantees and other obligations, privileges, interests, and claims as well as intellectual property. Thus, theft of trade secrets and documents containing confidential information would be covered under section 1731.

In prohibiting the theft of documents—and duplicates of documents containing confidential information—this section reflects current law.[23] Where documents constitute the property "obtained or used," as that phrase has been defined, the "ideas" contained in the documents, rather than the paper on which the ideas are written, establish the value of the stolen property. The Second Circuit in *United States* v. *Bottone* [24] has held that the copying of documents containing a secret formula and the asportation of the copies violate the 18 U.S.C. 2314 theft provision even though the originals of the documents were returned to their appropriate place. The same result is intended under this proposed section. The criminologically significant element is the theft of the confidential information. The fact that the information from the document is copied on other paper is of no consequence. An exception to this concept has been included in section 1739(c) as a bar to prosecution in the case of intangible property obtained by nontrespassory means primarily for the purpose of disseminating it to the public. This will be discussed *infra*.

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[21] See sections 303(b)(1) and 302(b)(1).

[22] The National Commission distinguished movable from immovable real property, applying the theft provision unrestrictedly to the former, but, with respect to the latter, only if the exercise of control involved a transfer of an interest in the property. See Final Report, § 1741(f), defining "property;" Working Papers, p. 916. The Committee has decided to adopt the New York approach which does not recognize any such distinction. Where a person intends to deprive another of his property, it should not matter whether the deprivation involves a transfer of an interest. The criminologically significant element is the intent to deprive another of property, whether or not it is accomplished by a transfer or purported transfer of an interest. For a discussion of the application of this section to leasehold disagreements, see *C. Property of another*, this section, *infra.*

[23] See, e.g., *United States* v. *DiGilio*, 538 F.2d 972 (3d Cir. 1976) (sustaining conviction under 18 U.S.C. 641 for making and selling unauthorized copies of FBI files). *Hancock* v. *Decker*, 379 F.2d 552 (5th Cir. 1967); *United States* v. *Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *United States* v. *Lester*, 282 F.2d 750 (3d Cir. 1960); *United States* v. *Seagraves*, 265 F.2d 876 (3d Cir. 1959). With respect to government documents, the theft of records from any court of the United States or from any other public officer or government employee is covered by 18 U.S.C. 2071. The same result is intended under this section.

[24] *United States* v. *Bottone*, *supra* note 23.

An important addition to current law effected by the definition of "property" is the coverage of services among the items that can be the subject of theft.[25] Present Federal criminal law is deficient in this respect. Theft of services is not currently covered except in a few narrow situations, such as use of the mails without paying proper postage.[26] In prohibiting the theft of services, proposed section 1731 follows the lead of most modern reform efforts.[27]

C. Property of another

In order to make out a violation of section 1731, the prosecution must prove that the property involved is "of another." That term is defined in section 111 to mean: property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property.

This definition is patterned upon the definition proposed by the National Commission.[28] As the consultants to the Commission explained the import of the term: [29]

> This definition is . . . intentionally broad, and is designed to include diverse kinds of invasions of property interests of other people. The operative concept is an interest which the actor is not privileged to infringe without consent. This would obviously include an ownership or a possessory interest. It is also meant to include situations such as sales tax money collected by a merchant and held for the government (the government would have an "interest" which the merchant would not be entitled to infringe), income taxes withheld by an employer to be transmitted to the government (again, the government would have such an "interest") and other similar arrangements where property is withheld or transferred under a specific reservation that it, or equivalent property out of the actor's own funds, will be dealt with in a particular way.

The definition of "property of another" in section 111 is meant to carry the same thrust and breadth. The National Commission included in its definition in section 1741(g) of the Final Report the concept that another person's interest in property is subject to infringement by theft regardless of the fact that the other person might be precluded from civil recovery because the property was used in unlawful transaction or was subject to forfeiture as contraband. The Committee intends the same result, which it deems implicit in its definition of "property of another".

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[25] The term "services" is defined in section 111.
[26] See 18 U.S.C. 1720, 1725.
[27] See Working Papers, pp. 937-938.
[28] See Final Report, § 1741(g).
[29] See Working Papers, p. 917.

The fact that the property is that "of another" is an attendant circumstance. Accordingly, because no culpability level is specified in this section, the requisite state of mind that must be established is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded a substantial risk that the property was not "his." [30] This is deemed an appropriate standard to preserve the general *scienter* requirements of current statutes.[31]

The Committee also believes that this culpability level is sufficient to deal with situations involving the so-called "claim of right" defense.[32] The National Commission proposed to define the defense for all forms of theft.[33] Under its suggested definition, it would be a defense to a prosecution for theft that the actor "honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him." Quite simply, the rationale for this position is that if the defendant honestly believed that the property was his, it should not be theft for him to take it.[34]

The Committee believes that the "claim of right" defense is, to a satisfactory degree, built into the culpability requirements of the offense. Thus, if the defendant is unaware of the risk that the property he obtains is that of another, and believes it is his, he has a defense to theft—even though his belief was incorrect—because he lacks the requisite culpability. He did not obtain the property in reckless disregard of the fact that it was property of another. On the other hand, where the defendant is aware of the substantial risk that the property may be that of another (in the sense that the other has an interest which the defendant is not privileged to infringe without consent), then he would be guilty of theft if he took the property. The Committee believes that the penal sanction should be used to discourage persons from employing a self-help remedy such as taking property where the defendant believes that the property is his but is aware of the substantial risk that it may in fact be property of another. Where the defendant has such an awareness, he should use the legal process to vindicate his claims. By incorporating the "claim of right" defense in the culpability requirements of the offense, the section discourages an individual from forsaking legitimate means for contesting property where he is aware of the risk that he may not be entitled to the property [35] but allows a defense where the individual honestly believes that he is entitled to the property and is unaware of any other's claim to the property.

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[30] See sections 303(b)(2) and 303(c)(1).

[31] See *Morissette* v. *United States, supra* note 2. Note that it is not required to show that the defendant knew whose property an item or object was, provided he was aware of the substantial risk that it was not his. See *United States* v. *Smith,* 489 F.2d 1330, 1332-1334 (7th Cir. 1973), cert. denied, 416 U.S. 994 (1974); *United States* v. *Howey,* 427 F.2d 1017 (9th Cir. 1970); see also *Barnes* v. *United States,* 412 U.S. 837, 874-848 (1973).

[32] See Working Papers, pp. 941-944.

[33] See Final Report. § 1739(1)(a).

[34] See Working Papers, pp. 941-942.

[35] The risk must be such, for criminal liability hereunder, that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances. See section 302(c)(1).

Two matters bear on the "property of another" element. The first deals with the ordinary credit transaction, i.e., where a seller extends credit to a buyer without retaining an interest in the property sold. The Model Penal Code, in an earlier draft, suggested a provision excluding liability where the transaction involved only a "promise or other duty to be performed in the future" so as to "avoid putting the force of criminal law behind transactions which are in fact credit transactions." [36] The concern, as the National Commission pointed out, is with the housewife buying a refrigerator on credit and subsequently failing or being unable to pay for the refrigerator. There is no intention to punish the housewife for theft.[37]

A provision like the one suggested by the Model Penal Code is not necessary to evince this intention for two reasons. First, it must be remembered that an intent to deprive another of his property or to "appropriate" the property is an important ingredient of any theft charge. The offense is not simply a failure to pay but a deliberate attempt to deprive the seller of his interest in the property. This analysis, however, need not even be reached because of the second reason which is more fundamental: there is no interest of another that is infringed. In the definition of property of another, the operative concept is an interest which the actor is not privileged to infringe without consent. In the ordinary debt situation, the seller does not have an interest that can be infringed. The same is true where there is a security agreement, i.e., a seller retains a security interest in the property sold. In such a case the debtor's failure to pay still does not deprive the security holder of the security interest in the property. The security holder has an interest in his debt being paid and hence may sue the debtor for that purpose (including a suit to reclaim the secured property), but the mere failure to pay pursuant to the terms of the contract does not infringe the security interest of the seller in the particular property that is the subject of the sale.[38]

The second point involves the landlord-tenant relationship. As previously discussed, property is defined to include real property. There is no intention, however, to punish as theft the failure of a tenant to pay his rent on his leasehold, although again, as in the case of ordinary credit situations, there is no need specifically to evince this intention. Section 1731 would not apply to such a situation because, aside from the intent requirement, the landlord does not have an interest in the property at issue that is infringed by the failure to pay rent; rather he has a contractual interest in receiving payment which he may enforce, against the debter's assets, in the courts.

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[36] Model Penal Code, § 206.4. Comment, pp. 80–81 (Tent. Draft No. 2, 1954).

[37] Working Papers. p. 918. This assumes, however, that the housewife in good faith intended to pay when she obtained the property. If a person acquires property on credit without intending to pay, his actions would constitute theft under this section (i.e., they would amount to "obtaining property by fraud," within the definition of "obtains or uses" in section 1739).

[38] In the situation of a security agreement, section 1736 also applies. As in the case of the "ordinary debt situation," section 1736 would not encompass mere failure to pay. It requires a deprivation of the security interest by removing, concealing, encumbering, transferring, or converting property, for example, by selling the property without regard to the security interest. See *United States* v. *Coleman*, 259 F. Supp. 394 (N.D. Miss. 1966), aff'd, 383 F.2d 989 (5th Cir. 1967).

D. With intent to deprive another of a right to the property, or to appropriate the property to his own use or to the use of another person

The last element required to be proved in order to make out a violation of the theft offense is an intent to deprive another of his property or to appropriate the property. The phrases "with intent to deprive . . ." and "(with intent) to appropriate . . ." are purposive clauses that carry their own culpability standards. The terms "right to the property" and "benefit of the property" derive their meaning from the definition of "property of another," discussed above.

The National Commission intended the word "deprive" to carry more than the element of permanency. As the consultants to the Commission explained, "with intent to deprive . . . includes, but . . . is not limited to, a purpose permanently to appropriate the property to the actor's own benefit."[39] There is some dispute among legal authorities whether common law larceny required an intent to appropriate property permanently.[40]

Federal cases construing theft statutes on this issue are quite few in number, and a difference in viewpoint is evident. Two cases, indicating that larceny provisions should be construed as requiring an intent to deprive permanently, suggest that permanency is an element of the traditional or common law approach.[41] But the contrary position is taken in *Mitchell* v. *United States, supra,* where the court concluded, upon its analysis of the authorities, that common law larceny did *not* involve an intent permanently to deprive and construed a District of Columbia Code provision accordingly. In another case, *United States* v. *Henry,*[42] however, the court construed 18 U.S.C. 661 as *not* involving an intent permanently to deprive because the underlying Congressional intent was to broaden, not codify, the common law crime of larceny.

While the question may be unsettled with respect to larceny, it is clear that embezzlement in its various forms is committed without proof of any intent to deprive permanently. An embezzler may well mean to replace the embezzled funds at a subsequent time, but the crime is complete even if he succeeds in restoring the monies. "Borrowing" funds with which one is entrusted is embezzlement whether or not the borrower intends to restore the funds within a short period of time.[43]

The Committee is persuaded that the better reasoned case authority supports the view that Federal theft offenses should not carry the element of an intent permanently to deprive. Where one obtains property of another with the requisite intent to deprive the other of a right to the property or a benefit of the property, it ought not to matter whether the deprivation is intended to be temporary or permanent. Accordingly, the concept of permanency is not intended to be an element of the offense.[44]

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[39] Working Papers, p. 920.

[40] See 52A C.J.S., Larceny, § 27a; *Mitchell* v. *United States,* 394 F.2d 767, 770–771 (D.C. Cir. 1968).

[41] *Government of Virgin Islands* v. *Williams,* 424 F.2d 526 (3d Cir. 1970) (construing a provision of the Virgin Islands Code); *Ailsworth* v. *United States,* 448 F.2d 439, 442 (9th Cir. 1971) (dictum that had the evidence shown an intent to return the property, no violation of 18 U.S.C. 641 would have been committed).

[42] 447 F.2d 283 (3d Cir. 1971). See also, endorsing *Henry, United States* v. *Maloney,* 607 F.2d 222, 226–227 (9th Cir. 1979).

[43] For a few examples in the area, see *Rakes* v. *United States,* 169 F.2d 739 (4th Cir.). cert. denied, 335 U.S. 826 (1948) (involving a check-kiting operation); *Golden* v. *United States,* 318 F.2d 357 (1st Cir. 1963); *United States* v. *Friend,* 95 F. Supp. 580 (S.D.W.Va. 1951) (no intent permanently to deprive required for misapplication of postal funds).

The Committee considered including a defense of "consent," but ultimately decided that this was unnecessary. In a prosecution for theft, the government must show either an intent to "deprive" another of property, or an intent to "appropriate" the property. In either situation, the defendant could come forward with evidence of consent such as to negative the requisite intent. Because satisfactory proof of an "intent to deprive" precludes the possibility of consent, and because "appropriate" is is defined in section 1739 to mean "take or make use of without authority or right", it is apparent that if the defendant can show that he obtained the property with the consent of the other person or that he believed that the other person consented, the government's case must fail.

The following examples illustrate the kind of conduct that is meant to be covered by this section, and which conduct the Committee feels would establish the requisite "intent to deprive . . . or to appropriate . . .":

(i) Creating or reinforcing false impressions in order to induce another to part with his property. For example, the defendant obtains property of another by knowingly creating or reinforcing a false impression as to a present or past fact, or by omitting to disclose any fact necessary in order to render statements made not misleading, or by preventing the other from acquiring information which would affect his judgment of a transaction.

(ii) Theft of property lost, mislaid, or delivered by mistake. The defendant fails to take reasonable measures to restore property of another that he knows to have been lost, mislaid, or delivered by mistake and converts the property to the use of himself or of a third person.[45]

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[44] Whether the deprivation is intended to be temporary or permanent is an issue, however, that is relevant to sentencing. Subsection (b)(4)(B) provides that an intended temporary deprivation of a motor vehicle or vessel by a person under age seventeen shall be graded as a Class B misdemeanor rather than a felony.

[45] The National Commission suggested a separate offense for the theft of property lost, mislaid, or delivered by mistake. See Final Report, § 1734. It recognized that there is no criminological significance to the fact that the property stolen is lost or mislaid (Working Papers, p. 939): "There is very little difference in character between an actor who picks up money he finds lying on a table in someone's house (ordinary larceny) and one who keeps a $100 bill handed to him when he knows he is entitled only to $10 and that the victim thinks he is giving him only $10. Nor is there much difference between these two offenders and the actor who 'finds' money lying on the counter in a bank and who helps himself to it. The point, of course, is that the actor is just as culpable if he intends to appropriate property he knows to belong to another whether he takes it, finds it, or discovers it as it is being mistakenly delivered to him. And it is just as clear that the extent of his criminal liability should not turn on technical differences between whether the money was lost, mislaid, or simply placed somewhere for safekeeping. This, in any event, is the premise of the proposal to make appropriation of found or discovered property theft just like any other kind of theft."

Although the Committee believes that the theft of property lost, mislaid, or delivered by mistake should be punished as theft, it does not believe that a separate offense section is necessary. Theft of such property is covered by this section. The key elements for such an offense are property of another and intent to deprive or appropriate. Where the actor disregards a risk that the property is not abandoned and hence may be property of another, he is guilty of theft if in fact the property belongs to another.

The National Commission added an extra element in its section on theft of lost or mislaid property—whether the actor took reasonable measures to restore the property to a person entitled to have it. The Committee believes that a separate statement of this element is unnecessary. It bears on the question of the awareness of the actor as to whether the property is abandoned and on the question of his intent to deprive or appropriate. Proof that measures to restore the property were taken or were not taken is relevant but not dispositive of these issues.

(iii) Passing bad checks. The defendant obtains property by issuing or passing a check for the payment of money drawn upon a bank or other depository with knowledge that the maker or drawer has no account, funds, or credit at such bank or other depository for the payment of such instrument.

(iv) Theft of services. The defendant avoids payment for services rendered, by stealth, force, intimidation, deception, trick, artifice, or any misrepresentation of fact that the person knows to be false.

The defendant obtains services or avoids payment for services rendered, by means of tampering or making connection with, or in any manner adjusting, altering, or modifying by mechanical, electrical, acoustical, or other means any of the equipment of the supplier, including a meter or other device for measuring the amount of services rendered or any device designed to supply or to prevent the supply of services either to the community in general or to a particular structure.

The defendant uses or diverts to the use of himself or of a third person labor in the employ of another person or business, or commercial or industrial equipment or facilities of another person, knowing that the user is not entitled to the use of such labor, equipment, or services.

The defendant obtains property of another by means of an express or implied representation that he or a third person will in the future engage in particular conduct when he does not intend to engage in such conduct or does not believe that the third person intends to engage in such conduct.[46]

4. Proof

Section 1739(b)(1) provides, *inter alia*, that in a prosecution under this section the possession of property recently stolen, unless satisfactorily explained, constitutes *prima facie* evidence that the person in possession of the property in some way participated in its theft. The term "prima facie evidence" is contained in proposed Rule 25.1 of the Federal Rules of Criminal Procedure and is explained in connection therewith. In essence it has the consequence that the court will instruct the jury that ordinarily the fact of recent possession of stolen property is a circumstance from which the jury may draw the inference that the person in possession in some way participated in the theft. A similar common law inference from possession of recently stolen property has long been applied by the Federal courts[47] and was sustained as constitutional in *Barnes* v. *United States*[48] as meeting the requisite test of rationality based upon experience. This provision thus continues and codifies that doctrine.[49] The issue of what constitutes "recent" possession is intended, as under existing law, to be left to the courts and the jury depending upon the circumstances of each case.

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[46] Of course, the person's intent or belief that the promise would not be performed may not be inferred solely because the promise was not performed but it may be inferred by nonperformance plus evidence of a scheme to defraud; lack of capacity to engage in the promised conduct; conduct, in fact, prohibited by a pertinent licensing or regulatory provision; transfer of assets to avoid civil liability for breach of contract; or other proof that the circumstances of the situation are inconsistent with an absence of intent to steal.

[47] See, e.g., *United States* v. *Johnson*, 433 F.2d 1160, 1163–1170 (D.C. Cir. 1970), and cases cited therein; *Kowalewski* v. *United States*, 418 F.2d 118, 119–121 (9th Cir. 1969).

[48] 412 U.S. 837, *supra* note 31.

[49] See, e.g., *Hale* v. *United States*, 410 F.2d 147, 150–151 (5th Cir.), cert. denied, 396 U.S. 902 (1969).

Section 1739(b) (2) and (3) contains additional proof provisions applicable to this section as well as sections 1732 and 1733. These provisions are discussed in relation to the following section and that discussion should be consulted here.

5. Bar to Prosecution

Section 1739(c) provides that it is a bar to a prosecution under sections 1731, 1732, and 1733 that (1) the subject of the offense was intangible property owned by, or under the care, custody, or control of, the United States, (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public, and (3) the property was not obtained by means of conduct constituting an offense under section 1521 (Eavesdropping), 1524 (Intercepting Correspondence), 1711 (Burglary), 1712 (Criminal Entry), or 1713 (Criminal Trespass), or constituting a trespass under civil law. "Civil law" refers to the civil law in the State in which the conduct occurred.

This provision is designed to accomplish two principal objectives. For one thing, it is intended to remove criminal liability on a theft theory for so-called "whistleblowers." Thus, under this provision, a government employee who, for the primary purpose of public exposure of the material, reveals a government document, to which he obtained access lawfully or by non-trespassory means, would not be subject to criminal prosecution for theft.

The second noteworthy consequence of this provision is its preclusion of criminal liability for theft or receipt of stolen property for members of the press who, motivated primarily by the interest in public dissemination thereof, publish information, owned by or under the custody of the government, that was not obtained by them by trespassory means. The Committee intends that the phrase "primarily for the purpose of disseminating it to the public" be construed to permit the successful invocation of the bar in this subsection, where a subsidiary motive for publication was the possibility of a promotion or payment of salary or bonus to the reporter, or the incidental reaping of financial gain from the sale of a book. The Committee intends that the burden of establishing the bar to prosecution rests on the defendant as the person invoking the bar and as the one in the best position to explain his own motivation and the manner in which he acquired the information.

6. Jurisdiction

In keeping with the general approach of the proposed Code, the jurisdictional bases for Federal prosecution have been separated from the formulation of the offense itself. The numerous bases set forth below in most cases retain the coverage of present law. However, because some of the bases are general in nature (e.g., property "moving in interstate or foreign commerce"), and because many present statutes do not cover theft of services, expansion of theft jurisdiction in certain areas has been effected.

The jurisdiction subsection is divided into several parts. Paragraphs (1) through (5), which are self-explanatory, refer to: (1) the special jurisdiction of the United States;[50] (2) property owned by or under the care, custody, or control of, the United States,[51] or being produced, manufactured, constructed, or stored for the United States; (3) an offense committed by a Federal public servant acting under color of office; (4) an offense committed by a person pretending to be a present or former Federal public servant, or a foreign official;[52] (5) property obtained upon a representation that it will be used to cause a Federal public servant to take or withhold official action.[53]

Paragraph (6) provides for Federal jurisdiction if the property has a value of $2,500 or more, and is obtained through the use of one or more counterfeit, fictitious, altered, forged, lost, or stolen credit cards in a transaction or series of transactions affecting interstate or foreign commerce.

This provision has been included to deal with the problem created by *United States* v. *Maze,*[54] in which the Supreme Court held that the defendant's use of a credit card, issued by a Kentucky bank, to obtain food and lodging at motels in California did not come within the Federal mail fraud statute. The Court reasoned that the subsequent mail delivery of sales slips of purchases made by the defendant to the bank was not sufficiently related to his scheme to bring his conduct within the statute. In other words, his scheme had already reached fruition when the mails were used, and thus the defendant did not "use" the mails to defraud within the meaning of 18 U.S.C. 1341.

Because the proposed Code's reenactment of the mail and wire fraud statutes also require "the use of the United States mail" in the "course of executing such scheme or artifice" (see the discussion of section 1734 *infra*), the Committee has decided to cover conduct similar to that in *Maze* under the general theft statute.

In large measure in response to the *Maze* decision, the Congress, in the enactment of Public Law 93-495, amended a section of the Truth in Lending Act[55] that prohibited the use of a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card in a transaction involving interstate or foreign commerce to obtain goods or services having, in the aggregate, a retail value of $5,000 or more. The 1974 amendment lowered this jurisdictional base to $1,000 and created several new offenses. Moreover, the maximum penalty for all the offenses in the statute (15 U.S.C. 1644) was raised from five to ten years' imprisonment. The new offenses included (1) the use, with fraudulent intent, of any instrumentality of interstate or foreign commerce to sell or transport a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card knowing it to be counterfeit, fictitious, etc.; (2) the transportation in interstate or foreign commerce, with fraudulent intent, of such an improperly obtained credit card knowing it to be counterfeit, fictitious, etc.; (3) the knowing receipt, concealment, use, sale, or transportation in interstate or foreign commerce of one or more tickets for such transportation which have an aggregate value, in any one year, of $500 or more and which were obtained with a counterfeit, fictitious, etc., credit card; and (4) the furnishing of money, property, services, or anything of value which, in any single year, has an aggregate value of $1,000 or more, through the use of any counterfeit, fictitious, etc., credit card knowing it to be counterfeit, fictitious, etc.

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[50] See 18 U.S. 661, 1025.

[51] It should be noted that conduct in the nature of theft or fraud involving property subject to a security interest held by the United States—such as current 18 U.S.C. 1010—is covered in section 1736 (Interfering with a Security Interest).

[52] See 18 U.S.C. 912, 915.

[53] This provision covers a person who obtains money on a promise that he can influence a public servant to act in the victim's favor. Such conduct has been sought, unsuccessfully, in the past to be prosecuted as an obstruction of justice, but is really a species of theft (i.e., obtaining property by fraud). See *Ethredge* v. *United States,* 258 F.2d 234 (9th Cir. 1958); *United States* v. *Campbell,* 350 F. Supp. 213 (W.D. Pa. 1972).

[54] 414 U.S. 395 (1974).

[55] Section 134 of that Act (15 U.S.C. 1644).

The statute prior to its amendment in 1974 was rarely utilized, primarily because of the availability of the mail fraud statute. The 1974 amendment sought to broaden the use of the existing statute and thus cure the problem created by the *Maze* decision.

Since *Maze* has effectively eliminated the use of the mail fraud statute as a weapon against the fraudulent use of a credit card, the Committee has provided felony jurisdiction in paragraph (6) of this section for theft by use of a counterfeit, forged, lost, or stolen credit card of property valued at $2,500 or more, thus enabling section 1731 to reach nearly all of the cases formerly prosecuted under the mail fraud statute. Thefts by use of a counterfeited, forged, lost, or stolen credit card in any amount from $1,000 to $2,500 would be covered as Class A misdemeanors under the Truth in Lending Act (15 U.S.C. 1644) as amended by the Criminal Code Reform Act of 1981.

The Committee has made one other change in current law.[56] Existing 15 U.S.C. 1644 requires that the aggregate jurisdictional amount of $1,000 be met in a "transaction affecting interstate or foreign commerce." Conceivably this could be interpreted to mean that the jurisdictional amount must be met in but one basic transaction. The Committee does not believe that the existing law should be read in this narrow manner. To avoid any such interpretation the words "or series of transactions" have been added to make it clear that the new $2,500 limit can be reached by aggregating purchases made throughout the use of the card or cards involved.

"Credit card" is intended to mean all objects commonly referred to by that term, and includes a card, charge plate, or any other identifying symbol or instrument which purports to evidence an undertaking to pay for property or services delivered to or rendered upon the order of a designated person or bearer.

Paragraph (7) provides jurisdiction where the property is mail, and thus in effect reenacts 18 U.S.C. 1702 and 1708.

Paragraph (8) provides for jurisdiction where:

> [T]he property is moving by common carrier in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system which extends across a State or United States boundary or in a storage facility of such a system.

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[56] It should be noted that the basic reach of the 1974 Act concerning receiving property obtained by the use of a forged or stolen credit card is carried forward in section 1732 (Trafficking in Stolen Property) and section 1733 (Receiving Stolen Property).

This provision is based largely on 18 U.S.C. 659. The phrase in that statute "which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce" is carried forward here by the language "moving by common carrier in interstate or foreign commerce", although this language may not be strictly necessary in view of the very broad interpretation accorded the term "interstate or foreign commerce" by the Federal courts, which construction the Committee endorses and intends to perpetuate under this section.[57] It should be noted that the terms "interstate commerce" and "foreign commerce" are defined in section 111 (compare 18 U.S.C. 10). The Committee further intends that the branch of 18 U.S.C. 659 dealing with theft from a passenger on a common carrier moving in interstate or foreign commerce be deemed encompassed in the concept of "property moving in interstate or foreign commerce" in this paragraph. The fact that the property is on the person of a passenger rather than in a freight car does not alter the fact that the property itself is in commerce.

It should be noted in regard to this jurisdictional base that section 1739(b)(4) provides that:

> [I]n establishing that property constitutes or is part of an interstate or foreign shipment within the meaning of section 1731(c)(8), proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped or was being shipped as indicated by such document.

This is derived from a similar provision in 18 U.S.C. 659, which speaks in terms of "prima facie evidence" instead of a presumption.[58] A presumption is defined in Rule 25.1 of the Federal Rules of Criminal Procedure contained in the reported bill. The Rule provides that where a presumption is created, the court shall charge that the jury may find the existence of the presumed fact on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as strong evidence of the fact presumed.

Paragraph (9) covers property that is ammunition, a firearm, or a vehicle or has a value of $5,000 or more, and that is moved across a State or United States boundary in the commission of the offense. The term "commission of an offense" is defined in section 111 to include the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense. Thus, this base will carry forward, in part, the coverage of certain crimes in the National Stolen Property Act, 18 U.S.C. 2312, 2314, 2315, and 2316, as well as 18 U.S.C. 922(i). Those statutes punish the transportation in interstate or foreign commerce of ammunition, a firearm or a vehicle, or property valued at $5,000 or more, "knowing the same to have been stolen". Thus, where the interstate or foreign movement of such stolen property occurs during the consummation or immediate flight after the commission of the offense, it will be encompassed within this section. The remaining coverage of these statutes is carried forward in the following two sections, by means of a related jurisdictional base.

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[57] See, e.g., *United States* v. *Berger,* 338 F.2d 485 (2d Cir. 1964), cert. denied, 380 U.S. 923 (1965); *United States* v. *May,* 419 F.2d 553 (8th Cir. 1969), to the effect that once property is delivered to the carrier for shipment, its interstate character attaches notwithstanding that no interstate route had been selected and the interstate journey had not begun at the time of the theft. See also *United States* v. *Gollin,* 166 F.2d 123 (3d Cir.), cert. denied, 333 U.S. 875 (1948); *United States* v. *Augello,* 452 F.2d 1135 (2d Cir. 1971), cert. denied, 409 U.S. 859 (1972); *United States* v. *Astolas,* 487 F.2d 275 (2d Cir. 1973), cert. denied, 416 U.S. 955 (1974).

[58] The National Commission also included such a provision. See Final Report, § 1739(2)(c).

Paragraph (10) applies to property owned by, or under the care, custody, or control of, a national credit institution.[59] This provision continues Federal jurisdiction over thefts, embezzlements, etc., from Federally controlled or insured financial institutions.[60]

Paragraph (11) applies to offenses committed by a misrepresentation of United States ownership, guarantee, insurance, or other interest of the United States in property involved in a transaction. It is derived from existing law.[61]

Paragraph (12) covers offenses committed by impersonation of a creditor of the United States. This section is premised on the existing jurisdictional base in 18 U.S.C. 914.

Paragraph (13) provides for Federal jurisdiction where:

> [T]he property: (A) is owned by, or is under the care, custody, or control of, an Indian tribe, band, community, group, or pueblo that is subject to a federal statute relating to Indian affairs, or a corporation, association, or group organized under any such statute; or (B) is the subject of a grant, subgrant, contract, or subcontract pursuant to the Indian Self-Determination and Education Assistance Act (88 Stat. 2203) or the Act of April 16, 1934, as amended (25 U.S.C. 452 *et seq.*), and the offense is committed by an agent of a recipient of such a grant, subgrant, contract, or subcontract.

This provision substantially codifies the jurisdictional bases in 18 U.S.C. 1163 and 25 U.S.C. 450d, covering embezzlement and theft from Indian tribal organizations or by agents of recipients of various governmental contracts and grants.

Paragraph (14) provides for Federal jurisdiction where:

> [T]he property is owned by, or is under the care, custody, or control of, an employee benefit plan subject to a provision of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*).

This jurisdictional base is the same as that contained in 18 U.S.C. 664, encompassing theft or embezzlement from an employee welfare or pension benefit plan.

Paragraph (15) is new and covers trust funds established by employers or employee organizations (as defined in section 3(4) of the Employee Retirement Income Security Act of 1974)[62] to provide benefits to the members of such organizations or their families. The purpose of this provision, which expands current law, is discerned by reference to the discussion in this report to section 1752(b)(2) (Labor Bribery).

Paragraph (16) provides that there is Federal jurisdiction where:

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[59] The term "national credit institution" is defined in section 111.

[60] See, e.g., 18 U.S.C. 656, 657, 2113.

[61] See U.S.C. 663, 1861.

[62] 29 U.S.C. 1002(4).

> [T]he property is owned by, or is under the care, custody, or control of, and the offense is committed by an agent or member of, or a person connected in any capacity with: (A) a labor organization as defined in section 3 (i) and (j) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402 (i) and (j)), or (B) a labor organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with any United States government agency regarding grievances, personnel policies and practices, or other matters affecting the working conditions of its employees.

The first branch of this jurisdictional base carries forward present law and is adapted from 29 U.S.C. 501(c). The second branch is new and is designed to extend Federal jurisdiction to thefts from Federal employee unions. Labor organizations comprised solely of Federal employees (with the exception of postal workers) are not covered by the provisions of the Labor-Management Reporting and Disclosure Act. Because of this omission, officials of Federal employee unions who steal or embezzle union funds are not now subject to prosecution by the Federal government. The Committee regards this as unjustified. It is ironic and irrational that under the present state of the law, Federal law enforcement officials are authorized to prosecute embezzlement or theft involving the assets of private-sector unions but have no cognizance over similar offenses affecting union members who are Federal employees. This jurisdictional base will remedy this gap.

Paragraph (17) provides for Federal jurisdiction where:

> [T]he offense is committed by an agent or receiver of, or a person connected in any capacity with, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958, as amended (15 U.S.C. 662), and the property is owned by, or is under the care, custody, or control of, such small business investment company.

This provision will reenact the jurisdictional coverage of current 18 U.S.C. 657 and 1006.

Paragraph (18) provides that there is Federal jurisdiction where:

> [The] property is owned by, or is under the care, custody, or control of—
>
> (A) a person registered or required to be registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);
>
> (B) a member of a national securities exchange as defined in section 3(a)(3)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(3)(A));
>
> (C) a clearing agency or participant in a clearing agency as defined in section 2(a)(23) and 3(a)(24) of the Securities Exchange Act of 1934 (15 U.S.C. 78-3(a)(23) and 75c-3(a)(24));
>
> (D) an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, *et seq.*));

> (E) a person registered or required to be registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*); or
>
> (F) an insurance company registered under the law of a State or a foreign insurance company doing business within the United States if such company holds the property in a capacity that is or may be regulated under such laws.

This covers the jurisdictional bases contained in 15 U.S.C. 80a-36 and 80a-48 and represents an extension of Federal jurisdiction over present law, the need for which was amply demonstrated in hearings held before the Senate Permanent Subcommittee on Investigations concerning organized crime and the theft and counterfeiting of corporate securities.[63] It was established at those hearings that present law is inadequate to combat the sophisticated fraudulent schemes involving use of stolen and counterfeit corporate securities and that new legislation is needed.[64]

Based on those hearings the Committee has concluded that the use of stolen securities as collateral for loans, to bolster the credibility of fraudulent financial statements, as well as for other illegal purposes, has a serious and detrimental effect on interstate commerce.[65] In addition, statistics gathered by the Permanent Subcommittee on Investigations clearly indicate that the problem concerns securities issued by State and local governments as well as those issued by corporations.[66] Furthermore, these fraudulent schemes, using stolen securities, invariably reach beyond State and even national boundaries, and thus State law enforcement authorities are generally unable to cope effectively with these offenses. It is for these reasons that the Committee believes it is essential to extend Federal jurisdiction to cover the theft of the type enumerated in subparagraphs (A) through (F). The scope of this provision is substantially similar to legislation introduced in recent Congresses by several Senators.[67]

Paragraph (19) reaches cases where:

> [T]he offense is committed by a futures commission merchant as defined in section 2(a) of the Commodity Exchange Act, as amended (7 U.S.C. 2), or an agent thereof, and (A) the property is that of a customer and is received by such futures commission merchant to margin, guarantee, or secure trades or contracts of any customer; or (B) the property has accrued to a customer as the result of trades or contracts.

This reflects the jurisdictional base set out in 7 U.S.C. 13(a).

Paragraph (20) provides for Federal jurisdiction where:

> [T]he property is owned by, or is under the care, custody, or control of, an organization engaged in interstate com-

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[63] See *Hearings on Organized Crime: Securities Thefts and Frauds*, before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 93d Cong., 1st Sess., Part 1, pp. 1-9 and Part 2, pp. 123-136.

[64] *Ibid.*

[65] *Ibid.*

[66] *Id*, at Part 4, p. 516.

[67] S. 2221, 94th Cong., 1st Sess.; S. 2323, 95th Cong., 1st Sess; S. 1380, 96th Cong., 1st Sess.

> merce as a common carrier, and the offense is committed (A) by a president, director, officer, or manager of such common carrier; or (B) by an agent of such common carrier riding in a motor vehicle, vessel or aircraft of such common carrier that is moving in interstate commerce.

This provision incorporates jurisdictional bases currently contained in 18 U.S.C. 659 and 660.

Paragraph (21) covers situations where:

> [T]he offense is committed by an agent of, or a person connected in any capacity with, an agency receiving financial assistance under the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2701 *et seq.*), and the property is the subject of a grant or contract of assistance pursuant to such Act.

This provision continues the present scope of 42 U.S.C. 2703(a).

Paragraph (22) provides that there is Federal jurisdiction where:

> [T]he property consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a federal public building, federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained or retained by fraud in relation to that person's employment.

This is based on 18 U.S.C. 874 (kickbacks from public works employees), which prohibits such kickbacks by means of force, intimidation, threat or "any other manner whatsoever." The proposed Code deletes the omnibus coverage of 18 U.S.C. 874 ("any other manner whatsoever") and limits the jurisdictional purview of the offense to kickbacks obtained by extortion [68] or fraud.

Paragraph (23) covers situations where:

> [T]he offense is committed by a trustee, receiver, custodian, marshal, or other court officer and the property consists of a part of the estate of a debtor concerning whom a petition has been filed pursuant to title 11 of the United States Code.

This continues the present scope of 18 U.S.C. 153.

Paragraph (24) establishes Federal jurisdiction where:

> [T]he property consists of a part of a grant, contract, or other form of assistance received directly or indirectly, from the Law Enforcement Assistance Administration pursuant to title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. 3701 *et seq.*).

This duplicates the coverage of 42 U.S.C. 3791.

Paragraph (25) establishes Federal jurisdiction where:

> [T]he property (A) consists of a coupon, or of an authorization card, defined in section 3 (c) and (d) of the Food Stamp Act of 1964, as amended (7 U.S.C. 2012 (c) and (d)); or (B) is obtained by the use of such a coupon or authorization card that has been obtained in violation of this sec-

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[68] See proposed section 1722 (a) and (c)(8).

> tion, that has been counterfeited in violation of section 1741, or that has been forged in violation of section 1742.

This provision continues the coverage of 7 U.S.C. 2023.

Paragraph (26) provides that there is Federal jurisdiction where:

> [T]he property consists of agricultural products stored or to be stored in a licensed warehouse pursuant to the United States Warehouse Act (7 U.S.C. 241 *et seq.*) and licensed receipts have been or are to be issued for such products.

This is the same jurisdictional base contained in 7 U.S.C. 270.

Paragraph (27) covers situations where:

> [T]he property consists of money paid under a law administered by the Veterans' Administration for the benefit of a minor, an incompetent, or another beneficiary, and the offense is committed by a fiduciary of such beneficiary.

This provision codifies 38 U.S.C. 3501.

Paragraph (28) covers situations where:

> [T]he property is owned by, or under the care, custody, or control of, the Securities Investor Protection Corporation or a trustee appointed in connection with proceedings under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*).

This is intended to carry forward the offenses in 15 U.S.C. 78jjj(c)(2).

Paragraph (29) establishes Federal jurisdiction where:

> [T]he property is a payment made pursuant to section 801 of the Presidential Election Campaign Fund Act, as amended (26 U.S.C. 9001 *et seq.*), or pursuant to section 9037 of the Presidential Primary Matching Account Act (26 U.S.C. 9037), and the offense is committed by a person to whom such payment is made or to whom a portion of such payment is transferred.

This carries forward the offenses in 26 U.S.C. 9012(c) and 9042(b).

Paragraph (30) creates jurisdiction where the property is provided or insured under part B of title IV of the Higher Education Act of 1965, as amended (20 U.S.C. 1071 *et seq.*). This carries forward the scope of 20 U.S.C. 1087-4(a).

Paragraph (31) provides jurisdiction if the offense is committed in connection with a payment for furnishing an item or service pursuant to title XVIII or XIX of the Social Security Act (42 U.S.C. 1395 *et seq.* or 42 U.S.C. 1396 *et seq.*) This carries forward the felony conversion offenses in 42 U.S.C. 1395nn(a)(4) and 1396h(a)(4).

Paragraph (32) creates Federal jurisdiction where:

> [T]he offender—
>
> (A) transports the property in interstate or foreign commerce, or uses an instrumentality of interstate or foreign commerce to sell or transport the property, and the property consists of a debit instrument, as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(c)); or

(B) uses the property in a transaction affecting interstate or foreign commerce or the property has moved in or is part of or constitutes interstate or foreign commerce, and the property has a value of $1,000 or more and is obtained in a transaction, or a series of transactions in a one-year period, by the use of such a debit instrument that is counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained.

This is designed to carry forward the theft-type offenses enacted in the 95th Congress in the Electronic Fund Transfer Act, Public Law 95–630.

Paragraph (33) creates jurisdiction if the property is the subject of a grant or other form of assistance under the National School Lunch Act (42 U.S.C. 1751 *et seq.*) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 *et seq.*). This brings forward the offenses in 42 U.S.C. 1760(g).

Paragraph (34) provides for Federal jurisdiction if the property has a value of $5,000 or more and is property owned by, or under the care, custody, or control of, an organization, or a State or local government agency, that received benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or another form of Federal assistance, and if the offense involves property owned by, or under the care, custody, or control of, the program and is committed by an agent of such organization or agency.

This jurisdictional base is new in the generality of its application to thefts from all federally funded programs, but draws upon specific statutes such as 18 U.S.C. 665(a), applicable to thefts from the C.E.T.A. program. The provision, which is strongly supported by the Department of Justice, is designed to remedy a gap in the existing coverage of such thefts, resulting primarily because of the requirement under 18 U.S.C. 641 that the money stolen be proved to be United States government property. Once money is paid over pursuant to a Federal program to an organization or unit of State or local government, frequently title passes or the Federal funds are commingled with other funds and lose their character as Federal dollars, although the Federal Government clearly retains a strong interest in assuring the integrity of such program monies. Indeed, a recurring problem in this area, underlining the need for Federal jurisdiction, has been that State and local prosecutors are often not inclined to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.

The jurisdictional base, while broad in its concept, contains various limiting features, so as to insure against an unwarranted expansion of Federal jurisdiction into areas of little Federal interest. The limiting features are (1) the requirement that the theft involve at least $5,000, (2) the requirement that the theft be from a program that received at least $10,000 in Federal benefits over a one-year period, (3) the requirement that the property stolen be property owned by or under the care, custody, or control of, the program, and (4) the requirement that the offense be committed by an agent of the receiving organization or government agency. The terms "organization", "agent", and "government agency" are defined in section 111.

Paragraph (35) creates Federal jurisdiction if the property stolen has a value of $10,000 or more and the offense is committed in connection with the marketing of livestock in interstate or foreign commerce. This jurisdictional base is derived in part from 18 U.S.C. 2316 and is intended to permit Federal cognizance of large scale livestock thefts having an interstate nexus. The Committee has been advised that such thefts are a significant problem in Western States and that local law enforcement is often incapable of dealing with the problem.

Finally, paragraph (36) provides Federal jurisdiction if the property consists of tickets or other documents accepted or issued by an air carrier for the interstate or international air transportation of persons and (A) the value of the tickets or documents is $5,000 or more; or (B) the number of tickets or documents is 100 or more. It has been brought to the Committee's attention that there is a significant and growing problem with theft of airline tickets.[69] Since this type of activity is interstate or international in scope the Committee feels it is necessary to have Federal jurisdiction over this conduct.

In addition, it should be noted that if an offense under this section involves fraud upon the United States or the theft of United States property, there is extraterritorial jurisdiction under section 204(c)(5).

7. Grading

To remedy the lack of uniformity in the grading provisions of present law, the Committee has proposed a four step approach to the problem. The most severe grading—i.e., Class C felony (up to twelve years' imprisonment)—is reserved for instances in which the property that is the subject of the offense has a value in excess of $100,000. While it may be that few thefts will involve this amount, those that do ("white collar" crimes, for instance) are in the Committee's judgment sufficiently serious to warrant this classification.

Class D felony treatment (up to six years in prison) is prescribed if the property which is the subject of the offense has a value in excess of $500 but not more than $100,000. The reason for according such a felony level to every theft in excess of $500—admittedly a low threshold—is to permit appropriate sentencing in cases where the defendant is apprehended before his crime is completed. Thus, if an arrest is effected during the course of a theft from an interstate shipment, but the defendant has only appropriated a few hundred dollars worth of merchandise, the crucial inquiry becomes how much property he intended to steal—e.g., only enough to customize his own car, or $50,000 worth of automotive accessories. Although grading for attempt is equivalent to that for the complete offense, charging the defendant with attempt does not obviate the problem, because of the difficulty of proving how much he intended to steal. To avoid this dilemma, which can be expected to arise in cases where the thieves are interrupted in the early stages of their work, the Committee has proposed that every theft in excess of $500 (up to $100,000) be graded as a Class D felony. Where the full import of the offense, although within this range, is relatively minor, the court may of course take this factor into account in imposing sentence.

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[69] See Hearings, Part XVI, pp. 12089-12091 (testimony of William J. Burhop, Vice Pres., Federal Affairs, Air Transport Association).

Class D felony treatment is also provided for the theft of certain enumerated items, regardless of their monetary value being $500 or less:

A. A firearm, ammunition, or a destructive device

Theft of the various items included within this provision [70] is all too often the predicate or catalyst for the commission of far more serious crimes, and thus the relatively harsh penalty is justified. In addition, the *per se* felony treatment avoids the difficult and essentially irrelevant issue of value in this context.

B. A vehicle, except as provided in paragraph (4) [71]

This essentially allows coverage parallel to that of the existing Dyer Act (18 U.S.C. 2312), although jurisdiction has been expanded somewhat by the addition of vessels within the definition of "vehicle" in section 111. While that Act is considered to be an effective tool in prosecuting car thieves, too many cases, basically local in nature, have found their way into the Federal courts. Indeed, some courts have indicated a desire to limit the Dyer Act primarily to organized crime, professional criminals, "ring" cases, salvage and stripping operations, and the like.

For this reason, the Department of Justice has issued guidelines limiting prosecution of Dyer Act cases.[72] The Committee is of the view that these guidelines, by and large, obviate the problem, while providing flexibility should changing circumstances warrant prosecution. The Committee, however, has superseded the guidelines in one respect, providing in paragraph (4)(B) for Class B misdemeanor treatment (up to six months in prison) for what is typically considered "joyriding" where the property is a motor vehicle or a vessel,[73] the defendant is less than seventeen years old, and the defendant's intent involved deprivation or appropriation of a temporary rather than a permanent nature. This provision will permit statutory coverage in those rare instances (e.g., "joyriding" on a Federal enclave) in which Federal prosecution is warranted, notwithstanding the general guidelines.[74]

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[70] Each of the above terms is defined in section 111 and is discussed in detail in relation to subchapter C of chapter 18.

[71] Paragraph (4) refers essentially to the "joyriding" situation, discussed *infra*.

[72] The Department of Justice has promulgated the following guidelines in the United States Attorneys' Manual (Title 9, §§ 9–61.131–9–61.133) for determining whether violations of 18 U.S.C. 2312 and 2313 should be investigated or prosecuted by the Federal Government:

1. Organized ring cases and multi-theft operations should be investigated and prosecuted.

2. Individual theft cases involving exceptional circumstances should be investigated with the provision that when local authorities indicate a willingness to prosecute, the United States Attorney should defer to such prosecution. In determining whether "exceptional circumstances" justifying federal prosecution are present, the following examples may be considered illustrative but not exhaustive:

(a) The stolen vehicle is used in the commission of a separate felony for which punishment less than for the Dyer Act would be expected from local courts.

(b) The stolen vehicle is demolished, sold, stripped or grossly misused.

(c) An individual steals more than one vehicle in such a manner as to form a pattern of conduct.

(d) The stolen vehicle constitutes heavy commercial or farming equipment, such as a tractor truck, farm tractor, or vehicle used in heavy construction.

3. Individual theft cases should not be prosecuted in Federal courts, regardless of local prosecutive decisions, in the following instances:

(a) Joy-riding.

(b) Cases in which the individual to be charged is 21 years of age or older and has not previously been convicted of a felony in *any* jurisdiction.

(c) Cases in which the individual to be charged is less than 21 years of age and cannot be defined as a recidivist. A "recidivist" for purposes of this policy is a person under 21 who has on at least two prior occasions been arrested for motor vehicle thefts and on one or more occasions has been subjected to institutional incarceration for motor vehicle theft or other offenses.

C. A record or other document owned by, or under the care, custody, or control of, the United States

Class D felony status attaches under this provision regardless of whether the property is stolen from a government office or public servant. This is in contrast to the more restrictive approach of the National Commission.[75]

D. A counterfeiting or forging implement designed for the making of a written instrument of the United States

This language is intended to reflect the first paragraph of 18 U.S.C. 642, which proscribes the theft of certain items related to the production of money, bonds, stamps, and other government obligations,[76] as well as to cover, at a felony level, the theft of such things as postal validating stamps that could be used to commit forgery. The meanings of the terms "counterfeiting implement," "forging implement," and "written instrument" are explained in section 1739 by means of a cross reference to sections 1747(b), (d), and (i).

E. A key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of, the United States

This is designed to reflect the first paragraph of 18 U.S.C. 1704, which penalizes the theft of keys suited for opening postal locks protecting United States mail. Because there appears no good reason to limit application of the theft statutes to preservation of the mail, the language has been extended to its proposed form. The approach is a necessary one. Those who possess stolen keys enabling them to gain access to mail or other government property must be presumed to intend to appropriate as much property as possible. The fact that the property is found to have a value of not more than $500 (see below) should not entitle the thief to be treated as a mere misdemeanant. The crucial issue is the danger the stolen key represents to the integrity of the mail or other property.

However, although felony sanctions are provided by the Committee's formulation, it should be noted that the misdemeanor provisions of subsections (b) (3) and (4) remain available. In an appropriate case, the prosector may prefer a misdemeanor charge of theft of property of a value less than $500 (Class A misdemeanor) or $100 (Class B misdemeanor).

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[73] The terms "motor vehicle" and "vessel" are defined in section 111.

[74] If the car is damaged, there would be coverage under section 1703 (Property Destruction).

[75] Final Report, § 1735(2)(e).

[76] See also 18 U.S.C. 2314 (par. 5).

F. Mail other than a newspaper, magazine, circular, or other advertising matter

The intent of this provision is to cover theft from the mails. To provide maximum protection to the integrity of the mail service, the Committee has provided for felony treatment of theft of all mail except that which is specifically excluded. Section 111 defines "mail" and is intended to incorporate the holding of *Rosen* v. *United States,*[77] that the mail does not pass out of the custody of the government, and beyond the protection of Federal law, when it is placed in the addressee's privately owned mail receptacle.[78]

Misdemeanor treatment is afforded if the property which is the subject of the offense is less than $500. If its value is between $100 and $500, the offense is graded as a Class A misdemeanor (up to one year in prison). This represents an amelioration of current law since, as was seen in the listing of present statutes covering theft, many of these draw the felony-misdemeanor line at $100. The offense is graded as a Class B misdemeanor (up to six months in prison) if, *inter alia,* the value of the property is under $100.[79]

With the exception of "joyriding," which is prefaced by a special "notwithstanding" clause, the Committee does not intend the above grading classification to be interpreted so as to limit prosecutorial discretion. On the contrary, if an offense (for example) involved property which was of a type specified in subsection (b)(2)(B) but which was also of a value in excess of $100,000, it is the Committee's intent that *either* level (class C or D felony) of the offense could be charged.

SECTION 1732. TRAFFICKING IN STOLEN PROPERTY

1. In General and Present Federal Law

This section parallels the trafficking in smuggled property offense in proposed section 1412. The section has no direct counterpart in existing Federal law.[80] It is designed to create a distinction between the "trafficker" in stolen goods (i.e., most commonly the professional "fence") and the individual, not in the business of dealing in stolen property, who buys or receives stolen wares for his own use. The latter individual's offense is covered in the following section at a reduced grading level. The offense here is graded commensurately with theft under section 1731. The Committee is aware that there may be instances where a person's conduct will fall within the literal framework of this section and yet only warrant prosecution under the less serious offense in section 1733. Such cases are left to prosecutorial discretion and to the sentencing discretion of the courts. Notwithstanding the lack of watertight compartments in terms of the categories covered by this and the following section, the Committee believes that the basic difference in degree of social harmfulness between the professional dealer in stolen goods and the one-time or occasional purchaser who buys them for his own use is sufficiently apparent to justify the creation of the trafficking offense.

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[77] 245 U.S. 467 (1918).

[78] See also *United States* v. *Davis,* 461 F.2d 83 (5th Cir.), cert. denied, 409 U.S. 921 (1972), holding that mail misdelivered remains "in the mail" for purposes of 18 U.S.C. 1708 in view of the continuing obligation of the Postal Service to make a proper delivery; *United States* v. *Lopez,* 457 F.2d 396 (2d Cir.), cert. denied, 409 U.S. 866 (1972).

[79] In addition, as previously discussed, Class B misdemeanor status is made applicable to the so-called "joyriding" situation.

[80] Sections 1732 and 1733 essentially accept the recommendation of the American Bar Association as to the need for separate treatment of offenses relating to the receipt of stolen property. Hearings, p. 5813.

2. The Offense

Subsection (a) provides that a person commits an offense if he traffics in property of another that has been stolen. "Traffics" is defined in section 111 to mean "(a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing." Thus, this section covers dealings in stolen property where the actor acquires the merchandise not for himself but to dispose of it to another person for a consideration.[81] As indicated, the intent of the Committee is that the section be primarily used with respect to the professional "fence" of stolen goods, whose activities encourage others to commit the underlying offense.

The conduct in this section is "trafficking" in property. Because no level of culpability is specifically designated, the requisite state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[82]

The elements that the property is that "of another" and that the property "has been stolen" are existing circumstances.[83] "Property of another" as a term, including the definition of "property," is discussed in the preceding section and that discussion is incorporated here. Because no level of culpability is prescribed herein with respect to this element, the requisite state of mind to be shown is at a minimum, "reckless." i.e., that the defendant was aware of the substantial risk that the property was that of another but disregarded that risk.[84] The same culpability standard applies to the fact that the property has been stolen. It is the view of the Committee that a person who is aware of the possibly stolen nature of goods and who knowingly traffics in such goods in disregard of a substantial risk that the property is stolen engages in conduct that warrants penal sanctions.[85]

3. Proof

Section 1739(b)(1) contains an evidentiary provision applicable to this section stating, in essence, that possession of property recently stolen, unless satisfactorily explained, constitutes prima facie evidence that, *inter alia*, the person in possession was aware of the risk that the property had been stolen. This provision (including the meaning of "prima facie evidence") has been discussed in connection with the preceding section, and that discussion should be consulted here. As indicated, the instant provision merely codifies current Federal judicial doctrines.

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[81] This section thus does not cover the situation where a person buys or receives stolen property with intent to give it to a friend, family member, or a charity.

[82] See sections 303(b)(1) and 302(b)(1)

[83] The term "stolen property" is broadly defined in section 111 to mean property that has been the subject of "any criminal taking." Cf. *United States* v. *Turley, supra* note 5.

[84] See sections 303(b)(2) and 302(c)(1).

[85] For a more detailed discussion of the level of culpability required with respect to the fact that the property is stolen, see the next section, 1733, covering receipt of stolen property.

Section 1739(b)(2) contains a further evidentiary provision to the effect that the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been stolen. This too codifies a well-recognized common law inference sustained by the Federal courts.[86]

Section 1739(b)(3) adopts a recommendation contained in the Model Theft and Fencing Act by providing an evidentiary provision to the effect that the purchase or sale of stolen property by a person who traffics in property as a business, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been stolen.[87]

4. Bar to Prosecution

Section 1739(c) provides a bar to prosecution if the property that is the subject of the offense is intangible property of the United States, not obtained by trespassory means, if the primary purpose of the defendant in obtaining it was to disseminate it to the public. This provision has been discussed in relation to the previous section and that discussion should be consulted here.

5. Jurisdiction

There is Federal jurisdiction over an offense described in this section in four circumstances. The first is if a circumstance set forth in the jurisdictional section of the theft offense, section 1731, exists or has occurred. These provisions are discussed in the preceding section of this report. For the most part, the Committee believes that there should be equivalent jurisdiction over the crimes of theft of, trafficking in, and receiving stolen property. The second basis for Federal jurisdiction is if the property is an interest bearing obligation of the United States. This is meant to reach all forms of United States obligations which earn interest, whether through discount or accrual, including savings bonds, treasury bills, treasury notes, and treasury bonds. The justification for this coverage, which will be new to Federal law, is contained in hearings held before the Senate Permanent Subcommittee on Investigations concerning organized crime and theft and trafficking in corporate and governmental securities and obligations. These hearings showed, as pointed out by Senator Percy, that a considerable portion of the then approximately $100 million in missing United States government obligations were in the hands of "fences" awaiting an opportunity to be sold.[88] Such trafficking clearly is damaging to investor confidence in United States interest bearing obligations, yet it cannot be punished under current Federal laws absent some other factor such as transportation of the obligation in interstate commerce or the use of the mails. In essence, those hearings and other information available to the Committee indicate that there is a serious and growing problem, with which States are unable to cope, in the "fencing" by organized crime elements of stolen United States government obligations. The Committee accordingly has included jurisdiction over this conduct in this section in the hope of deterring this burgeoning unlawful activity through future Federal investigation and prosecution of the major criminals who encourage it through their "fencing" operations. The Committee has not, however, extended theft jurisdiction itself this far, believing that the theft of a United States savings bond or similar obligation of the United States should remain exclusively a matter for State and local authorities. On the same theory, the Committee has not included this jurisdictional base for the following section dealing with receivers of stolen property. Since the receiving offense covers simple possession (with culpable knowledge) of stolen property, extending Federal jurisdiction of this offense would permit Federal prosecution of the person who steals a government savings bond as a receiver. The Committee is interested only in reaching, as a Federal offense, the professional trafficker in United States interest bearing obligations and has therefore limited the extension of Federal jurisdiction solely to the offense described in this section.

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[86] See, e.g., *United States* v. *Brauer*, 182 F.2d 117, 130-131 (2d Cir. 1973); *see* also *United States* v. *Infanti*, 474 F.2d 522, 525-526 (2d Cir. 1973); *Melson* v. *United States* 207 F.2d 558 (4th Cir. 1953); *United States* v. *Wainer*, 170 F.2d 603, 606 (7th Cir. 1948), (*dictum*).

[87] See Blakey and Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Reform*, 74 Mich. L. Rev. 1511, 1587 (1976), also advocating the adoption of such a statutory inference.

[88] See 121 Cong. Rec. S14385-14386 (July 30, 1975 (daily ed.)).

The third jurisdictional circumstance is if the property has a value of $5,000 or more, or is ammunition, a vehicle, or a firearm, and, after having been stolen, is moved across a State or United States boundary. This provision complements section 1731(c)(9) and, in conjunction with section 1733, carries forward the basic scope of the National Stolen Property Act laws, 18 U.S.C. 2312, 2314, 2315, and 2316. Those statutes punish the transportation in interstate or foreign commerce of a vehicle or property valued at $5,000 or more, "knowing the same to have been stolen". Similarly, 18 U.S.C. 922(i) proscribes the interstate or foreign transportation of ammunition or a firearm "knowing the same to have been stolen". The inclusion of the jurisdictional base in this section is necessary to perpetuate the full reach of these provisions, since the comparable base for theft extends only to interstate or foreign transportation "in the commission of the offense".

Finally, Federal jurisdiction also exists if the property has a value of $500 or more, is obtained in a single transaction or a series of transactions within a period of one year, and consists of a ticket for interstate or foreign transportation that is obtained by the use of a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument, as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(c)). This carries forward section 916(b)(5) of the Electronic Fund Transfer Act (15 U.S.C. 1643n(b)(5) as it relates to trafficking in transportation tickets obtained by unlawful use of a credit card or similar device.

6. Grading

An offense under this section is graded as an offense of the same class as that specified in section 1731(b) for the theft of the same object. This reflects the Committee's judgment that the trafficker in stolen goods warrants the same kind of treatment as the person who stole them.[89]

SECTION 1733. RECEIVING STOLEN PROPERTY

1. In General

This section makes it an offense to receive property of another that has been stolen. It complements the general theft section by permitting separate prosecution of the defendant who receives the property from the person who stole it. Along with the previous section, it is designed to carry forward the basic receiving offenses in existing law.[90]

2. Present Federal Law

Current law covers receiving offenses in several statutes, each with its own jurisdictional base:

18 U.S.C. 641 deals with property of the United States. It makes it an offense to receive, conceal, or retain property of the United States with intent to convert it to one's use, knowing it to have been embezzled, purloined, converted, or stolen. The basic penalty is up to ten years in prison. The penalty diminishes to a misdemeanor level (one year) if the value of the property is less than $100.00.

18 U.S.C. 659 makes it an offense if a person "buys or receives or has in his possession" goods from an interstate or foreign shipment, "knowing the same to have been embezzled or stolen." The basic penalty is a maximum of ten years in prison. The penalty diminishes to a misdemeanor level (one year) if the value of the property is less than $100.00.

18 U.S.C. 662 covers receiving stolen property within the special maritime and territorial jurisdiction of the United States. A violation is normally punishable by imprisonment not to exceed three years. The penalty diminishes to a misdemeanor level (one year) if the value of the property is less than $100.00.

18 U.S.C. 922(j) makes it unlawful for any person to receive, conceal, store, barter, sell, dispose, or pledge or accept as security for a loan any ammunition or firearm moving as, or which constitutes, interstate or foreign commerce knowing the same to have been stolen. The maximum penalty is imprisonment for five years.

18 U.S.C. 1708 punishes by up to five years in prison whoever receives mail matter, knowing the same to have been "stolen, taken, embezzled, or abstracted."

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[89] Cf. 18 U.S.C. 2113(c); *United States* v. *Bolin,* 423 F.2d 834 (9th Cir.), cert. denied, 398 U.S. 954 (1970); *United States* v. *Evans,* 446 F.2d 998 (8th Cir. 1971), cert. denied, 404 U.S. 1021 (1972). The Committee was urged by one witness to grade the trafficking offense here, as well as in the section covering smuggled property (1412), higher than that applicable to the thief or smuggler, on the ground that a study of organized crime indicates that the trafficker is usually a more significant criminal than the thief and that "fencing", because it tends to cause thefts, is a more serious crime than theft. Hearings, pp. 8614, 8623–8740 (testimony of G. Robert Blakey); see also Blakey and Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Reform, supra* note 87. While not including this novel approach in this bill, the Committee is in agreement on the point concerning the central importance of the "fence" in theft activities and believes that new ideas should be explored in the future to deal with this problem. It might be noted also that a professional "fence" may be prosecuted, upon proof of two or more trafficking incidents, for racketeering under section 1802, which carries a maximum twenty-five year prison term.

[90] Sections 1732 and 1733 essentially reflect the recommendation of the American Bar Association as to the need for separate treatment of offenses relating to the receipt of stolen property. Hearings, p. 5813.

18 U.S.C. 2113(c) deals with property of financial institutions. It makes it a crime to receive property taken from a federally insured bank, savings and loan association, or credit union, knowing such property to have been stolen. The penalty is the same as that prescribed for the taker under 18 U.S.C. 2113(b), i.e., imprisonment for up to ten years if the value of the property taken exceeds $100; otherwise a prison term of up to one year.

18 U.S.C. 2313 proscribes various acts relating to stolen motor vehicles or aircraft. It authorizes up to a five-year prison sentence for whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen.

18 U.S.C. 2315 is similar to section 659 discussed above. It covers receiving stolen goods in general, where they are of the value of $5,000 or more and are moving as, or a part of, or constitute interstate or foreign commerce. The penalty is imprisonment for not more than ten years.

18 U.S.C. 2317 deals only with cattle. It makes it a crime to "receive, conceal, store, barter, buy, sell, or dispose of any cattle, moving in or constituting a part of interstate or foreign commerce, knowing the same to have been stolen." Violation of this statute subjects the offender to a maximum prison term of five years.

3. The Offense

Subsection (a) of section 1733 provides that a person commits an offense if he buys, receives, possesses, or obtains control of property of another that has been stolen. The verbs used to describe the conduct in this offense constitute the latter part of the definition of "traffics," used in the preceding section. No intent to dispose of the property, however, need be shown. Hence, this section is designed principally to reach the individual who obtains stolen property for his own use.

The conduct in this section is "buys, receives, possesses, or obtains control of" property. Because no culpability level is specifically designated here, the applicable state of mind that must be proved is at least "knowing," that is, it must be shown that the defendant was aware of the nature of his actions.[91]

The Committee intends the terms, "buys, receives, possesses, or obtains control" to cover as inclusively as possible the entire range of conduct from the initial acquisition of property through the holding on to it. As the National Commission explained in its formulation of the offense:[92]

> The reason for using multiple terms in this context instead of simply using the term "receiving" is that the requisite knowledge that the property has been stolen can be acquired at any time during the course of one's dominion or control over property. The judgment is that one who acquires property innocently is as culpable if he later learns that it is stolen and in the face of that knowledge contin-

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[91] See sections 303(b)(1) and 302(b)(1).

[92] Working Papers, p. 933.

> ues his control over it or disposes of it, as he would have been if he had initially received it with such knowledge.

Furthermore, it should be noted that by employing these words, the Committee intends to retain the meaning of the various terms currently employed in title 18 to cover receiving offenses.

The second element, property "of another," is an existing circumstance. This element, including the definition of property, has been examined in connection with the section on theft (1731), and that discussion is incorporated here. Because no level of culpability is expressly prescribed in this section with respect to this element, the requisite state of mind to be proved is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstance existed, and the risk was such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[93]

The element that the property of another "has been stolen," is likewise an existing circumstance as to which the requisite culpability level is, at a minimum, "reckless." This culpability standard is intended to reflect the concerns of Judge Learned Hand in his oft-quoted statement on the proper state of mind for receiving offenses: [94]

> The receivers of stolen goods almost never "know" that they have been stolen, in the sense that they could testify to it in a court room. The business could not be so conducted, for those who sell the goods—the "fences"—must keep up a more respectable front than is generally possible for the thieves. Nor are we to suppose that the thieves will ordinarily admit their theft to the receivers: that would much impair their bargaining power. For this reason, some decisions even go so far as to hold that it is enough, if a responsible man in the receiver's position would have supposed that the goods were stolen. That we think is wrong; and the better law is otherwise, although of course the fact that a reasonable man would have thought that they have been stolen, is some basis for finding that the accused actually did think so. But that the jury must find that the receiver did more than infer the theft from the circumstance has never been demanded, so far as we know; and to demand more would emasculate the statute for the evil against which it is directed is exactly that: i.e., making a market for stolen goods which the purchaser believes to have probably been stolen.

The Committee believes that the "reckless" level of culpability as defined in section 302, generally walks the line Judge Hand drew. Proof of a reckless state of mind requires proof of more than that a reasonable man would have supposed the goods were stolen. The defendant, not a fictional reasonable man, must perceive the risk that the goods were stolen, and he must act notwithstanding his awareness of the risk. There need not be proof, however, that the defendant actually knew that the goods were stolen.[95] As under section 1732, it is the view of the Committee that a person who is conscious of the possibly stolen nature of merchandise and who knowingly obtains it in disregard of a substantial risk that the property is stolen [96] engages in conduct sufficiently blameworthy to warrant penal sanctions.

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[93] See sections 303(b)(2) and 302(c)(1).

[94] *United States* v. *Werner*, 160 F.2d 438, 441–442 (2d Cir. 1947).

4. Affirmative Defense

The National Commission included an additional element in its formulation of the offense requiring proof of an intent to deprive the owner of the property. As the Commission explained, "(i)t is this aspect of the mental element that protects the actor who knowingly comes into possession of stolen property, but does so in good faith and with the intention of restoring the property to its owner or to the authorities." [97] Rather than including an additional element to this effect in the offense, the Committee in subsection (b) has afforded an affirmative defense if "the defendant bought, received, possessed, or obtained control of the property with intent to report the matter to an appropriate law enforcement officer or to the owner of the property." The affirmative defense serves the same purpose as the intent element—i.e., it excludes from criminal liability a person who purchases or otherwise obtains control of property for samaritan purposes—and has the added virtue of relieving the prosecution of proving in every case that the actor did not intend to return the property to a person entitled to have it. The rationale underlying the decision to shift the burden to the defendant [98] is that the defendant is in a much better position than the government to show his intent to return the property. Furthermore, because of the possibility that this type of defense may be asserted as a sham, it seems reasonable to require the defendant to demonstrate his good intent.

5. Bar to Prosecution

Section 1739(c) provides a bar to prosecution if the property that is the subject of the offense is intangible property of the United States, obtained by non-trespassory means, if the defendant's primary purpose in so doing was to disseminate the property to the public. This provision has been discussed in connection with section 1731 and that discussion should be consulted here.

6. Proof

Paragraphs (1), (2), and (3) of subsection (b) of section 1739 contain prima facie evidence provisions that may be used to show an awareness of the risk that the property was stolen. These provisions have been discussed in relation to sections 1731 and 1732, and that discussion is applicable here.

It should be noted that the Committee has decided to reject the National Commission's additional provision for a "prima facie case of theft" where a public servant or a person connected in any capacity with a financial institution has failed to account upon lawful demand for property entrusted to him as part of his official duties or where an audit reveals a shortage or falsification of his accounts.[99]

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[95] In this respect the Committee's standard is slightly less demanding than that in *Werner* and other cases. See, e.g., *United States* v. *Fields*, 466 F.2d 119, 120 (2d Cir. 1972).

[96] The meaning of "stolen" has been explained in connection with section 1732. This accords with the recommendation of Professors Blakey and Goldsmith in their article, *Criminal Redistribution of Stolen Property: The Need for Reform*, 74 Mich. L. Rev. 1511, 1559–1562 (1976).

[97] Working Papers, p. 935.

[98] See the definition of "affirmative defense" in section 111.

The Commission believed this provision to be warranted on the theory that those who handle money and property are placed under a high duty of care and thus warrant exposure to the possibility of a successful theft prosecution if they cannot account for the money entrusted to them.[100]

The Commission's formulation is derived from 18 U.S.C. 3487, which provides that the refusal of any person charged with the safekeeping or disbursement of the public money to pay any draft drawn upon him by the General Accounting Office, for any public money in his hands belonging to the United States, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed to constitute prima facie evidence of embezzlement.[101]

The Commission, however, expanded greatly upon 18 U.S.C. 3487 to provide coverage of persons connected in any way with a financial institution. The Committee believes that this provision sweeps too broadly. Under the Commission's proposal, it is conceivable that every management official of a bank could be held responsible for failing to account where a lower-echelon employee has embezzled funds from customer's accounts.

It is the Committee's view that the better approach is to rely on the common law theory that the failure of a fiduciary to account for property entrusted to him is sufficient to support a verdict of embezzlement.[102] Prosecutorial experience in this area has shown that a statutory provision setting forth a prima facie case is not critical to the success of such prosecutions, unlike the situation with respect to the aforementioned proof provisions dealing with receiving stolen property.

7. *Jurisdiction*

There is Federal jurisdiction over an offense described in this section if a circumstance specified in section 1731(c) or 1732(c)(3) or (c)(4) exists or has occurred. These bases are discussed in this report in relation to those sections, and that discussion should be adverted to here.

8. *Grading*

An offense under this section is graded as of the class next below that specified in section 1731(b) for theft of the same property. This implements the Committee's decision to punish the occasional receiver under this section at a lower level than the professional "fence" under section 1732. However, the grading is structured so that, if the value of property is greater than $500 or consists of any of the enumerated types of property set forth in section

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[99] See Final Report, § 1739(2)(a).

[100] See Working Papers, p. 931.

[101] See also 18 U.S.C. 643, 3497.

[102] See *United States* v. *Powell*, 413 F.2d 1037 (4th Cir. 1969); *Taylor* v. *United States* 320 F.2d 843 (9th Cir. 1963), cert. denied, 376 U.S. 916 (1964); *O'Malley* v. *United States* 378 F.2d 401 (1st Cir.), cert. denied, 389 U.S. 1008 (1967); *Roberts* v. *United States*, 151 F.2d 664 (5th Cir. 1945).

1731(b)(2)(B), the offense will remain (as it is under current law) a felony.

SECTION 1734. EXECUTING A FRAUDULENT SCHEME

1. In General

This section contains two offenses. The first is designed substantially to reenact the current series of Federal statutes punishing schemes to defraud.[103] These statutes, although worded substantially in similar fashion, are each limited to the use of a particular means for the purpose of executing the scheme, sufficient to confer Federal jurisdiction (e.g., use of the mails, or a transmission via radio, wire, or television communication in interstate or foreign commerce). This section consolidates these narrow offenses into a single, all-encompassing fraud statute. In addition, by means of jurisdictional bases, this section proposes some significant expansions of Federal anti-fraud coverage, including arson-for-profit and drug "rip-off" schemes.

The present Federal statutes in this area play an important role in protecting the consumer against fraud, since the circumscribed jurisdiction of the States renders it difficult for them to suppress fraudulent interstate promoters; an indictment or even a conviction in one State often has little effect on operations in other States. Partly for this reason, the Federal courts have been liberal in their interpretation of the Federal laws, enabling them to reach a wide variety of fraudulent schemes. The Committee's intent is to retain the body of highly favorable case law that has evolved under the current statutes.

The second offense contained in this section is new and is aimed at a particular type of fraudulent scheme—the pyramid sales scheme—that for various reasons has seldom been prosecuted successfully under existing enactments. The Committee's proposal is based upon a similar bill (S. 1509), introduced by Senator Moss, that passed the Senate on May 14, 1975.[104]

2. Present Federal Law

The basic mail fraud statute, 18 U.S.C. 1341, originally enacted in 1872, provides that:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be

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[103] See 18 U.S.C. 1341, 1343, 2314.

[104] See 121 Cong. Rec. S 8063, (May 14, 1975 (daily ed.)).

> fined not more than $1,000 or imprisoned not more than five years, or both.

In 1952, Congress enacted a statute (now 18 U.S.C. 1343) prohibiting fraud by wire, radio, or television, in terms nearly identical to those of the mail fraud statute. That law provides that:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Case law interpreting the wire fraud statute generally follows that with respect to mail fraud. The discussion below, while concentrating on mail fraud, is applicable to both mail or wire fraud unless otherwise stated.

The basic elements of a mail fraud violation under 18 U.S.C. 1341 are: (1) a scheme to defraud, and (2) use of the mails in furtherance of the scheme.[105] Generally, the courts have held that there must be a specific intent to defraud,[106] but that intent to use the mails to effect the scheme need not be shown if such use could reasonably have been foreseen.[107] The mail and wire fraud statutes have also played an important anti-public corruption role in recent years, as a result of court interpretations that the prohibited scheme or artifice does not require the obtaining of money or property or the infliction of economic loss, and may be applied where the scheme operates to defraud citizens of their right to a defendant's—public servant's—honest and faithful service.[108] Thousands of cases prosecuted under the mail fraud statute have established, *inter alia*, the following principles:

A. The phrase "scheme and artifice to defraud" is to be broadly interpreted; for example, it has been held to reach a scheme calculated to deceive persons of ordinary prudence and comprehension even though no misrepresentation is made.[109]

B. Any scheme which involves elements of trickery or deceit is within the mail fraud statute.

C. A scheme to defraud may be shown by statements of half truths or the concealment of material fact, as well as by affirmative misrepresentation.

D. One who acts with reckless indifference as to whether a representation is true or false is as liable as if he had actual knowledge of the falsity.

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[105] *Pereira* v. *United States*, 347 U.S. 1 (1954).

[106] E.g., *Williams* v. *United States*, 278 F.2d 535 (9th Cir. 1960).

[107] E.g. *Pereira* v. *United States*, *supra* note 105, at 8–9; *United States* v. *Sparrow*, 470 F.2d 885, 889 (10th Cir. 1972), cert. denied, 411 U.S. 936 (1973). By contrast, under 18 U.S.C. 1343 no *scienter* need be shown as to the use of an interstate wire or other communication facility. See *United States* v. *Blassingame*, 427 F.2d 329, 330–331 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971).

[108] See, e.g., *United States* v. *Barrett*, 505 F.2d 1091, 1103–1105 (7th Cir. 1974), cert. denied, 421 U.S. 964 (1975): *United States* v. *Mandel*, 591 F.2 1347, 1358–1364 (4th Cir. 1979).

[109] *Blachly* v. *United States*, 380 F.2d 665, 673–674 (5th Cir. 1967).

E. The success or failure of the scheme is immaterial, and it is not necessary to show that any person was in fact defrauded.

F. A scheme to defraud encompasses false representations as to future intentions, as well as existing facts.

G. A promoter's sincere belief in the ultimate success of his enterprise will not excuse false representations.

H. The mail fraud statute was intended to protect the gullible, the ignorant and the over-credulous as well as the more skeptical. The "monumental credulity of the victim is no shield for the accused." [110]

I. Proof of reliance on the false representation is not necessary.

In addition to the mail and wire fraud statutes, the second paragraph of 18 U.S.C. 2314 punishes by up to ten years in prison:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more.

Though there have been few cases prosecuted under this provision since its enactment in 1956,[111] the Committee believes that the coverage should be retained for the reasons stated by Congress at that time: [112]

> . . . [T]he Department of Justice has found that our present Federal laws are inadequate when it comes to dealing with the criminal who utilizes travel by the victim in the perpetration of the scheme to defraud that individual of his money. Such criminals avoid prosecution under the mail fraud statutes (sec. 1341 U.S.C., title 18) by not using the mails. Also delay on the part of the victim in reporting his being hoaxed makes prosecution under the present provisions of section 2314 of title 18 for the transportation in interstate commerce of money taken from the victim more difficult. Delay makes it possible for the criminal to move far from the scene of the swindle and dispose of the money which constitutes the necessary evidence to establish elements of the crime.
>
> This proposed legislation is intended to remedy this present lack in the law. Few people carry on their persons the large amounts of money sought by these confidence men, and it is therefore necessary for the victim to travel in interstate commerce to his home in order to get the money for the false venture described by the confidence man as a part of the scheme. This travel by the victim not only serves to provide a means of carrying the money to the criminal by the agency of the victim himself, but because the victim is induced to travel away from home, the

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[110] *Deaver* v. *United States*, 155 F.2d 740 (D.C. Cir.), cert. denied, 329 U.S. 766 (1946).

[111] E.g., *United States* v. *Hassel*, 341 F.2d 427 (4th Cir. 1965); *United States* v. *Scoratow*, 434 F.2 1288 (5th Cir. 1970), cert. denied, 401 U.S. 955 (1971).

[112] H. Rept. No. 2474, 84th Cong., 2d Sess., p. 3 (1956).

> time incident to his travel and return may also occasion an additional delay which can be used by the criminal to escape from the scene.
>
> The committee recognizes the need for the amendment proposed by this bill, and agrees with the position taken by the Attorney General in this matter. Accordingly, this committee recommends that the bill be favorably considered.

Finally, a more specific statute punishing schemes to defraud was enacted by the Congress in 1978 as part of the Securities Investor Protection Act. Under U.S.C. 78jjj(c)(1), it is a five-year felony for a person "in connection with or in contemplation of any liquidation proceeding or direct payment procedure" under the Act (a form of bankruptcy) to employ "any device, scheme, or artifice to defraud".

3. The Offense

Subsection (a)(1) provides that a person commits an offense if, having devised a scheme or artifice (A) to defraud, or (B) to obtain property of another by means of a false or fraudulent pretense, representation, or promise, he engages in conduct with intent to execute such scheme or artifice.

This provision, insofar as possible within the confines of proposed Code style and structure, is designed to duplicate current law. Moreover, as previously mentioned, the Committee wishes to retain the case law that has developed around the current statutes and therefore intends that the concept of a "scheme or artifice to defraud or to obtain property of another by means of a false or fraudulent pretense," etc., be read to incorporate the body of judicial decisions construing the equivalent language in 18 U.S.C. 1341, 1343, and 2314.[113]

The conduct described in subsection (a)(1) contains two elements. The first consists of "having devised a scheme or artifice to defraud, or to obtain property by means of a false or fraudulent pretense, representation, or promise." The second consists of engaging in any conduct. Since no culpability standard is designated herein, the applicable state of mind that must be proved with respect to each element is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[114]

The element that the property is "property of another" [115] is an existing circumstance. Since no culpability level is specifically set forth, the applicable state of mind to be established is at least "reckless", i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.

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[113] This same purpose is reflected in the definition of "conduct" in subsection (b)(3) to include a failure to state a fact necessary to avoid making a statement misleading. Current law clearly reaches instances where the fraud occurs through omission of material facts. E.g., *Lustiger* v. *United States*, 386 F.2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968). However, without the special definition of "conduct" it is arguable that some fraudulent schemes that are now within the purview of 18 U.S.C. 1341 and 1343 could not be punished, in view of the general definition of the term "omission" (included in the definition of "conduct") in section 111 as meaning a failure to perform an act that there is a legal duty to perform. No independent legal duty may exist to mandate the disclosure of all facts by the offender.

[114] See sections 303(b)(1) and 302(b)(1).

[115] The term "property of another" is defined in section 111.

The element that the conduct subsequent to the devising of the scheme or artifice to defraud, must be engaged in "with intent to execute such scheme or artifice" states the particular purpose for which it must be shown that the defendant engaged in such conduct.

While it is apparent that section 1731 (Theft) and this section overlap, some overlap is necessary to insure complete coverage. Whereas the general theft statute covers obtaining property of another by fraud, this section covers all schemes to defraud, whether or not property is actually obtained. It is true that attempted thefts and conspiracies to commit theft (by fraud or otherwise) under section 1731 can be reached via the applicable provisions of chapter 10. But section 1734 also covers what can be called "one-man conspiracies" that might not amount to "attempts" under section 1001; that is, any conduct engaged in with intent to execute the fraudulent scheme, whether or not sufficient to constitute an "attempt," will permit conviction under this section. This broader coverage of "white collar" crime, in addition to the desirability of preserving the well-understood judicial interpretations of existing fraud laws, justifies independent retention of the mail, travel, and wire fraud statutes in this section.

The Committee has accordingly rejected the approach taken by the National Commission to restrict the fraud provisions to the general theft section and to specify the various acts and omissions which have traditionally constituted fraud.[116] Despite the Commission's inclusion of a catch-all phase ("any other scheme to defraud"), there is a great risk that under such a formulation courts might be inclined to compel prosecutors to bring their cases under the more particularized provisions of the statute.

The complex and sophisticated schemes prosecuted in Federal courts defy precise definition or categorization. Indeed, the "fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it . . . lest the craft of man should find ways of committing fraud which might evade such a definition." [117]

Mail and wire fraud schemes typically involve a combination of false statements, half truths, failure to reveal material facts, lulling transactions, and the like. The following examples of the subtle and varied machinations that have been prosecuted in Federal courts illustrate the wisdom of retaining current law: advance fee rackets; [118] schemes involving breach of fiduciary or official duties or breach of trust; [119] chain referral schemes; [120] charitable frauds; [121] schemes to obtain cash or credit through checks and check-kiting; [122] correspondence school schemes,[123] credit card schemes; [124] debt consolidation schemes; [125] franchise schemes; [126]

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[116] See Final Report, §§ 1732(b), 1741(a).

[117] 37 Am. Jur. 2d. Fraud and Deceit, § 1, pp. 17-18; see also *Blachly* v. *United States, supra* note 109 at 671.

[118] *United States* v. *Uhrig,* 443 F. 2d 239 (7th Cir.). cert. denied 404 U.S. 832 (1971).

[119] *United States* v. *Gurule,* 437 F. 2d 239 (10th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

[120] *Blachly* v. *United States, supra* note 109.

[121] *Koolish* v. *United States,* 340 F. 2d 513 (8th Cir.), cert. denied, 381 U.S. 951 (1965).

[122] *Williams* v. *United States, supra* note 106.

[123] *Babson* v. *United States,* 330 F. 2d 662 (9th Cir.), cert. denied, 377 U.S. 993 (1964).

[124] *Adams* v. *United States,* 312 F. 2d 137 (5th Cir. 1963).

[125] *United States* v. *Bertin,* 254 F. Supp. 937 (D. Md. 1966).

[126] *Irwin* v. *United States,* 338 F. 2d 770 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965).

schemes to defraud insurance companies;[127] schemes to defraud investors;[128] and sale schemes;[129] loan application schemes;[130] merchandising schemes;[131] marital schemes;[132] planned bankruptcy schemes;[133] work-at-home schemes.[134]

An injunctive remedy, broader than the one presently available to the Postmaster General, has been included in the procedural part of the proposed Code[135] in order to provide a means by which an allegedly fraudulent activity can be enjoined pending criminal prosecution. It is similar in concept to the effective provision for injunctive relief long used by the Securities and Exchange Commission in combating securities fraud.[136]

Subsection (a)(2) provides that a person is guilty of an offense if he transfers, or receives anything of value for, a right to participate in a pyramid sales scheme, or receives compensation from a pyramid sales scheme.

The term "pyramid sales scheme" is defined in subsection (b)(4) to mean a plan or operation, whether or not involving the sale or distribution of property, that includes, as the exclusive or primary inducement to participate in the plan or operation, a right to receive compensation, upon payment of anything of value, for (A) the introduction of another person into participation in such plan or operation, or (B) such other person's introduction of another person into participation in such plan or operation. "Anything of value" is defined generally in section 111 but is given a special definition in subsection (b)(1) to exclude payment made for sales demonstration equipment, material furnished on a nonprofit basis for use in making sales and not for resale, time or effort spent in pursuit of sales or recruiting activities and payment aggregating $100 or less on an annual basis.

The term "compensation" is defined in subsection (b)(2) to include payment based on a sale or distribution made to a person who is a participant in a pyramid sales scheme or who, upon such payment, obtains the right to become a participant; but does not include payment based on a retail sale to an ultimate consumer.

Finally, the phrase "sale or distribution" is defined in subsection (b)(5) to include a lease, rental, or consignment.

At present there is no existing Federal law specifically prohibiting the operation of a pyramid sales scheme, although several States have such statutes. The Securities and Exchange Commission has had some success in persuading courts that pyramid schemes are "securities" and, not being registered, are illegal.[137] On occasion the mail fraud statute, 18 U.S.C. 1341, has been used to prosecute operators of pyramid schemes for misrepresentations and fraudulent statements made in connection therewith.[138] However, such investigations and prosecutions tend to be very long and costly and, therefore, are not generally pursued.

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[127] *United States* v. *Unger*, 295 F. 2d 889 (7th Cir. 1961).

[128] *United States* v. *Culver*, 224 F. Supp. 419 (D. Md. 1963).

[129] *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

[130] *United States* v. *Young*, 232 U.S. 155 (1914).

[131] *United States* v. *Press*, 336 F.2d 1003 (2d Cir. 1964), cert. denied, 379 U.S. 965 (1965).

[132] *Pereira* v. *United States*, *supra* note 105.

[133] *Jacobs* v. *United States*, 395 F. 2d 469 (8th Cir. 1968).

[134] *United States* v. *Baren*, 305 F. 2d 527 (2d Cir. 1962).

[135] Section 4021.

[136] See 15 U.S.C. 774.

[137] See *S.E.C.* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir.), cert. denied, 414 U.S. 821 (1973).

The harm to the public which can be and has been caused by the promotors of pyramid sales plans has been the subject of much recent comment in legal periodicals.[139] The authors, while differing on the type and extent of Federal intervention warranted, are uniform in their recognition of serious misuse in the area of referral selling and the need for legislation to curb interstate promotors.

S. 1509, introduced by Senator Moss, which passed the Senate in the 94th Congress on May 14, 1975, responded to this need, and the present proposal derives from that measure. The proposal differs from the existing mail fraud statute (essentially carried forward in subsection (a)(1)) in the method of reaching such schemes. Under the mail fraud statute (and under subsection (a)(1), *supra*), a prosecution is based essentially upon misrepresentation or nondisclosure of material facts. In a mail fraud prosecution of a pyramid sales scheme, the misrepresentation charged is that a purchaser in a pyramid sales plan may profit, or recoup or reduce his purchase price, by inducing others to join the plan. The nondisclosure charged is that it is mathematically impossible for each participant to do so.[140]

By contrast, the present proposal, like S. 1509, does not proscribe misrepresentation and nondisclosure in the context of pyramid selling; rather it proscribes pyramid selling *per se* regardless of the manner of promotion. Because it is inherent in a pyramid sales plan that the number of participants expands geometrically, control by the original promoters of misrepresentation and nondisclosure throughout the promotion would most likely be impossible. For this reason, the proposed statute bars the scheme itself, as a species of fraud, irrespective of any particular fraudulent statement.

The conduct in this offense is transferring or receiving. As no culpability level is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[141] The elements that what was transferred or received was "anything of value" [142] and that such transfer or receipt was "for" (i.e., in return for) a right to participate in a pyramid sales scheme, or that what was received was "compensation from a pyramid sales scheme" are existing circumstances. Since no culpability standard is specifically set forth, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[143]

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[138] E.g., *Blachly* v. *United States, supra* note 109. In addition, the Federal lottery statute, 18 U.S.C. 1302, has been used at least once to reach a pyramid sale scheme. See *Zebelman* v. *United States*, 339 F. 2d 484 (10th Cir. 1964), but the rationale of that case suggests its inapplicability to single-level plans. I.e., in *Zebelman* the scheme was that the addressee of a letter, after purchasing a car, would receive $100 each time one of the persons whose names he submitted to defendants purchased an automobile from them, and would receive an additional $50 each time a person named by one of the persons he originally solicited into the scheme purchased a car. The court held that the element of chance in connection with the $50 aspect, over which the addressee had no control (the second level), placed the scheme within the ban of the lottery statute.

[139] See, e.g., Note, *Pyramid Schemes: Dare To Be Regulated*, 61 Geo. L.J. 1257 (1973); Note, *Regulation of Pyramid Sales Ventures*, 15 Wm. & Mary L. Rev. 117 (1973); Comment, *Arizona's Home Solicitation and Referral Sales Act: An Evaluation and Suggestions for Reform*, 12 Ariz. L. Rev. 803 (1970); Comment, *Multi-Level or Pyramid Sales Systems: Fraud or Free Enterprise*, 18 S. D. L. Rev. 358 (1973); Comment, *Federal Regulation of Pyramid Sales Schemes*, 1974 U. Ill. L.F. 137; Comment, 52 N. C. L. Rev. 476 (1973); Case Note, 27 Rut. L. Rev. 220 (1973); Comment, 51 Tex. L. Rev. 788 (1973).

[140] *See Blac[illegible] v. United States, supra*, note 109 at 672.

[141] See se[illegible](1) and 302(b)(1).

[142] The term "anything of value" is defined in section 111.

It should be noted that under subsection (c) it is no defense to a prosecution for this offense that the plan or operation limits the number of persons who may participate, or imposes conditions with respect to the eligibility of participants, or that upon payment of anything of value a participant obtains, in addition to the right to receive "compensation," as defined in subsection (b)(2), any other property. These are designed to preclude the creation of loopholes enabling perpetrators of such schemes to escape punishment, e.g., by establishing conditions to eligibility (for example only adults over twenty-one years of age).

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if: (1) the offense is committed within the special jurisdiction of the United States; (2) "in the commission of the offense, the actor"—(A) uses, or causes the use of the United States mail; (B) uses or causes the use of an interstate or foreign communication facility, including a facility of wire, radio, or television communication; (C) travels in, or causes or induces any other person to travel in, or to be transported in, interstate or foreign commerce; (D) traffics, in a transaction involving a Federal law enforcement officer, in a substance that purports or is represented to be a controlled substance as defined in 21 U.S.C. 802; or (E) solicits property in any airport, railroad station, or bus station, that serves as a passenger terminal for travel in interstate or foreign commerce; (3) the offense is committed in connection with or in contemplation of a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*); or (4) the scheme or artifice affects interstate or foreign commerce and involves the obtaining of $100,000 or more through conduct described in section 1701(a) (Arson).

Jurisdictional bases (e)(2) (A), (B), and (C) and (e)(3) reflect the reach of current law, as outlined respectively in 18 U.S.C. 1341, 1343, and 2314 and 15 U.S.C. 78jjj(c)(1).[144] The jurisdiction in wire fraud situations (currently 18 U.S.C. 1343) has been broadened to include the use of the instrumentalities of an interstate communication facility even where the sounds do not themselves move in interstate commerce. Separating the jurisdictional bases from the substantive offense, in keeping with the general format of the proposed Code, will obviate the most frequent criticism made of current law—pyramiding of offenses. Thus, the mailing of ten letters in furtherance of a single scheme to defraud will constitute only one offense, and not ten as under the existing statute.[145]

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[143] See sections 303(b)(2) and 302(c)(1).

[144] Thus, this section will not cover credit schemes such as that in *United States* v. *Maze*, *supra* note 54. However, as indicated in connection with the discussion of jurisdiction under section 1731(c)(6), such schemes will be prosecuted under the general theft statute. The addition of the words "travels in" broadens 18 U.S.C. 2314, which presently reaches only schemes in which the victims are induced to travel in interstate or foreign commerce. The expansion is justified by the fact that, in several instances, persons have evaded the statute by persuading the victims to pay the travel expenses for the perpetrators to meet with the victims at the victims' place of business.

The other jurisdictional bases are new. Paragraph (e)(1) creates fraud jurisdiction when the offense is committed in Federal enclaves or other places within the special jurisdiction of the United States as defined in section 203. This will enable uniform Federal coverage in lieu of resort to State or local laws under the assimilative crime concept (see section 1861).

Subparagraph (e)(2)(D) extends Federal cognizance over fraudulent schemes that involve a substance that purports or is represented to be a controlled substance under 21 U.S.C. 802. This addition is intended to reach situations such as those in which narcotics or other controlled substances are arranged to be purchased by an undercover agent, but the defendant instead delivers a common substance such as sugar or flour.

The Drug Enforcement Administration spent nearly $5 million to buy narcotics last year and another $3.5 million for information leading to narcotics transactions. Widespread fraudulent drug sales means widespread waste of scarce Federal enforcement resources. Since there is no real disincentive to such schemes, the incidence of fraudulent transactions is sure to climb as the price of drugs increases. Moreover, effective control of those who deal in actual controlled substances can be enhanced by halting the flow of fraudulent controlled substances transactions. One effective way of doing that is to take the profit out of such transactions through the criminal process, an approach strongly supported by the Drug Enforcement Administration. The existing controlled substances laws, as well as the counterpart offenses in this bill, do not cover such transactions since the term "counterfeit substance" is defined in 21 U.S.C. 802 in such a way as to mean only an actual "controlled substance" that is misidentified as to label or producer. The Federal interest in reaching such situations is twofold. First, the Committee has been informed by the Drug Enforcement Administration that the class of persons who engage in such schemes are themselves usually traffickers in controlled substances whose activities are otherwise within the purview of Federal law. Second, the would-be victims of such schemes, which may involve large sums of money, often are Federal undercover agents who may have risked their lives to catch a narcotics trafficker in the act and yet who, upon making an arrest and conducting a field test of the transferred substance only to find it counterfeit, are constrained by existing law to release the trafficker to ply his trade once more. The new jurisdictional base at least would permit the bringing of a felony charge for the fraud involved.

Subparagraph (e)(2)(E) establishes Federal jurisdiction over fraudulent activities that involve soliciting property in airports, bus stations, and railroad stations that serve as passenger terminals for interstate or foreign travel. In conjunction with the special definition of "conduct" in subsection (b)(3) as including the failure to state a fact necessary to avoid making a statement misleading, this jurisdictional base is particularly aimed at reaching a person who, e.g., at an airport, solicits property from individuals for an organization without disclosing the identity of the organization—for example, a religious "cult" or political candidate to whom the solicitee might not have contributed if the true name of the intended beneficiary of his charity were known. Some of the passenger terminals covered under this base could also be reached through application of the offense to the special jurisdiction under paragraph (e)(1).

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[145] Likewise, such a separation eliminates the anomaly of requiring culpability as to the jurisdictional element. See section 303(d)(2); *United States* v. *Blassingame*, *supra*, note 107, at 330-331.

This provision was offered as an amendment in Committee by Senator Dole based on hearings he chaired on cults on February 5, 1979, and on correspondence with ex-cult members and other interested parties. He concluded that cult solicitation and recruitment poses a serious problem in this country involving, among other things, cult members frequently initiating solicitation and recruitment by posing as members of an imaginary or vaguely-specified group, such as "creative community services", cult recruiters disclosing only a vague, general goal of solicitation, such as "helping poor people", and cult organizations specifically indoctrinating their members to lie to "targets" in order to solicit cash. If people are to be persuaded to donate property, they deserve not to be misled concerning the identity of the group to which they are giving their property. This amendment is directed at that type of fraudulent activity and does not penalize freedom of speech or religion.

The rationale for extending Federal jurisdiction to any airport, bus terminal, or railroad terminal rests on the fact that these facilities are an integral part of the transportation systems involving interstate and foreign commerce; but for the fact that people travel an interstate or foreign commerce, they would not be found in such terminals carrying large sums of money that specifically make them targets for fraudulent solicitation.

The final jurisdictional base is directed at large scale arson-for-profit schemes. Hearings before the Senate Permanent Subcommittee on Investigations [146] have documented the considerable and apparently increasing involvement of organized crime elements in the highly lucrative business of arson for profit. For this reason, and because such crimes are notoriously difficult to detect and investigate at the State or local level, the Committee believes that a specific Federal grant of jurisdiction (apart from cognizance if a Federal instrumentality such as the mails is used) is appropriate to enable the investigative apparatus of the Federal government to be utilized when the sum involved is substantial and the offense affects interstate or foreign commerce. $100,000 was chosen as a reasonable, albeit necessarily somewhat arbitrary, threshold figure for triggering Federal jurisdiction.

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison if it is within subsection (a)(1) (fraudulent scheme other than pyramid sales). This is commensurate with the present maximum sentence under 18 U.S.C. 1341 and 1343 (five years) rather than that under 18 U.S.C. 2314 (ten years). Pyramid sales schemes are a Class E felony (up to three years).[147]

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[146] *Arson-For-Hire,* Hearings before the Subcommittee on Permanent Investigations of the Committee of Governmental Affairs, 95th Cong., 2d Sess. (1978).

SECTION 1735. BANKRUPTCY FRAUD

1. In General

This section is designed to protect the integrity of bankruptcy proceedings. With some modifications, principally in the area of culpability, it substantially reenacts that portion of 18 U.S.C. 152 not covered by other sections of the proposed Code. This section also creates a new offense dealing with fraud in State insolvency proceedings.

2. Present Federal law

Existing law covering bankruptcy fraud is contained in a complex statute, 18 U.S.C. 152, as amended by Public Law 95-598, effective October 1, 1979, which imposes up to a five-year prison sentence upon:[148]

> Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or
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> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; or
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> Whoever knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11; or
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> Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or
>
> Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; or
>
> Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11; or
>
> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case

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[147] The maximum penalty prescribed in S. 1509 for the pyramid sales scheme offense was one year in prison. However, a similar bill, S. 1939, passed the Senate in the 93d Congress (see 120 Cong. Rec. S. 15085, Aug. 22, 1974 (daily ed.)) and carried a maximum penalty of five years in prison. The three-year maximum approved by the Committee is a compromise between the two bills and, in the Committee's opinion, felony grading is necessary because of the seriousness of this fraudulent activity.

[148] Under 18 U.S.C. 3284 the concealment of assets of a bankrupt or other debtor is made a continuing offense for purposes of the statute of limitations. This provision is reflected in section 511 (Time Limitations).

> under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or
>
> Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor; or
>
> Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

In addition, the Securities Investor Protection Act Amendments of 1978, Public Law 95-283, created a series of provisions patterned upon the bankruptcy law set forth above and designed to punish persons who perform similar acts "in connection with or in contemplation of any liquidation proceeding or direct payment procedure" under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*). The offenses carry a five-year maximum prison term.[149]

3. The Offense

The Committee has retained the coverage of existing law by essentially reenacting, although in simpler language, the first, fifth, sixth, seventh, eighth, and ninth paragraphs of 18 U.S.C. 152 and the comparable provisions of 15 U.S.C. 78jjj(l)(1).[150] The other paragraphs, dealing with false oaths and claims, will be covered by proposed sections 1341 (Perjury), 1342 (False Swearing), and 1343 (Making a False Statement). As previously indicated, a new provision, dealing with fraud in State insolvency proceedings, has been added and will be discussed more fully below. Also discussed below are two additional provisions dealing with fraudulent procuring of an order confirming a reorganization plan or of a bankruptcy court's approval of a disclosure statement relating to such a plan.

Subsection (a) provides that a person commits an offense, if with intent to deceive a court or an officer thereof or to deceive or harm a creditor or equity shareholder, he:

> (1) transfers or conceals property belonging to the estate of a debtor;
>
> (2) receives a material amount of property from a debtor after the filing of a case under title 11 of the United States Code, or after the filing of a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*);
>
> (3) transfers or conceals, in contemplation of a case under title 11 of the United States Code, or after the filing of a liquidation proceeding or direct payment procedure under the Secu-

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[149] 15 U.S.C. 78jjj(c)(1).

[150] The Committee's formulation is derived from Final Report, § 1756.

rities Investor Protection Act (15 U.S.C. 78aaa *et seq.*), his own property or the property of another;

(4) transfers or conceals, in contemplation of a State insolvency proceeding, his own property or the property of another;

(5) alters, destroys, mutilates, conceals, or makes a false entry in a record or document affecting or relating to the property or financial affairs of a debtor in contemplation of or after the filing of, a case under title 11 of the United States Code, or a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*), or withholds such record or document from the trustee or other officer of the court entitled to its possession;

(6) offers, gives, or agrees to give, or solicits, demands, accepts, or agrees to accept, anything of value for or because of acting or forbearing to act, or having acted or forborne to act, in a case under title 11 of the United States Code, or a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*);

(7) procures, by fraud, an order confirming a plan pursuant to 11 U.S.C. 1129; or

(8) procures, by fraud, approval by a bankruptcy court of a disclosure statement pursuant to 11 U.S.C. 1125(b), or engages or participates in a solicitation with respect to a plan under a disclosure statement so procured.

An issue that arose in the codification of these offenses involved the manner of stating the requisite state of mind to accompany them. As explained by the National Commission, current law is deficient in this respect: [151]

> Existing law requires that the defendant act "knowingly and fraudulently" and in certain instances that he intended "to defeat the bankruptcy law." The word "fraudulently" is not used here because of its imprecision. The "intent to defeat" language is not included because it does not seem appropriate or necessary to require that the actor know what the bankruptcy laws are and affirmatively intend to undercut them. Knowingly engaging in the described conduct with an intent to harm creditors of the bankrupt more accurately describes the appropriate *mens rea.*

Following the lead of the National Commission, the Committee has adopted this approach. The offenses thus require proof that the defendant knowingly engaged in the specified conduct with the intent to deceive the court or its officers or to deceive or harm a creditor or equity shareholder. The Committee believes that this formulation properly reflects the purposes of penal sanctions as applied to bankruptcy proceedings, namely to insure the distribution to creditors of the bankrupt's remaining assets and to preserve the integrity of the proceeding itself.

Each paragraph of the offense subsection describes a type of conduct that jeopardizes bankruptcy proceeds. The "intent to deceive" the court or to "deceive or harm" a creditor or equity shareholder element is contained in the prefatory clause,[152] which states the particular purpose for which it must be shown that the conduct was engaged in.

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[151] See Final Report, § 1756, Comment, p. 232.

In paragraph (1), the conduct is "transfers or conceals property." Since no culpability level is specifically designated herein, the applicable state of mind that must be proved is (as it is for each element of conduct in each paragraph of this subsection) at least "knowing," i.e., that the offender was aware of the nature of his actions.[153] The element that the property "belong[s] to the estate of a debtor" is an existing circumstance. Since no state of mind is specifically prescribed, the requisite intent, under section 303(b)(2) is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded a substantial risk that the property belonged to the debtor's estate.[154]

The conduct in paragraph (2) is "receives . . . property," and must be engaged in knowingly. The phrases "material amount,"[155] "from a debtor," and the "after the filing" all describe existing circumstances as to which the required state of mind is at least "reckless."

In paragraph (3) the conduct is "transfers or conceals . . . property" and requires, at a minimum, proof of a "knowing" state of mind. The adjectival phrases "his own" and "of another," are existing circumstances, as to which the required culpability is at least "reckless." The phrase beginning "in contemplation" describes the particular state of mind of the defendant that must be shown.

The culpability analysis of paragraph (4) is parallel to that of paragraph (3), except that there the defendant must act "in contemplation of a *state insolvency* proceeding" (emphasis added). The difference in terminology is required by an unusual feature of our law that insurance companies cannot go "bankrupt," but can only be declared "insolvent" in a State proceeding. Clearly, however, the result is the same whether it is termed "bankruptcy" or "insolvency."

At present, there is no Federal cognizance over this offense. But, because insurance companies are clearly involved in interstate commerce and the problem is thus one of nationwide concern, the Committee believes it proper to expand Federal law to allow coverage of such offenses.

Part of the conduct forbidden by paragraph (5) is "alters, destroys, mutilates, conceals, or makes a false entry in a record or document." The applicable minimum culpability is again "knowing." The element "affecting or relating to the property or affairs of a debtor" is an existing circumstance, as to which at least a "reckless" state of mind must be shown. This paragraph also covers situations where the defendant "withholds such record or document," and this conduct likewise must be engaged in knowingly. The phrase "from the trustee or other officer of the court entitled to its possession" is an existing circumstance, as to which a

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[152] The Committee intends that the phrase "creditor of a bankrupt" include an insurance policy holder when the bankrupt is an insurance company in a state of insolvency proceedings. The phrase "equity shareholder" is used to protect stockholders of the bankrupt who, along with creditors, may be harmed by conduct proscribed under this section.

[153] See sections 303(b)(1) and 302(b)(1).

[154] See section 302(c)(1).

[155] The term "material" is carried forward from present law.

"reckless" state of mind applies. The phrase beginning "in contemplation", as in paragraph (3), describes the particular state of mind of the defendant that must be proved.

In paragraph (6), the conduct is "offers, gives, or agrees to give, or solicits,[156] demands, accepts or agrees to accept." As in the other cases, this conduct must be "knowing." The element "for or because of acting or forbearing to act, or having acted or forborne to act," in either of the enumerated proceedings sets forth the particular purpose for which it must be proved that the conduct was performed.[157] The element that what was offered, accepted, etc., was "anything of value" is an existing circumstance. Since no culpability standard is specifically set forth, the applicable state of mind to be shown is "reckless."

The conduct in paragraph (7) is "procures, by fraud". Again, this conduct must be "knowing". The term "fraud" is intended to be construed broadly to include all types of fraudulent conduct covered by section 1734 (Executing a Fraudulent Scheme). The statement that what was procured by fraud was "an order confirming a plan pursuant to 11 U.S.C. 1129" describes an existing circumstance, as to which the state of mind that must be proved is "reckless".

Finally, in paragraph (8) the conduct is "procures, by fraud" and "engages or participates in". As to this element, the requisite culpability is "knowing". The fact that what was fraudulently procured was approval by a bankruptcy court of a disclosure statement pursuant to 11 U.S.C. 1125(b) is an existing circumstance. The phrase "with respect to a plan under a disclosure statement so procured" also describes an existing circumstance. As to both types of circumstance, since no culpability level is specified, the proof must show at least "reckless" conduct by the defendant.

Paragraphs (7) and (8) are designed to reach two kinds of fraud that may arise under the new Bankruptcy Code that would not otherwise be prosecutable unless the reorganization plan involved the issuance of securities.

Subsection (b) contains several definitions which are important to the operation of the above offenses. The term "debtor" is defined to mean a person (A) concerning whom a case has been filed under title 11, (B) concerning whom a liquidation proceeding or direct payment proceeding has been instituted under the Securities Investor Protection Act (15 U.S.C. 78aaa *et seq.*), or (C) for the purposes of paragraph (a)(4), a person who is the subject of a State insolvency proceeding. The term "person" is defined to include a municipality as defined in 11 U.S.C. 101. "Insolvency proceeding" is defined to include an assignment for the benefit of creditors, and a proceeding intended to liquidate or rehabilitate the estate involved. Finally, "harm" (as in "harm a creditor") is defined to mean "to cause loss, deprivation, or reduction in value, with respect to an economic benefit."[158] The term "property" is given an expansive definition in section 111 and has been discussed in the analysis of section 1731.

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[156] "Solicits" is intended to have the same meaning as in section 1351 (Bribery) and does not refer to the conduct described in section 1003 (Criminal Solicitation). See section 111.

[157] See also section 1352 (Graft), employing similar phraseology. The "because of" branch of this offense expands present law, which reaches only monies offered or solicited "for" future conduct in a bankruptcy proceeding. The Committee perceives no reason not to prosecute a payment for a past act, as is done in the general graft offense. See also 18 U.S.C. 201.

[158] By contrast the National Commission did not define "harm."

4. *Jurisdiction*

There is Federal jurisdiction over an offense under subsection (a)(1), (a)(2), (a)(3), (a)(5), (a)(6), (a)(7), or (a)(8) if it is committed within the general jurisdiction of the United States or the special jurisdiction of the United States. This plenary scope of jurisdiction is based upon Article I, Section 8 of the United States Constitution which provides in Clause 4 that Congress shall have the power to establish "uniform laws on the subject of bankruptcies throughout the United States." This also continues the present purview of 18 U.S.C. 152 and 15 U.S.C. 78aaa *et seq.*

With respect to the proposed new offense under subsection (a)(4) of a transfer or concealment of property in contemplation of a State insolvency proceeding, there is Federal jurisdiction if the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce, and if the person who is the subject of the State insolvency proceeding may not be treated as a debtor under title 11 of the United States Code.[159]

5. *Grading*

Unlike current law, the Committee proposes to make a grading distinction between major and minor bankruptcy frauds. Thus, if the property which is the subject of the offense has a value in excess of $500, the offense is graded as a Class D felony (up to six years in prison). This compares to a present maximum of five years in prison under 18 U.S.C. 152. If the value of the property is $500 or less, a violation of this section is graded as a Class E felony (up to three years in prison).

SECTION 1736. INTERFERING WITH A SECURITY INTEREST

1. *In General*

This section protects collateral pledged as security for a loan or other advance of credit and provides for felony treatment of conduct interfering with a security interest. Current law is concerned mostly with security interests relating to agriculture and agricultural products. While the proposed coverage of this section is broader, the concept is the same as that in existing law. The National Commission suggested similar coverage.[160]

2. *Present Federal Law*

The major enactment in present law dealing with secured property is 18 U.S.C. 658, which provides:

> Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or that of another, any property mortgaged or pledged to, or held by,

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[159] A similar broad jurisdictional base is contained in section 1721 (Robbery) and 1722 (Extortion). The jurisdictional subsection in this offense was redrafted from earlier versions in order to limit the scope of subsection (a)(4) to require an interstate or foreign commerce nexus and to require, in essence, that it be shown that no other jurisdictional base under this section is available.

[160] See Final Report, § 1738.

> the Farm Credit Administration, any Federal intermediate credit bank, or the Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any production credit association organized under sections 1131–1134m of Title 12, any regional agricultural credit corporation, or any bank for cooperatives, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

By virtue of 12 U.S.C. 1457(b), section 658 also applies to the Federal Home Loan Mortgage Corporation.

Two other statutes, summarized also in the discussion of section 1731, concern secured property. Section 30 of the United States Warehouse Act, 7 U.S.C. 270, makes it a ten-year felony for a person to convert to his own use agricultural products stored in a licensed warehouse. The Act makes it quite apparent that such products will often be subject to security interests. Section 15 of the Commodity Credit Corporation Charter Act, 15 U.S.C. 714m(c), makes criminal the theft of property owned by or pledged to the Corporation. The basic penalty is up to five years in prison, reduced to a maximum of one year if the property has a value less than $500.

There are few cases under 18 U.S.C. 658. It has been held that the statute expresses a clear Congressional intent to protect collateral from conscious fraud, but does not evince a Federal policy to replace State laws which control title either to realty or personalty.[161] Further, it has been held that where the defendant's conduct violates both section 658 and State law, State prosecutors need not defer to Federal prosecution.[162] The codification effected by the proposed Code is not intended to change this result or to displace State law.[163]

3. The Offense

Subsection (a) provides that a person commits an offense if:

> holding a legal interest in property subject to a security interest, he deprives the holder of the security interest of a right to the property or a benefit of the property by removing, concealing, encumbering, transferring, or converting such property.

The language "deprives the holder of the security interest of a right to the property or a benefit of the property" describes the result that must be proved to have been occasioned by the defendant's conduct. Since no culpability standard is specified, the proof need only show that the defendant was "reckless" as to the occurrence of such a result.[164] That is to say, it must be proved that he was aware of but disregarded a substantial risk that such a result would occur.

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[161] See *United States* v. *Kramel*. 234 F.2d 577 (8th Cir. 1956). But cf. *United States* v. *Hext*, 444 F.2d 804, 807–809 (5th Cir. 1971).

[162] *State* v. *Duncan*, 221 Ark. 681, 255 S.W. 2d 430 (1953).

[163] See section 206.

[164] See section 302(c)(2).

This is a lower standard than in 18 U.S.C. 658, which requires an "intent to defraud." It also differs from the proposal of the National Commission, which requires an "intent to prevent collection of the debt represented by the security interest."[165] The Committee has elected to eliminate the "intent to defraud" requirement and to reject the Commission formulation, partly for reasons expressed by the Department of Agriculture in its critical comments on the National Commission's proposal as follows:

> Security interests have a very important part in numerous of the Department's programs. Conversion of property in which security interest exists is made a felony under the United States Warehouse Act. 7 U.S.C. § 270, and the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(c). Section 658 of Title 18, which the Code is intended to replace, makes a felony the conversion of property in which a security interest is held by the Federal Crop Insurance Corporation or the Farmers Home Administration.
>
> Under the Department programs, property with security interests amounting to hundreds of millions of dollars annually is pledged, stored, or utilized.
>
> Code § 1738 purportedly is attempting to define an offense of defrauding secured creditors along the lines of present 18 U.S.C. § 658. See Working Papers 973. Actually, it defines a novel offense which poses grave problems for this Department. The culpability requirement of an "intent to prevent collection of the debt represented by the security interest" plus the verbs employed in Code § 1738 project an offense whose essence appears to be obstructionism, possibly maliciously motivated.
>
> It is doubtful whether the offense defined by Code § 1738 would reach many common forms of the offense. Consider, for example, a person who depletes or consumes the property or money in which another holds a security interest, but at the same time acknowledges the debt and indicates a willingness to pay it, although prevented from doing so at present by financial difficulties. He may not have been motivated by any desire to prevent the collection of the debt, and the money may even have gone to paying other debts, so that he would probably be found innocent under Code § 1738. Nonetheless, he may have deliberately taken and used a million dollars of someone else's money with no realistic prospect of ever repaying it. Surely, such offense should not go unpunished.

The Committee thus intends to reach the person who, although lacking the specific intent to deprive the security holder of his rights, sells or otherwise disposes of the secured property in reckless disregard of such rights and uses the proceeds for another purpose, even though he intends to pay the security holder.

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[165] See Final Report, § 1738.

The forbidden conduct under section 1736 is "removing, concealing, encumbering, transferring, or converting" property. Because no culpability level is specified, under section 303(b)(1), the applicable state of mind to be proved is "knowing". It should be noted that the coverage of section 1736 is broader than 18 U.S.C. 658 in terms of the types of conduct proscribed. Both provisions punish concealing, removing, and converting. Section 658 also covers "disposing of", which is paralled by "transferring" in this section. The subject section, however, also prohibits "encumbering" the property, conduct not covered by present law.

On the other hand, existing law is broader than the proposed section in that it is aimed at anyone ("whoever") who engages in the forbidden conduct. But a person violates section 1736 only if he holds "a legal interest in property subject to a security interest." However, interference with a security interest by a third party will be covered by other sections of the proposed Code. Section 1731 (Theft) will deal with unauthorized appropriation of the property; and where the collateral is damaged or destroyed, either by a third party or the holder of a legal interest, the provisions of subchapter A of chapter 17 will come into play.

The remaining elements, e.g., "holding a legal interest in property subject to a security interest" are existing circumstances. Since no culpability level is specifically designated, under section 303(b)(2) the applicable state of mind is at a minimum "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[166] The Committee intends the content of the terms "legal interest in property" and "holder of security interest" to come from Federal or State property law.

4. Jurisdiction

There is Federal jurisdiction over an offense in this section if the property is subject to a security interest held by the United States. This reflects the coverage of current law, although it expands it to include all property in which the United States has a security interest, and not just the particular property encompassed by 18 U.S.C. 658, 7 U.S.C. 270, and 15 U.S.C. 714m(c).

5. Grading

Subsection (b) provides for a three-step grading system, patterned somewhat after that of the theft section 1731. Paragraph (1) makes an offense a Class D felony (maximum of six years' imprisonment) if the deprivation of the right or benefit has a value in excess of $100,000. Paragraph (2) provides for Class E felony treatment (maximum of three years in prison) where the deprivation of the right or benefit has a value in excess of $500 but not greater than $100,000. Finally, paragraph (3) makes violations in "any other case" a Class A misdemeanor (maximum penalty of one year in prison). The felony classifications for this section are one grade below those of section 1731, reflecting the Committee's view that while interference with a security interest is a serious enough offense to warrant felony status, it is not as grievous a crime as, e.g., an unauthorized taking with intent to deprive another of his right to or a benefit of the property. The National Commission Final Report section 1738 reflected a similar grading differential, but would have classified all security interest violations as misdemeanors.

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[166] See section 302(c)(1).

SECTION 1737. FRAUD IN A REGULATED INDUSTRY

1. In General

This section codifies three special felony fraud provisions of current law. Subsection (a)(1) is designed to protect the environment and the public health and safety with respect to pesticides and herbicides; subsection (a)(2) punishes equity skimming schemes involving Federally insured mortgages; and subsection (a)(3) reaches frauds involving certain land sales.

2. Present Federal Law

A. Pesticide Control

7 U.S.C. 136a forbids trafficking in any pesticide[167] which is not registered with the Administrator of the Environmental Protection Agency. Among the registration requirements (violation of which subjects the offender to misdemeanor penalties) is one that calls for a statement of "the complete formula of the pesticide."[168] In order to protect this confidential commercial information, which persons in business are required to give to the government, 7 U.S.C. 136*l*(b)(3) provides up to a three-year prison sentence for:

> Any person who, with intent to defraud, uses or reveals information relative to formulas of products acquired under the authority of section 136a of this title.

No reported prosecutions under this statute apparently exist.

B. Equity Skimming

12 U.S.C. 1709-2 punishes by up to three years in prison whoever, with intent to defraud, willfully engages in a pattern or practice of (1) purchasing one to four-family dwellings which are subject to a loan in default at time of purchase or within one year subsequent thereto where the loan is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed by the Veterans' Administration, or the loan is made by the latter, (2) failing to make payments under the mortgage or deed of trust as the payments become due, and (3) applying or authorizing the application of rents from such dwellings for his own use. The statute does not apply to a purchaser of such a dwelling or a beneficial owner under any business organization or trust purchasing such dwelling, or to an officer, director, or agent of any such purchaser.[169]

12 U.S.C. 1715z-4(b) punishes by up to three years in prison whoever, as an owner of a property which is security for a mortgage described in 12 U.S.C. 1715z-4(a) (i.e., a mortgage covering multifamily housing), or as a stockholder of a corporation owning such property, or as a beneficial owner under any business organization

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[167] The term "pesticide," along with other relevant terms, is defined in 7 U.S.C. 136.

[168] 7 U.S.C. 136a(c)(1)(E).

[169] See *United States* v. *Berg*, 390 F. Supp. 8 (C.D. Cal. 1975), aff'd, 539 F.2d 719 (9th Cir. 1976).

or trust owning such property, or as an officer, director, or agent of any such owner, (1) willfully uses or authorizes the use of any part of the rents or other funds derived from the property covered by such mortgage in violation of a regulation promulgated by the Secretary of Housing and Urban Development under 12 U.S.C. 1715z-4(a), or (2) if such mortgage is determined to be exempt from or is not otherwise covered by such regulation, willfully and knowingly uses or authorizes the use of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet actual and necessary expenses arising in connection with such property (including amortization charges under the mortgage).

C. Land Sale or Lease Fraud

15 U.S.C. 1703, part of the Interstate Land Sales Full Disclosure Act, makes it unlawful for any developer or agent to use any means or instrument of transportation or communication in interstate commerce, or of the mails (1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with 15 U.S.C. 1706 and a printed property report, meeting the requirements of 15 U.S.C. 1707, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser, and (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision, (a) to employ any device, scheme or artifice to defraud, (b) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies, or (c) to engage in any practice, transaction, or course of business which operates or would operate as a fraud or deceit upon a purchaser.[170]

The terms "person," "subdivision," "agent," "interstate commerce," "purchaser," and "offer" are defined in 15 U.S.C. 1701. 15 U.S.C. 1702 contains a number of exemptions, including the sale or lease of real estate under court order and the sale or lease of real estate by any government or government agency.

15 U.S.C. 1717 is the penalty section and provides that any person who "willfully violates" any of the provisions of this chapter (including 15 U.S.C. 1703), or the rules and regulations issued pursuant thereto, may be imprisoned upon conviction for up to five years.

3. The Offense

Subsection (a) provides that a person commits an offense if he "violates": (1) 7 U.S.C. 1361(b)(3), which relates to improper disclosure of a pesticide formula with intent to defraud;[171] (2) 12 U.S.C. 1709-2 or 1715z-4(b), relating to equity skimming in federally insured mortgages on single or multiple family dwellings; or (3) 15

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[170] It has been held that this offense states a distinct crime from mail fraud. *United States* v. *Pocono International Corp.*, 378 F. Supp. 1265 (S.D.N.Y. 1974).

[171] It is the "intent to defraud" element that distinguishes the offense of revealing information in this section from the general misdemeanor offense in section 1525 (Revealing Private Information Submitted for a Government Purpose).

U.S.C. 1717, relating to fraudulent sale or lease of lots in real estate subdivisions.

The term "violate" is defined in section 111 to mean in fact to engage in conduct which is prohibited, proscribed, declared unlawful, or made subject to a penalty. Thus, this section carries forward the precise elements of the offense (including *scienter* [172] and jurisdiction [173]) in existing law. Whether proof of a state of mind is required with respect to the fact that the conduct is a crime is to be determined by reference to the underlying statute and not by reference to section 303(d)(1)(A).[174] The description in parenthesis of the underlying statutes is not to be read as limiting the scope or application of their provisions.[175]

4. Jurisdiction

This section contains no subsection setting forth the extent to which there is Federal jurisdiction over an offense herein. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2).[176]

5. Grading

An offense under subsection (a)(1) or (a)(2) is graded as a Class E felony (up to three years in prison). This is the same as the present penalty level under 7 U.S.C. 136*l*, 12 U.S.C. 1709-2, and 7 U.S.C. 1715z-4(b). An offense under subsection (a)(3) is a Class D felony (up to six years in prison). This penalty approximates that provided in U.S.C. 1717.

SECTION 1738. CRIMINAL INFRINGEMENT OF A COPYRIGHT

1. In General and Present Federal Law

This section is designed to carry forward the current copyright infringement offense in 17 U.S.C. 506, while upgrading to felony level certain violations involving sound recordings, motion pictures, and audiovisual works. Separate coverage of counterfeiting labels for such items is found in section 1746.

At present, criminal infringement of a copyright is proscribed under 17 U.S.C. 506(a). The statute punishes by up to one year in prison and a $10,000 fine any "person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain". The penalty rises to one year and a $25,000 fine for a first offense involving the copyright in a sound recording or a motion picture, and to two years and a $50,000 fine for a second offense.[177]

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[172] See section 303(a)(2).

[173] See section 201(b)(2).

[174] It appears that the courts would probably determine that no mental state need be proved as to the fact that the conduct is a crime under the statutes that this section perpetuates as felonies. Cf. *United States* v. *International Min'ls Corp.*, 402 U.S. 558 (1971).

[175] See section 112(b).

[176] See also Article I, section 8, clause 8, of the United States Constitution.

[177] A related statute, 18 U.S.C. 2318, punishes the transportation, receipt, sale, or offer to sell in interstate or foreign commerce, with fraudulent intent, of any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which is stamped or affixed any label, knowing such label to be forged, falsely made, or counterfeited. A first violation is punishable by up to one year in prison and a $10,000 fine; a second, by up to two years in prison and a $25,000 fine. This offense is carried forward in section 1746.

The statute has been sustained against constitutional attack predicated upon the alleged vagueness of the concept of infringment,[178] but the number of criminal prosecutions brought under it (or under its predecessor enactment, 17 U.S.C. 104) have been few,[179] so that there has been comparatively little exposition of the required elements. The concept of willfulness has been deemed to require knowledge of the fact that the law was being violated, i.e., that the copyright was being infringed.[180]

2. The Offense

Subsection (a) provides that a person commits an offense if, for purposes of commercial advantage or private financial gain, he infringes a copyright. This is intended to bring forward, as closely as possible, the existing scope and elements of the offense in 17 U.S.C. 506(a). The conduct element is infringing a copyright. Since no culpability level is specifically prescribed, the applicable state of mind "knowing",[181] requiring proof that the actor was aware of the nature of his conduct.[182] The requirement of "knowing" is designed to perpetuate as nearly as possible under the bill's culpability terms the current concept of "willful" infringement. The element that the conduct was performed "for the purpose of commercial advantage or private financial gain" states (identically to current law) the particular intent with which it must be established that the conduct was engaged in. It has been held that, while it is irrelevant whether pecuniary gain was realized, the prosecution must show that the infringement was committed in the hope of obtaining some financial benefit or profit; thus infringement by a lobbyist for other than financial motives would not constitute a criminal offense.[183]

3. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, by operation of section 201(b)(2), there is Federal jurisdiction if the offense is committed in the general or special jurisdiction of the United States.

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the conduct involved 100 or more copies infringing a copyright in sound recordings or 10 or more copies infringing a copyright in motion pictures or audiovisual works. Class E felony coverage is provided if the amount involves less than that required for a Class D felony and is a second offense. Other violations are Class A misdemeanors (up to one year in prison). These grading distinctions are designed to increase the deterrent effect of the law. The terms "audiovisual work", "motion picture", and

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[178] *United States* v. *Wise*, 550 F. 2d 1180 (9th Cir. 1977).

[179] *United States* v. *Wise, supra* note 178; *United States* v. *Bily*, 406 F. Supp. 726 (E.D. Pa. 1975); *United States* v. *Wells*, 176 F. Supp. 630 (S.D. Tex. 1959); see also *United States* v. *Backer*, 134 F2d 533 (2d Cir. 1943).

[180] *United States* v. *Wise, supra* note 178, at 1194.

[181] See section 303(b).

[182] See section 302(b)(1).

[183] See *United States* v. *Wise, supra* note 178; *United States* v. *Bily, supra* note 179.

"sound recording" are defined by in section 1739 cross-reference to 17 U.S.C. 101.

The "pirating" of films and records has been growing at an alarming rate and there are indications that these crimes often involve highly organized production and distribution rings. Such crimes are also extremely lucrative. The Motion Picture Association of America, Inc. and the Recording Industry Association of America, Inc., in a statement submitted to the Committee,[184] have estimated that the volume of all forms of record and film counterfeiting and piracy take away in excess of six hundred and fifty million dollars annually from legitimate sales and rentals in these industries. The Motion Picture Association and the Recording Industry Association joined, therefor, in recommending to the Committee that, in order to enhance the deterrent effect of the criminal law, the present distinction between first and second offenses should be dispensed with and such offenses involving a significant number of sound recordings, motion pictures or audiovisual works should be graded as felonies. The Committee believes the recommendation is well founded and has accepted it. In addition to substantially raising the maximum prison sentence available for a first offense, it should be noted that, because of the generally increased fine levels contained in section 2201, the maximum fines authorized to be imposed for a felony violation will be increased to one million dollars in the case of an organization and $250,000 in the case of an individual.

SECTION 1739. GENERAL PROVISIONS FOR SUBCHAPTER D

Section 1739 contains definitions (subsection (a)), general provisions relating to matters of proof (subsection (b)), and a provision barring prosecution in certain circumstances (subsection (c)) for this subchapter. Each provision has been explained in the discussion of the sections to which it applies.

SUBCHAPTER E.—COUNTERFEITING, FORGERY, AND RELATED OFFENSES

(Sections 1741–1747)

The offenses included within this subchapter are: Counterfeiting, (section 1741); Forgery (section 1742); Criminal Endorsement of a Written Instrument (section 1743); Criminal Issuance of a Written Instrument (section 1744); Trafficking in a Counterfeiting Implement (section 1745); and Trafficking in a Counterfeit Sound Recording or Motion Picture Label (section 1746). Definitions for the various terms of art used throughout the subchapter appear in section

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[184] See Hearing, Part XIV, pp. 10694–10705.

1747. The chief virtue of this subchapter is the consolidation and, consequently, the clarification of a great number of offenses found throughout the United States Code (principally in title 18) dealing with counterfeiting,[1] forgery,[2] and related matters.[3] In addition, these sections harmonize and simplify multiple and arbitrary standards of culpability,[4] as well as inconsistent levels of punishment [5] that exist throughout the current statutes.

The current statutes proscribing counterfeiting, forgery, and related offenses were enacted piecemeal over the years and are distinguishable from each other by the different written instruments or symbols of value which are protected,[6] the different Federal agencies associated with certain statutes,[7] and the interstate aspect provided in various statutes.[8] All of these offenses, however, have a common ground in that they involve in some way false dealings in regard to writings or symbols of value (issuing an authentic document without authority) or the falsification or attempted falsification of such materials. The offenses in this subchapter share this common ground. Thus, sections 1741 and 1742 proscribe the making, uttering, or possession, with the intent to deceive or harm another person or a government, of a counterfeited written instrument (section 1741) and of a forged written instrument (section 1742). Section 1743 penalizes the endorsing of a written instrument in such a manner that it falsely purports to have been signed or endorsed on behalf of another. Section 1744, on the other hand, essentially proscribes the issuance of an authentic written instrument without authority. Section 1745 prohibits the production, trafficking in, or possession of counterfeiting and forging implements. Finally, section 1746 penalizes trafficking in counterfeit labels which are designed to be or are affixed to phonorecords, copies of motion pictures, or copies of audiovisual works.

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[1] See, e.g., 18 U.S.C. 331, 471-473, 484-486.

[2] See, e.g., 18 U.S.C. 471-473, 484, 495, 500, 502.

[3] See, e.g., 18 U.S.C. 334 (prohibiting Federal Reserve Agents, or an agent or employee of such Agent, or of the Board of Governors of the Federal Reserve System from issuing Federal reserves notes without complying with regulations regarding such issuance); 18 U.S.C. 335 (prohibiting certain persons connected with a corporation created by an Act of Congress, the charter of which has expired, from issuing any securities of such corporation); and 18 U.S.C. 500 (prohibiting the issuance of postal money orders, without having received the full amount payable therefor, for the purpose of fraudulently receiving from the United States a sum of money).

[4] Compare 18 U.S.C. 472 ("with intent to defraud"); 18 U.S.C. 482 ("with intent to defraud falsely"); and 18 U.S.C. 485 ("falsely").

[5] Compare 18 U.S.C. 331 (fine of not more than $2,000 and imprisonment for not more than five years for fraudulent alteration or falsification of coins) with 18 U.S.C. 483 (fine of not more than $5,000 and imprisonment for not more than fifteen years for the counterfeiting or forgery of coins).

[6] Compare 18 U.S.C. 485 (prohibiting the forgery or counterfeiting of coins of a denomination higher than five cents) with 18 U.S.C. 490 (prohibiting the forgery or counterfeiting of nickels and pennies (minor coins)).

[7] Compare 18 U.S.C. 1008 (prohibiting the forgery or counterfeiting of any document or the uttering of such a document, for the purpose of influencing in any way the action of the Federal Savings and Loan Insurance Corporation) with 18 U.S.C. 1010 (prohibiting the same conduct when undertaken for the purpose of obtaining any loan or advance of credit from any person or firm with the intent that such loan or advance or credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of influencing in any other way the action of such department).

[8] Thus, for example, 18 U.S.C. 2315, prohibits the knowing receipt, concealment, storing, bartering, selling or disposing of forged or counterfeited securities or tax stamps which are "moving as, or, which are a part of, or which constitute interstate or foreign commerce."

SECTION 1741. COUNTERFEITING

SECTION 1742. FORGERY

1. In General

Because of their close relationship, counterfeiting (section 1741) and forgery (section 1742) are discussed together. Indeed, in its broadest sense, counterfeiting includes forgery and, at common law, the two terms were used interchangeably.[9] Thus, both terms were used at common law to define the concept of falsely making a writing whether by manufacturing it falsely or falsely altering it in some fashion.[10] More narrowly, however, counterfeiting has generally been defined as the making of a false or spurious thing to resemble a genuine thing,[11] and forgery has been defined as the false making or material alteration, with intent to defraud, or any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability.[12]

Eventually, through usage, the term "forgery" became restricted to writings and the term "counterfeiting" became restricted to money or the equipment for making money.[13] Nevertheless, throughout the United States Code, the terms "forge" and "counterfeit" are coupled together in section after section,[14] whether the offense is clearly counterfeiting [15] or clearly forgery [16] under traditional concepts.

The bill, as reported, however, for the first time in Federal legislation proposes to draw a distinction between items that are counterfeited and items that are forged. The two types of conduct are clearly distinguished in such a way as to eliminate the confusion in the use of the terms "forge" and "counterfeit" engendered by current law. The Committee has thus rejected both the approach of the National Commission, which treated these terms as synonyms [17] and of S. 1, as originally introduced in the 93d Congress, which used both terms to describe essentially identical conduct.[18]

Section 1741 proscribes counterfeiting. It is limited to the situation where a written instrument which purports to be genuine but is not—because it has been falsely made or manufactured in its entirety—is made, uttered, or possessed with the intent to deceive or harm another person or a government. The basic purpose of the section is to consolidate in one provision all of the diverse statutes which proscribe counterfeiting, and thus to clarify and systematize their treatment. The primary focus of the section is upon protecting the integrity of coins and currency, obligations, securities, and the like.

Section 1742 proscribes forgery. This section is limited to the situation where a written instrument which purports to be genuine but is not—because it has been falsely altered, completed, signed, or endorsed, contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine written instruments—is made, uttered, or possessed with the intent to deceive or harm another person or a government. Like section 1741, the basic purpose of this section is to consolidate in one provision most of the statutes which prohibit forgery and thus to clarify and systematize their treatment. Again, as in the previous section, the focus of this section is upon protecting the integrity of written instruments where there is an underlying interest.

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[9] 2 Wharton, *Criminal Law*, section 652 (1957).

[10] See 2 East. *Please of the Crown*, p. 852 (1803).

[11] 2 Wharton *supra* note 9, section 652.

[12] *Id.*, section 621.

[13] *Id.*, section 652 (1957).

[14] See, e.g., 18 U.S.C. 471, 472, 473.

[15] See 18 U.S.C. 485 (counterfeiting gold or silver coins); 18 U.S.C. 490 (counterfeiting "minor" coins).

[16] See 18 U.S.C. 495 (forging deed, contract, and the like to obtain money from the United States).

[17] See Final Report, § 1754(g); Working Papers, p. 964.

[18] See S. 1, as introduced in the 93d Congress, §§ 2-8A1(4), 2-8E1(a), 2-8E2(a).

2. Present Federal Law

Current Federal statutes pertaining to counterfeiting and forgery are found throughout the entire United States Code but are primarily contained in title 18. The statutes cover a number of situations, including, but not limited to, protection of Federal obligations and securities; protection of foreign obligations, securities, and tax stamps; protection of Federal documents and other writings of the United States; proscription of the use of counterfeited and forged documents to influence actions of Federal agencies; and proscription of the interstate transportation of counterfeited and forged securities and tax stamps. In the interests of simplicity and clarity, the principal current statutes intended to be covered by sections 1741 and 1742 are set out below in numerical order.

7 U.S.C. 270. This section prohibits the issuance or utterance of a false or fraudulent warehouse receipt, or changing in any manner an original receipt subsequent to issuance by a licensee.[19] The penalty is imprisonment for not more than ten years.

7 U.S.C. 1379i. This section punishes anyone "who falsely makes, issues, alters, forges, or counterfeits any marketing certificate, or with fraudulent intent possesses, transfers, or uses any such falsely made, issued, altered, forged, or counterfeited marketing certificate." [20] A violation of this section is punishable by imprisonment for not more than ten years.

7 U.S.C. 2023. This section makes it an offense to alter food stamp coupons.[21] If such coupons are of a value of $100 or more, the punishment provided is imprisonment for not more than five years. If the coupons are of a value less than $100, the punishment is imprisonment for not more than one year.

8 U.S.C. 1185. This section proscribes, *inter alia*, the forging and counterfeiting of "any permit or evidence of permission to depart from or enter the United States." [22] It also proscribes the use, or furnishing to another for use, of "any false, forged, counterfeited

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[19] A warehouse receipt is categorized as a "security" under the definition of section 1747(f). Moreover, the receipt specified in 7 U.S.C. 270 is a written Instrument issued under the authority of the United States (see sections 1741(c)(2)(A), 1742(c)(2)(A), and 1746(j)), as such receipts may only be issued by those who have been licensed (see 7 U.S.C. 259, 260).

[20] Such marketing certificates are obligations of the United States under proposed section 1747(e), and, thus, securities under section 1747(f). See 7 U.S.C. 1379b(a).

[21] Such food stamp coupons are obligations of the United States under proposed section 1747(e), and thus, securities under section 1747(f). See 7 U.S.C. 2013(a). Moreover, even where printed and distributed by a State, such coupons are, by virtue of section 1747(j), "issued under the authority of the United States" as that phrase is used in sections 1741(c)(2)(A) and 1742(c)(2)(A). See 7 U.S.C. 2012(c), 2013(a).

[22] The term "permits to enter" includes passports, visas, reentry permits, and the like. See 8 U.S.C. 1185(g).

. . . or altered permit." Violations may be punished by imprisonment for not more than five years.

8 U.S.C. 1306. This section punishes anyone "who with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print, or impression in the likeness of any certificate of alien registration or an alien registration receipt card." The punishment is imprisonment for not more than five years.

18 U.S.C. 331. This section prohibits conduct such as the alteration and falsification of "any of the coins coined at the mints of the United States, or any foreign coins which are by law made current or are in actual use or circulation as money within the United States," as well as the knowing possession, utterance (including attempts to utter), and importation of such coins. The penalty is imprisonment for not more than five years.

18 U.S.C. 471. This section makes it a crime to falsely make, counterfeit, or alter "any obligation or other security of the United States" [23] with intent to defraud. The punishment provided is imprisonment for up to fifteen years.

18 U.S.C. 472. This section covers the instruments specified in the preceding section and proscribes such conduct as the passing, uttering, publishing, importation, or possession of such instruments. Attempts to do certain of the specified acts are also prohibited. The punishment is the same as that provided in section 471.

18 U.S.C. 473. This section prohibits the purchase, sale, exchange, transfer, receipt, or delivery of any of the instruments specified in section 471 "with the intent that the same be passed, published, or used as true and genuine." Violations are punishable by a term of imprisonment of not more than ten years.[24]

18 U.S.C. 478. This section proscribes the false making, altering, forging, or counterfeiting of "any bond, certificate, obligation, or other security of any foreign government, purporting to be or in imitation of any such security issued under the authority of such foreign government, or any treasury note, bill, or promise to pay, lawfully issued by such foreign government and intended to circulate as money." The punishment imposed is imprisonment for not more than five years.

18 U.S.C. 480. This section prohibits the knowing possession or delivery of "any false, forged, or counterfeit bond, certificate, obligation, security, treasury note, bill, promise to pay, bank note, or bill issued by a bank or corporation of any foreign country." The penalty is imprisonment for not more than one year.

18 U.S.C. 482. This section prohibits the false making, altering, forging, or counterfeiting of "any bank note or bill issued by a bank or corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country." The penalty is imprisonment for not more than two years.

18 U.S.C. 483. This section prohibits the uttering, passing, or tendering in payment of any of the items specified in section 482. The penalty is imprisonment for not more than one year.

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[23] The term "obligation or other security of the United States" is defined in 18 U.S.C. 8.

[24] Although worded differently, this section covers essentially the same conduct prohibited by section 472, yet prescribes a maximum term of imprisonment five years shorter.

18 U.S.C. 484. This section makes it a criminal offense to place or connect "together different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to defraud." Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 485. This section proscribes falsely making, forging, or counterfeiting "any coin or bar in resemblance or similitude of any coin of a denomination higher than five cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States." The section also proscribes the passing, uttering, publishing, selling, possessing, or importing of any such coins, as well as all attempts to commit such acts. The punishment imposed is imprisonment for not more than fifteen years.[25]

18 U.S.C. 486. This section prohibits anyone, except as authorized by law, from making, uttering, or possessing, or attempting to utter or pass, "any coins of gold or silver or other metal, or alloys of metal, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design.[26] The penalty is imprisonment for not more than five years.

18 U.S.C. 490. This section prohibits falsely making, forging, or counterfeiting "any coin in the resemblance or similitude of any of the minor coins [27] coined at the mints of the United States." The section also prohibits the passing, uttering, publishing, sale, importation, or possession of any such coin, with the intent to defraud any person. Violations are punishable by imprisonment for not more than three years.

18 U.S.C. 493. This section prohibits the false making, forgery, counterfeiting, or alteration of "any note, bond, debenture, coupon, obligation, instrument, or writing in imitation or purporting to be in imitation of, a note, bond, debenture, coupon, obligation, instrument, or writing, issued by" specified institutions.[28] The section also prohibits the passing, uttering, or publishing, as well as attempts so to do, of the specified instruments. The penalty is imprisonment for not more than five years.

18 U.S.C. 494. This section prohibits falsely making, altering, forging, or counterfeiting of "any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States," as well as

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[25] It is interesting to note the disparity in punishment between this section and section 331 (up to five years in prison), which, as noted, prohibits, *inter alia,* the fraudulent falsification of any coins coined at the mints of the United States.

[26] It has been said that the purpose of this section is to prevent the coining of money in competition with the United States. *United States* v. *Gellman,* 44 F. Supp. 360, 364 (D. Minn. 1942). To that extent this section will not be carried forward in the counterfeiting and forgery sections of the subject bill.

[27] The term "minor coins" is defined in 31 U.S.C. 317 to mean the "five-cent piece" and the "one-cent piece."

[28] The Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, or any land bank, intermediate credit bank, insured credit union, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States.

uttering or publishing as true, or possessing with the intent to utter or publish as true, any such writing knowing it to be of the prohibited character.[29] The section also forbids the knowing transmission to, or presentation "at any office or to any officer of the United States" of any such writing. The punishment imposed is imprisonment not to exceed ten years.

18 U.S.C. 495. This section proscribes the false making, altering, forging, or counterfeiting of "any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money." The section also punishes the knowing utterance or publication as true of any such writing, with intent to defraud the United States. Finally, the section proscribes the knowing transmission to, or presentation "at any office or officer of the United States," of any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States.[30] Violations are punishable by imprisonment for not more than ten years.

18 U.S.C. 496. This section makes it a criminal offense to forge, counterfeit, or falsely alter "any writing made or required to be made in connection with the entry or withdrawal of imports or collection of customs duties," or to use any such writing knowing it to be forged, counterfeited, or falsely altered. The penalty is imprisonment for not more than three years.

18 U.S.C. 497. This section proscribes falsely making, forging, counterfeiting, or altering "any letters patent granted or purporting to have been granted by the President of the United States." In addition, the section prohibits passing, uttering, or publishing, as well as attempts so to do, any such letters knowing them to be forged, counterfeited, or altered. A violation is punishable by imprisonment for not more than ten years.

18 U.S.C. 498. This section prohibits the forging, counterfeiting, or false altering of "any certificate of discharge from the military or naval service of the United States." In addition, the knowing use, unlawful possession, or exhibition of any such certificate is made an offense. The punishment is imprisonment not to exceed one year.

18 U.S.C. 499. This section makes it a criminal offense to falsely make, forge, counterfeit, alter, or tamper with "any naval, military, or official pass or permit, issued by or under the authority of the United States." The section also forbids the use or possession of any such pass with the intent to defraud. The penalty is imprisonment for not more than five years.

18 U.S.C. 500. This statute makes it an offense to falsely make, forge, counterfeit, engrave, or print "any order in imitation of or

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[29] This section has been given a very broad interpretation by the courts, so as to include all writings and actions which might in any way deceive the United States. For example, it has been held to be a crime under this section to utter a forged prescription for narcotics, because this activity defrauded the United States by frustrating the administration of the narcotics laws. *French* v. *United States*, 232 F.2d 736 (5th Cir.), cert. denied, 352 U.S. 851 (1956). See also *Fooshee* v. *United States*, 223 F.2d 261 (6th Cir. 1955).

[30] Although this section has primarily been used in the prosecution of forged United States securities, its reach is very broad. For example, it has been used to prosecute forged claims for refunds in income tax returns (*Hanson* v. *United States*, 271 F.2d 791 (9th Cir. 1959)), and forged claims for bounty land (*United States* v. *Wilcox*, 28 F. Cas. No. 16, 691 (C.C. N.Y., 1859)).

purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service." The statute also specifically prohibits forging or counterfeiting of "the signature or initials of any person authorized to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service," as well as "any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof." The statute further proscribes the false alteration, "in any material respect," of "any such money order or postal note," the passing, uttering, or publishing, as well as attempts so to do, of "any such forged or altered money order or postal note," and the transmission or presentation of any such instrument. The penalty is imprisonment for not more than five years.

18 U.S.C. 501. This section prohibits forging or counterfeiting of "any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope, or postal card, or any die, plate, or engraving thereof." In addition, the section forbids the manufacture, printing, knowing use or sale, or possession, with intent to sell, of any such proscribed item, as well as the manufacture, knowing use or sale, or possession, with intent to use or sell, of "any paper bearing the watermark of any stamped envelope, or postal card, or any fraudulent imitation thereof." Violations may be published by imprisonment not to exceed five years.

18 U.S.C. 502. This section makes it a criminal offense to forge or counterfeit any postage stamp or revenue stamp of any foreign government, as well as to knowingly utter or use any such stamp. The penalty is imprisonment for not more than five years.

18 U.S.C. 503. Under this section, the forging or counterfeiting of "any postmarking stamp, or impression thereof with intent to make it appear that such impression is a genuine postmark," as well as the knowing use or sale, or possession with the intent to use or sell, of "any forged or counterfeited postmarking stamp, die, plate, or engraving, or such impression thereof," is prohibited. Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 505. This section prohibits the forgery of "the signature of any judge, register, or other officer of any court of the United States, or of any territory thereof;" the forgery or counterfeiting of "the seal of any such court;" the knowing concurrence in the use of any such forged or counterfeit signature or seal, "for the purpose of authenticating any proceeding or document;" and, the tendering in evidence of "any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit." The penalty is imprisonment for not more than five years.

18 U.S.C. 506. This section makes it an offense to falsely make, forge, counterfeit, mutilate, or alter "the seal of any department or agency of the United States." In addition, this section makes it a crime to knowingly use, affix, or impress any such seal "to or upon any certificate, instrument, commission, document, or paper, of any description." Finally, the section prohibits the knowing possession

of any such seal, with the intent to defraud. The penalty is imprisonment for not more than five years.

18 U.S.C. 507. This section proscribes the false making, forging, counterfeiting, or altering of "any instrument in imitation of or purporting to be, an abstract or official copy or certificate of the recording, registry, or enrollment of any vessel, in the office of any collector of the customs, or a license to any vessel for carrying on the coasting trade or fisheries of the United States, or a certificate of ownership, pass, or clearance, granted for any vessel, under the authority of the United States, or a permit, debenture, or other official document granted by any collector or other officer of the customs by virtue of his office." The section also prohibits the uttering, publishing or passing as true, as well as attempts so to do, of any of the proscribed items. Violations are punishable by imprisonment for not more than three years.

18 U.S.C. 508. This section proscribes the false making, forging, counterfeiting, or altering of any "form or request provided by the Government for requesting a common carrier to furnish transportation on account of the United States or any department or agency thereof." The section also proscribes the knowing passing, uttering, publishing, or selling, as well as attempts so to do, of any such form or request. A violation subjects the offender to imprisonment for not more than ten years.

18 U.S.C. 1002. This section makes it a crime for anyone to possess, "knowingly and with intent to defraud the United States, or any agency thereof," "any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money." The penalty is imprisonment not to exceed five years.

18 U.S.C. 1003. This section makes it an offense for anyone "knowingly and fraudulently" to demand or endeavor "to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument." Violations are punishable by imprisonment for not more than five years. Where the sum or value obtained or attempted to be obtained does not exceed $100, the penalty is reduced to imprisonment for not more than one year.

18 U.S.C. 1008. This section prohibits the forging or counterfeiting of "any instrument, paper or document" for the purpose of influencing the action of the Federal Savings and Loan Insurance Corporation. It also proscribes the knowing uttering, publishing, or passing as true of any such instrument. The penalty is imprisonment for not more than two years.

18 U.S.C. 1010. This section proscribes the altering, forging, or counterfeiting of any instrument, paper, or document, as well as the knowing uttering, publishing, or passing as true of any such document, "for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Develop-

ment for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department." The punishment is imprisonment for not more than two years.

18 U.S.C. 1423. This section prohibits the knowing use "for any purpose [of] any order, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, unlawfully . . . made, or copies or duplicates thereof, showing any person to be naturalized or admitted to be a citizen." The penalty is imprisonment for not more than five years.

18 U.S.C. 1426. This section proscribes the false making, forging, altering, or counterfeiting of "any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate or documentary evidence of naturalization or citizenship or any order, record, signature, paper or proceeding or any copy thereof, required or authorized by any law relating to naturalization or citizenship or registry of aliens." [31] In addition, the section prohibits the uttering, selling, disposing of, or using as true or genuine any of the proscribed items, as well as the possession thereof with the intent to unlawfully use. Violations are punishable by up to five years' imprisonment.

18 U.S.C. 1506. This section makes it an offense to alter or falsify "any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect." The penalty is imprisonment for not more than five years.[32]

18 U.S.C. 1543. This section prohibits the false making, forging, counterfeiting, mutilating, or altering of "any passport or instrument purporting to be a passport," with the intent that it be used. The section also proscribes the willful and knowing use, or attempt to use, or furnishing "to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport." Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 1546. This section prohibits the knowing forgery, counterfeiting, altering, or false making of "any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States." [33] It also prohibits knowing utterance, use, attempts to use, possession, obtaining, acceptance, or receipt of any such visa, permit, or document. The penalty is imprisonment for not more than five years.

18 U.S.C. 2197. This section prohibits the altering, forging, and counterfeiting of, as well as attempts to alter, forge, and counterfeit, "any certificate, license, or document issued to vessels, or officers or seaman by any officer or employee of the United States authorized by law to issue the same." It also forbids the unlawful pos-

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[31] This statute has been construed to include an alien registration receipt card. *United States* v. *Castillo-Felix*, 539 F. 2d 9 (9th Cir. 1976).

[32] This section is also carried forward in part in sections 1325 (Tampering with Physical Evidence), 1344 (Tampering with a Government Record), and 1731 (Theft) of the proposed Code.

[33] This has been held not to include an alien registration receipt card, *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971); the offense in section 1741 of the Code will, however, reach such documents. Compare 18 U.S.C. 1426, *supra;* and see 8 U.S.C. 1306(d).

session or knowing use of any such certificate, license, or document. Finally, the section proscribes transferring or negotiating the transfer of any such altered, forged, or counterfeited certificate, license, or document. The penalty is imprisonment for not more than five years.

18 U.S.C. 2314. This section proscribes the transportation in interstate or foreign commerce of "any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited." The section also forbids the transportation in interstate or foreign commerce with fraudulent intent of any traveler's check bearing a forged countersignature.[34] Violations are punishable by imprisonment for not more than ten years.

18 U.S.C. 2315. This section prohibits receiving, concealing, storing, bartering, selling, or disposing of "any falsely made, forged, altered, or counterfeited securities or tax stamps," as well as knowingly pledging or accepting as security "for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce," knowing the same to have been so falsely made, forged, altered, or counterfeited. The same restrictions apply to this section as apply to 18 U.S.C. 2314. The penalty is imprisonment not to exceed ten years.

26 U.S.C. 5676(3). This section proscribes, *inter alia,*[35] the making, selling, or using of "any false or counterfeit stamp or device of the kind mentioned in section 5054 or regulations issued pursuant thereto."[36] The penalty is imprisonment for not more than five years.[37]

26 U.S.C. 7208. Paragraph (1) of this section prohibits, *inter alia,* the altering, forging, making, or counterfeiting, with intent to defraud, of "any stamp, coupon, ticket, book, or other device prescribed under authority of this title for the collection or payment of any tax imposed by this title," as well as the sale, lending, or possession of "any such altered, forged, or counterfeited stamp, coupon, ticket, book, or other device." Paragraph (3)(c) prohibits the fraudulent use, joining, fixing, or placing to, with or upon "any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title . . . any forged or counterfeited stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article." Paragraph (4)(A) makes it a

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[34] The section explicitly provides that it shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note issued by any foreign government or by a bank or corporation of any foreign country. See *United States* v. *Galardi,* 476 F. 2d 1072, 1076–1078 (9th Cir.), cert. denied. 414 U.S. 839, 856 (1973).

[35] This paragraph also covers other conduct which falls within the scope of section 1301 of the bill, as reported.

[36] The section referred to relates to stamps or other devices which evidence the tax on beer or compliance with the provisions of the chapter dealing with beer.

[37] There are a number of other sections in title 26 which deal with counterfeiting, forgery, and similar offenses. See, e.g., 26 U.S.C. 5601(a)(5); 5603(a) (2) and (3); 5604(a) (4), (5), (10), (16), (18), and (19); 5689; and 5762(a) (2) and (6). These sections have been covered in section 1403 of the subject bill (Alcohol and Tobacco Tax Offenses), because of the desire to group in one location all felony tax offenses and because of the difficulty of amending title 26 to conform to the bill, as reported. The result is that such offenses are, to some extent, subject to overlapping coverage under section 1403 and the provisions in this subchapter. Since, however, the grading provisions are similar, no difficulties are foreseen.

crime for anyone willfully to remove or alter the cancellation or defacing marks of any adhesive stamp, "with intent to use, or cause the same to be used, after it has already been used." Paragraphs (4)(B) and (4)(C) cover dealing in and possession of any such stamps. The penalty is imprisonment for not more than five years.

43 U.S.C. 1191. This section prohibits the false making, altering, forging, or counterfeiting of any documents evidencing "right, title, or claim to lands, mines or minerals in California . . . for the purpose of setting up or establishing against the United States any claim, right, or title to lands, mines, or minerals within the State of California." The statute also prohibits the uttering of such documents for such purpose. The penalty is imprisonment "at hard labor" for between three and ten years.

43 U.S.C. 1192. This section proscribes the making of any falsely dated "written evidence of right, title, or claim, under Mexican authority, to any lands, mines, or minerals in the State of California . . . for the purpose of setting up or establishing any claim against the United States to lands or mines or minerals within the State of California."

43 U.S.C. 1193. This section makes it an offense for anyone to present to an "officer of the United States, any false, forged, altered, or counterfeited . . . written evidence of right, title, or claim to lands, minerals, or mines in the State of California," for the purpose of setting up or establishing any claim against the United States to lands, mines, or minerals within the State of California. The penalty for the above two sections is the same as that provided in 43 U.S.C. 1191.

50 U.S.C. App. 462(b). This section prohibits the forging, alteration, or changing of any Selective Service System registration certificate, as well as the possession of a certificate so forged, altered, etc. Violations are punishable by imprisonment not to exceed five years.

3. The Offense

A. Elements—Section 1741. Counterfeiting

Section 1741 provides that a person commits an offense if, "with intent to deceive or harm another person or a government, he makes, utters, or possesses a counterfeited written instrument." The intent element covers the current law concept of "intent to defraud," [38] but uses words adopted from the Final Report of the National Commission [39] which convey a clearer meaning. Thus, it is not necessary that the intent be to deprive another person or a government of property or some other tangible right.[40] Rather, it is enough if the intent be to deceive or harm another person or a government [41] in any manner.[42] The Committee's formulation eliminates, as unnecessary, the phrase "or with knowledge that he is facilitating such deception or harm by another person," appearing in the Final Report, as well as the similar phrase found in S. 1, as originally introduced in the 93d Congress.[43] In every case where counterfeiting is engaged in with knowledge that another person will use the counterfeited written instrument to deceive or harm another person or a government, the actor has the requisite intent that such person or government be deceived or harmed.

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[38] The Committee endorses, for example, the holding in *Barbee v. United States*, 392 F.2d 532 (5th Cir.), cert. denied, 391 U.S. 935 (1968), that an intent to pass the instrument is not required.

[39] See Final Report, § 1751.

[40] This is in keeping with the focus of the section which is upon protection of the integrity of writings. It is in accord with common law treatment of counterfeiting and forgery, where emphasis is placed upon the instrument itself, as opposed to the purpose of the actor. The reason for emphasizing the integrity of the instrument at common law is said to be the protection of seal and signature so as to safeguard the holder, and the commercial necessity for making the negotiability of instruments feasible as a practical matter. See Kessler, *Forged Instruments*, 47 Yale L. J. 863 (1938).

Section 1741 is not restricted solely to the offense of counterfeiting but, like the approach adopted by the Final Report, also covers the related offenses of uttering and possessing of counterfeited written instruments.[44] This consolidation is based upon the principle that coverage of the related offenses of making, uttering, and possessing should be uniform, in the sense that the same jurisdictional bases should apply to each offense.

The section consolidates the large number of counterfeiting offenses it covers by the definition of the basic term "written instrument." The Final Report[45] contained a similar device, i.e., a definition of the term "writing."[46] Unlike the Final Report, however, the definition of "written instrument" here is structured in general terms, eliminating the list of items found in the Final Report.[47] The definition is designed to cover all items which can be the subject of Federal counterfeiting or forgery laws and is intended to be read and interpreted in an expansive manner. The term "written instrument" is defined in section 1746(i) and is broken down into three categories, as follows:

(i) "A security." "Security" is then defined in section 1747(f) to include obligations of the United States, as well as other enumerated securities.[48] S. 1, as originally introduced in the 93d Congress, did not provide a definition of "obligation of the United States." The reported bill, however, like current law (18 U.S.C. 8) provides such a definition in section 1747(e).

Blank money orders are specifically included within the definition of "security" in order to reflect a recent amendment to 18 U.S.C. 500, which eliminated a gap in present law coverage. Neither the National Commission nor S. 1, as introduced in the 93d Congress, provided specific coverage of money order blanks.

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[41] The terms "person" and "government" are defined in section 111.

[42] It thus clearly covers not only the case where the conduct is undertaken for the purpose of causing a monetary loss, but also the case where the prohibited conduct is, for example, undertaken for the purpose of interfering with or impairing a governmental function. See, e.g., *Leonard* v. *United States*, 324 F.2d 911, 913 (9th Cir. 1963).

[43] See section 2-8E1 of S. 1 of the 93d Congress.

[44] In several instances, the inclusion of such possession offenses expands current law. Compare, e.g., *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971).

[45] See Final Report, § 1754(b).

[46] S. 1. as introduced in the 93d Congress, on the other hand, treated the offenses of uttering and possession of a counterfeited written instrument in a separate statute (§ 2-8E4 (Trafficking in Specious Securities)). This resulted in inconsistent coverage and overlapping offenses, as under current law. Thus, both section 2-8E1 (Counterfeiting) and 2-8E4 reached falsely manufacturing obligations or securities of the United States or of foreign governments. On the other hand, the trafficking statute did not include the element of "intent to defraud," which is found in the counterfeiting statute. These features have been corrected in the bill, as reported.

[47] S. 1, as originally introduced in the 93d Cong., included a similar definition. See section 2-8A1 (12).

[48] See, e.g., *United States* v. *Speidel*, 562 F.2d 1129 (8th Cir. 1977), holding a quitclaim deed to be a security under 18 U.S.C. 2311. The same result would obtain under the definition of "security" in section 1747(f), which includes a "certificate of interest in tangible . . . property."

(ii) "A commercial paper or document, or other commercial instrument containing written or printed matter or its equivalent."

(iii) "A symbol or evidence of value, right, privilege, interest, claim, or identification that is capable of being used to the advantage or disadvantage of any person." The Committee has used this general phraseology and has eliminated the terms "public record," "affidavit," "certificate," "passport," "visa," and "contract" found in section 1754(b)(i) of the Final Report and eliminated the terms "signature," "certification," "credit card," "token," "stamp," "seal," "badge," "decoration," "medal," and "trademark" found in section 1754(b)(ii) of the Final Report on the theory that such specificity might result in an unduly restrictive construction of the definition. The definition is intended to cover all such items, as well as other items, such as, for example, tax stamps, and alien registration cards.[49]

Because the definition of "written instrument" is so broad, the Committee deems it appropriate to emphasize that the provisions in this subchapter do not and are not intended to cover certain minor offenses involving counterfeiting, forgery, and related conduct that will be punished by statutes outside title 18.[50] Where an individual engages in conduct which is punishable as a minor offense by a statute outside title 18, he will be punishable under that statute alone. In order to leave no doubt on this point, the Committee has framed the definition of "written instrument" in section 1747(i) so as to expect (other than as used in section 1745) a "written instrument that is the subject of a counterfeiting, forgery, criminal endorsement, or criminal issuance offense described outside this title."

The term "counterfeited written instrument" is defined in section 1747(a) to mean "a written instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." Thus, in essence, a "counterfeited written instrument" is one created out of whole cloth, as opposed to an instrument that was once genuine but is so no longer because it has been falsely altered, completed, signed, endorsed, or added to in some other manner ("forged written instrument"). The phrase "falsely made or manufactured" is intended to convey, when applied to counterfeiting, the traditional meaning of made without authority or right. That is, a "counterfeited written instrument" is an imitation or copy of some other writing, document, symbol of value, or the like, which is authentic.[51] Of course, a "counterfeited written instrument" need not be a complete and exact duplicate of the genuine article. Thus, the definition in the subject bill carries forward the general view that, in order for an article to constitute a counterfeit, it need only bear such a likeness or resemblance to the genuine article "as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest."[52]

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[49] The term "tax stamp," used in the jurisdictional subsection of this offense, is defined in section 1747(g).

[50] An example of such a statute is current 18 U.S.C. 1158 ("Counterfeiting Indian Arts and Crafts Board trademark"), an offense carrying a maximum penalty of six months' imprisonment. This statute is being moved to title 18 Appendix.

[51] See, e.g., *State Bank* v. *Maryland Cas. Co.*, 289 F.2d 544, 547-548 (8th Cir. 1961); *Exchange Nat'l Bank* v. *Insurance Co. of No. Am.*, 341 F.2d 673, 676 (2d Cir.), cert. denied, 382 U.S. 816 (1965); *First Nat'l Bank & Trust Co.* v. *United States Fid. & Guar. Co.*, 347 F.2d 945, 947 (10th Cir. 1965).

The verb "utter" is defined in section 1747(h) to mean "issue, authenticate, transfer, publish, sell, pledge, deliver, transmit, present, display, use, certify, or otherwise give currency to." This definition is deliberately broad in order to encompass the variety of Federal statutes listed above that will be replaced, in whole or part, by this section. The definition is derived from the suggestion of the National Commission.[53]

B. Elements—Section 1742. Forgery

Section 1742 provides that a person commits an offense if, "with intent to deceive or harm another person or a government, he makes, utters, or possesses a forged written instrument." As noted in the discussion concerning section 1741, the intent element covers the current law concept of "intent to defraud" and is satisfied if the intent be to deceive or harm another person or a government in any manner.

Like the preceding section and the approach adopted by the National Commission, this section is not limited solely to the offense of forgery, but also covers the related offenses of uttering and possessing of forged written instruments. Again, such consolidation is based upon the premise that coverage of these related offenses (i.e., making, uttering, and possessing) should be uniform, in the sense that the same jurisdictional bases apply to each offense.

Section 1742 also consolidates the large number of present forgery offenses it encompasses by the definition of the term "written instrument." This term was previously explained in the discussion of counterfeiting, and that discussion is incorporated here. The term "forged written instrument" is defined in section 1747(c) to mean "a written instrument that purports to be genuine [54] but is not, because it: (1) has been falsely altered, completed,[55] signed,[56] or endorsed;[57] (2) contains a false addition thereto or insertion therein; or (3) is a combination of parts of two or more genuine written instruments." The phrase "falsely altered, completed, signed, or endorsed" carries forward the traditional meaning of acting without authority or beyond any authority given. Thus, for example, one who signs or endorses the name of another, without being authorized to do so by that person, has made a "forged written instrument." Such a written instrument is forged because it falsely purports to be the written instrument of a person other than the actual maker.[58]

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[52] *United States* v. *Lustig*, 159 F.2d 798, 802 (3d Cir. 1947), rev'd on other grounds, 338 U.S. 74 (1949). See also *United States* v. *Chodor*, 479 F.2d 661, 664 (1st Cir.), cert. denied. 414 U.S. 912 (1973) (involving the possession of counterfeit obligations which resembled $10 Federal Reserve Notes but which lacked two serial numbers and the Treasury seal on their face); *United States* v. *Johnson*, 434 F.2d 827, 829 (9th Cir. 1970); *United States* v. *Smith*, 318 F.2d 94, 95 (4th Cir. 1963); *United States* v. *Gellman*, *supra* note 26.

[53] See Final Report, § 1754(h).

[54] The term "genuine" refers to the validity of the execution of the written instrument. Thus, for example, the mere fact that United States treasury bonds had been cancelled and replaced would affect only their redeemability, and not their genuineness for purposes of this section.

[55] See *Wright* v. *United States*, 356 F.2d 261, 264 (5th Cir.), cert. denied, 385 U.S. 844, 861 (1966). The term "completed" covers, for example, the situation where blanks are filled in on an otherwise fully executed instrument. See, e.g., *United States* v. *Di Pietto*, 396 F.2d 283, 286–287 (7th Cir. 1968), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310 (1969). The Committee intends to overrule the result in *Streett* v. *United States*, 331 F.2d 151 (8th Cir. 1964), criticized in *Di Pietto, supra*, where the court held that the defendant's forgery of the countersignature on an otherwise completed traveler's check did not render the check a "forged" security. The Committee also intends that, as under existing law, the fact that the defendant, in falsely completing a written instrument, signs his own name, does not insulate him from liability under this section. See *United States* v. *Smith*, 426 F.2d 275 (6th Cir.), cert. denied, 400 U.S. 868 (1970); *United States* v. *Franco*, 413 F.2d 282 (5th Cir.), cert. denied, 396 U.S. 836 (1969). An exception is the false agency endorsement situation, discussed subsequently. There, however, the instrument has been altered only by the endorsement, whereas under the "completed" branch of this section, the defendant will have done more than merely sign his own name to the written instrument.

[56] It is contemplated that the term "signed" will be interpreted to include anything that is intended as a signature, i.e., initials, the making of a mark, etc. See *United States* v. *Tasher*, 453 F.2d 244, 246 (10th Cir. 1972). See also 18 U.S.C. 500.

The Committee intends that the phrase "falsely . . . signed or endorsed" includes the situation where the name signed or endorsed is that of a fictitious person. In such a situation, the determination of whether the written instrument is forged should not depend upon the fact that the person or government[59] accepting the written instrument did so in reliance on the signature, as opposed to reliance upon the person who presents the written instrument.[60]

The Committee thus rejects the so-called "narrow" definition of forgery under which the name signed to the written instrument must purport to be the signature of some person other than the one actually signing it,[61] and instead embraces the so-called "broad" definition of forgery—generally adopted in present Federal law—under which forgery may be committed by using an assumed or fictitious name in signing a written instrument when such act is committed with the necessary intent.[62]

It is also intended that this section be interpreted so as to carry forward the prevailing doctrine that an agent may commit forgery by making or signing a written instrument in disobedience of his instructions or by exceeding his authority.[63] Thus, for example, where an agent is given authority by his principal to endorse the name of the principal on incoming checks for deposit only and instead endorses the name of the principal with the intent of cashing the checks and appropriating the proceeds, the agent is guilty of forgery.[64] Section 1742, however, is not intended to cover "false agency" signatures and endorsements and thus continues the rule that the term "forgery" does not cover the situation where a person signs an instrument purporting on its face to be signed by him as an agent, when, in fact, he has no authority to sign such instrument.[65] The reason for not including such conduct within this section [66] is that, as the person executing the instrument signs his true name, the execution of the instrument is, in fact, genuine, unlike forgery where there is no genuine execution. That is, the falsity lies not in the execution of the written instrument but rather in the representation of a non-existent authority.

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[57] See *Prussian* v. *United States*, 282 U.S. 675 (1931); *United States* v. *Calabro*, 467 F.2d 973, 980 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973).

[58] *Greathouse* v. *United States*, 170 F.2d 512, 514 (4th Cir. 1948).

[59] The terms "person" and "government" are defined in section 111.

[60] See, e.g., *Hall* v. *United States*, 372 F.2d 603, 610 (8th Cir.), cert. denied, 387 U.S. 923 (1967); *Cunningham* v. *United States*, 272 F.2d 791, 794 (4th Cir. 1959).

[61] It has been said that under the narrow definition forgery is not committed by signing the name of a fictitious person in the presence of the person defrauded. *Hubsch* v. *United States*, 256 F.2d 820, 823 (5th Cir. 1958) (citing Annotation, *Forgery-Fictitious Name*, 49 A.L.R. 2d 852, 854). The Committee rejects such an application of the forgery statute and fully intends section 1742 to cover such a situation.

[62] See, e.g., *Hubsch* v. *United States*, *supra* note 61, at 823; *Hall* v. *United States*, *supra* note 60, at 601–608; *Cunningham* v. *United States*, *supra* note 60 at 793–794; *Kitchens* v. *United States*, 272 F.2d 757, 761 (10th Cir. 1959), cert. denied, 362 U.S. 942 1960); *Rowley* v. *United States*, 191 F.2d 949, 951 (8th Cir. 1951); *Milton* v. *United States*, 271 F.2d 791, 794–795 (9th Cir. 1959).

[63] *Selvidge* v. *United States*, 290 F.2d 894, 895 (10th Cir. 1961).

[64] *Id.* at 895, Compare *Ross* v. *United States*, 374 F.2d 97 (8th Cir.), cert. denied, 389 U.S. 882 (1967), where the defendant who was authorized to endorse her mother's name on certain checks and cash them during her mother's lifetime, continued to do so after her mother's death.

Similarly, it is not intended that this section encompass the genuine making of a written instrument which contains false or misleading statements.[67] The purpose of this section, like section 1741, is the protection of the integrity of written instruments and not the punishment of fraudulent conduct in general.[68]

The phrase "contains a false addition thereto or insertion therein" in the definition of "forged written instrument" covers, for example, conduct in which the amount of a check is raised by adding additional figures—e.g., adding a zero to the figure of $50 so that the figure appears to be $500.[69] The phrase "is a combination of parts of two or more genuine written instruments" in the definition is intended to duplicate the coverage of 18 U.S.C. 484.

The verb "utters" is given an expansive definition in section 1747(h), as set forth in the discussion relating to section 1741.

C. Culpability

The conduct in sections 1741 and 1742 is making, uttering, or possessing an article. Since no state of mind is specifically assigned to this conduct, by operation of section 303(b)(1), the minimum mental state that must be proved is "knowing," i.e., that the offender was aware that he was making, uttering, or possessing an article.[70] The facts that the article was a "written instrument" and was "counterfeited" (section 1741) or "forged" (section 1742) are existing circumstances. Since no state of mind is specifically designated, by virtue of section 303(b)(2) the applicable state of mind to be established is at least "reckless," i.e., that the offender was aware of but disregarded a substantial risk that the circumstances existed.[71]

The element that the actor had an intent to deceive or harm another person or a government states the particular purpose for which it must be shown that the conduct was performed.

4. Jurisdiction

The jurisdictional provisions in sections 1741 and 1742 are identical. Subsections (c)(2)(E) and (F) aside, jurisdiction closely parallels current law, except in its instances where changes occur incidental to providing continuity of coverage in the two provisions.[72] The National Commission's provision for ancillary jurisdiction in the area of counterfeiting [73] has been rejected on the ground that the Federal interest involved in these statutes does not extend to State crimes committed simultaneously. For example, in a situation where an altercation develops in the attempted uttering of a counterfeit note at a grocery store, the Committee does not believe that there is sufficient Federal interest involved to provide for Federal prosecution of the assault of the cashier. This is to be contrasted, e.g., with the situation where a murder occurs during a violation of a civil rights statute. In such a case, the Federal interest in prosecuting the murder is manifest because of the aggravation of the civil rights violation.[74]

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[65] *Gilbert* v. *United States*, 370 U.S. 650 (1962); *Selvidge* v. *United States*, *supra* note 63; *Asher* v. *United States*, 480 F.2d 580 (6th Cir. 1973).

[66] Such conduct is covered under section 1743. Of course, where the person signing his own name as agent does so only after otherwise completing a written instrument so as to make it appear that the payee was his purported principal, he would be guilty under this section of having falsely "completed" the instrument. See note 55, *supra*.

[67] See, e.g., *Wright* v. *United States*, 172 F.2d 310, 311–312 (9th Cir. 1949) (checks signed by defendant in his true name and drawn on an existent bank in which defendant had no funds or credit); *Marteney* v. *United States*, 216 F.2d 760, 763–764 (10th Cir. 1954) (genuine warehouse receipts representing the storage of grain which, in fact, had never been received).

[68] See *Barbee* v. *United States*, *supra* note 38 at 536 and cases cited therein. Fraudulent conduct in general is punishable under section 1734 (Executing a Fraudulent Scheme). See also section 1301 (Obstructing a Government Function by Fraud).

[69] Conceivably, such conduct is also covered by the term "falsely alters."

[70] See section 302(b)(1).

[71] See section 302(c)(1).

Under sections 1741 and 1742 there is Federal jurisdiction over the offenses described in eight situations. The first arises where the offense is committed within the special jurisdiction of the United States as defined in section 203. Currently, some if not all counterfeiting and forgery offenses committed in Federal enclaves are punishable under the diverse laws of the States via the Assimilative Crimes Act, 18 U.S.C. 13.[75] This section will extend the general counterfeiting and forgery offenses to Federal enclaves (as well as to places of exclusive Federal jurisdiction, such as the high seas), enabling greater uniformity to be achieved.

The second situation occurs where the written instrument involved purports to be "made or issued by or under the authority of, or guaranteed by, the United States." This reaches, among other things, United States coins and currency, passports, and stamps. The term "stamp", included in the definition of "obligation of the United States" (which in turn is in the definition of "security" and "written instrument"), is intended to incorporate the various kinds of stamps used by different agencies of the Federal government, including postage stamps, tax stamps, revenue stamps, food stamps, etc. The phrase "or guaranteed by the United States" is intended to cover the possible conduct currently encompassed by 18 U.S.C. 495—i.e., "for the purpose . . . of enabling any other person, either directly or indirectly, to obtain . . . from the United States . . . any sum of money." This phrase is thus meant to cover written instruments which, although not issued by the United States, draw, in whole or in part, upon Federal funds. Examples of such written instruments are food stamp coupons [76] and State welfare checks.[77] The phrase "under the authority of" is to be read broadly to include the situation where a private person or organization is required or authorized by a Federal statute or regulation to make or issue a particular written instrument, as, for example, a warehouse receipt required to be issued by a licensed warehouseman under 7 U.S.C. 259.[78]

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[72] Subsections (c)(2) (E) and (F) are discussed *infra*.

[73] See Final Report, § 1751(3)(a).

[74] See section 1601(e)(4).

[75] See *United States* v. *Bullock*, 402 F.2d 476 (4th Cir. 1968).

[76] See 7 U.S.C. 2013, 2015, 2016.

[77] See 42 U.S.C. 1101(c)(1).

[78] As previously noted, warehouse receipts and authorizations to purchase cards under the Food Stamp Act are specifically included in the definition of "written instrument issued under the authority of the United States" by virtue of section 1747(j).

Third, Federal jurisdiction exists if the written instrument purports to be a security made or issued by or under the authority of a foreign government. This is in accord with current law [79] and significantly narrower than the jurisdictional provision suggested by the National Commission,[80] which covered any writing issued by a foreign government or bank. Such a provision goes far beyond current law and was rejected by the Committee on the ground that there is little, if any, Federal interest involved in protecting written instruments such as a counterfeit or forged military pass of a foreign country of a counterfeit or forged seal of a foreign court, as opposed to, for example, counterfeit or forged foreign securities.

There is also Federal jurisdiction under sections 1741 and 1742 if the written instrument purports to be a security or a tax stamp, and: (i) is moving in interstate or foreign commerce or constitutes or is part of interstate or foreign commerce; or (ii) is moved across a State or United States boundary in or after the commission of the offense. This is intended to duplicate the coverage presently provided in 18 U.S.C. 2314 and 2315. The term "commission of the offense" includes the attempted commission, consummation, and any immediate flight from the commission of the offense.[81] The term "tax stamp" is defined in section 1747(g) to include any evidence of an obligation running to a government or of the discharge of such an obligation.

The fifth situation arises if the written instrument purports to be a security issued by a national credit institution [82] where the offense is committed by an agent [83] of such institution. This provision is narrower than that recommended by the National Commission, which would have broadened current law in this area by covering all writings of a credit institution.[84] It has been included by the Committee in order to insure that this series of statutes is uniform and consistent in coverage. Thus, the provision insures that an agent of a national credit institution, who is currently subject to criminal penalties for issuing certain written instruments without authority,[85] is also subject to criminal penalties for counterfeiting and forging such written instruments.

In the sixth situation, i.e., subsection (c)(2)(E) Federal jurisdiction will exist if the written instrument involved is a security that is a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, or any form of debt instrument bearing interest, made or issued by an organization, or by a State or local government. This is an extension of Federal jurisdiction over present law, but the need for such extension was amply demonstrated in hearings held before the Senate Permanent Subcommittee on Investigations concerning organized crime and the theft and the counterfeiting of corporate securities.[86] It was established at those hearings that present law is inadequate to combat widespread sophisticated fraudulent schemes involving the use of stolen and counterfeit corporate securities and that new legislation was needed.[87] Based on those hearings, the Committee has concluded that the use of counterfeit and forged securities as collateral for loans to bolster the credibility of fraudulent financial statements, and for other illegal purposes, has a serious and detrimental effect on interstate commerce.[88] In addition, statistics gathered by that Subcommittee indicate that the problem concerns securities issued by State and local governments as well as by corporations.[89] Furthermore, these fraudulent schemes invariably reach beyond State and even national boundaries, and thus State law enforcement authorities are generally unable to cope with them. It is for these reasons that the Committee believes it is essential that the use or possession of a counterfeit or forged security of an organization, State, or local government with intent to deceive or harm be made a Federal offense. The scope of this provision is substantially similar to legislation introduced in the 95th Congress by Senators Percy, Thurmond, Jackson, Biden, Ribicoff, Javits, Nunn, and DeConcini.[90]

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[79] See 18 U.S.C. 482 and 502.

[80] See Final Report, § 1751(3)(b).

[81] See section 111. The Committee does not intend that the government be required to show under this base that the forgery occurred prior to the crossing of State lines and thus endorses the result in *McElroy v. United States*, 644 F.2d 274 (3d Cir. 1981) *(en banc)*, cert. granted, U.S. (October 5, 1981).

[82] The term "national credit institution" is defined in section 111.

[83] "Agent" is defined in section 111 to mean "a person authorized to act on behalf of another person or a government, and, in the case of an organization or a government, includes (a) a partner, director, officer, representative; and (b), except for purposes of receipt of service of process, a servant and employee."

[84] See Final Report, § 1751(3)(b)(i).

[85] See, e.g., 18 U.S.C. 1005.

The seventh situation in which Federal jurisdiction exists over counterfeiting and forgery is when the written instrument purports to be a ticket or other document accepted or issued by an air carrier for the interstate or international transportation of a person. A similar jurisdictional base has been included in section 1731 (Theft) to permit Federal prosecution for the theft of 100 or more airline tickets or of such tickets worth $5,000 or more. The 100 ticket and $5,000 value limitations are not included here since the counterfeiting of any number of such tickets itself portends the ability to counterfeit an unlimited number, and since the counterfeiting or forgery of such tickets impugns the integrity of all similar but genuine tickets and thus holds the potential of having a seriously disruptive effect on interstate travel. The eighth jurisdictional circumstances applicable to these sections exists if the government intended to be deceived or harmed is the Federal government. As used in this connection, the term "United States" includes some national credit institutions which are agencies of the United States.[91] It excludes from coverage, however, financial institutions the deposits of which are either insured by the Federal Deposit Insurance Corporation or by the Federal Savings and Loan Insurance Corporation. This is in accord with current law which protects only specified Federal lending agencies and not Federally insured lending agencies.[92] The National Commission, on the other hand, proposed to expand current law by reaching all counterfeiting and forgery offenses committed pursuant to a scheme to deceive or injure any national credit institution.[93]

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[86] See *Hearings on Organized Crime; Securities Thefts and Frauds,* before the Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 93d Cong., 1st Sess., Part 1, pp. 123–136. An identical jurisdictional provision has been added to section 1731 (Theft).

[87] *Ibid.*

[88] *Ibid.*

[89] *Id.* at Part 4, p. 516.

[90] S. 1380, 95th Cong., 1st Sess. See Cong. Rec. S8150–8151 (June 20, 1979) (daily ed.). Similar legislation was also introduced in the previous Congress.

[91] See definitions of "United States," "government," and "government agency" in section 111.

[92] See, e.g., 18 U.S.C. 1008, 1010.

In addition to these eight circumstances, it should be noted that extraterritorial jurisdiction under section 204(c)(1) also exists over an offense described in sections 1741 and 1742 if it involves counterfeiting or forgery of, or uttering of a counterfeited or forged copy of, a "seal, currency, security instrument of credit, stamp, passport, or public document that is or purports to be issued by the United States." Although few cases apparently exist with respect to extraterritorial jurisdiction under present laws, it seems likely that the courts would interpret current statutes as affording such jurisdiction, in view of the purpose to protect the integrity of domestic currency, passports, and other public documents.[94]

Note that, under section 206, the exercise of Federal jurisdiction over counterfeiting and forgery offenses does not, in and of itself, preempt the States from exercising concurrent jurisdiction over such offenses, notwithstanding the fact that they may involve United States currency or documents. This accords with current law.

5. Grading

Under sections 1741 and 1742 all counterfeiting and forgery offenses are classified as felonies, thus essentially preserving the grading provisions of current law.[95] This approach is consistent with the theory that these statutes are intended to protect the integrity of writings, symbols of value, and similar items where a Federal interest exists, rather than to punish fraudulent activity in general. However, the Committee has ameliorated present law in two respects. First, a grading distinction has been created between the offense of simple possession of a counterfeited or forged written instrument and the other offenses in these sections, so as to reduce the level of the possession offense. Second, grading differentials have been created with respect to the forgery offense based upon the value of the written instrument,[96] in recognition of the lesser threat posed by forgery (as compared to counterfeiting) to the integrity and public confidence in written instruments and the fact that forgers may commit the offense, on a fairly petty level, as a means of obtaining property similar to theft.

Counterfeiting is graded as a Class C felony (up to twelve years in prison) if the written instrument made or uttered purports to be a written instrument of the United States or a security.[97] In all other cases (i.e., including simple possession of written instruments of the United States and securities), the offense is a Class D felony (up to six years in prison). Forgery is a Class C felony where the written instrument made or uttered is or purports to be a Treasury check or an obligation of the United States that has a value in excess of $500, or an instrument in excess of $100,000 value. It is a

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[93] See Final Report, § 1751(3)(d).

[94] See, e.g., *United States* v. *Birch*, 470 F.2d 808, 811-812 (4th Cir. 1972), cert. denied, 411 U.S. 931 (1973), upholding the exercise of extraterritorial jurisdiction in connection with the forgery or false use of a military pass under 18 U.S.C. 499.

[95] Compare, e.g., Final Report, §§ 1751(2)(a)(ii) and 1751(2)(b)(vi).

[96] The term "value" is defined in section 111.

[97] This approximates the present penalty level of 18 U.S.C. 471-473 and is supported by the National Council on Crime and Delinquency, Hearings, p. 1539.

Class D felony if the written instrument made or uttered is or purports to be made or issued by or under the authority of, or guaranteed by, the United States, a State or local government, or a foreign government, or is worth more than $500 but not more than $100,000. The offense is a Class A misdemeanor (up to one year in prison) if it involves a written instrument that is or purports to be a Treasury check, or an obligation of the United States, that has a value of $500 or less. In all other cases, the offense is a Class E felony (up to three years).

SECTION 1743. CRIMINAL ENDORSEMENT OF A WRITTEN INSTRUMENT

1. In General and Present Federal Law

No counterpart to this section exists under current Federal law. The section is intended to reach the situation in which a person signs or endorses a written instrument on behalf of another when, in fact, he has no authority to do so, i.e., from the written instrument itself, it appears that the person has signed or endorsed as the agent of another person or a government when, in fact, there is no agency relationship.[98]

Attempts in the Federal system to punish such conduct under forgery statutes have been unsuccessful, the courts holding that such conduct does not amount to forgery since the falsity lies not in the execution of the instrument (the signature or endorsement is genuine) but rather in the representation that an agency relationship exists.[99] The English have remedied this problem by amending their forgery statute to include false agency signings and endorsements.[100] The present English forgery statute provides that a document is forged "if the whole or any material part thereof purports to be made by or on account of a person who did not make it nor authorize its making." [101]

Neither the Final Report of the National Commission [102] nor S. 1, as introduced in the 93d Congress,[103] contained a provision which covered the false agency signature or endorsement. Nevertheless, the Committee is of the view that such conduct, while technically not forgery, poses a comparable threat to the integrity of written instruments and thus deserves treatment similar to that accorded forgery and counterfeiting.[104]

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[98] An example of such conduct is as follows: The defendant obtains a check made payable to X. The defendant is not X's agent and has no authority to sign X's name to the check. Nevertheless, he takes the check to a bank where he endorses X's name and, below the endorsement, signs his true name, as follows: "John Defendant, agent for X."

[99] See, e.g., *Gilbert* v. *United States, supra* note 65; *Selvidge* v. *United States, supra* note 63; *Asher* v. *United States, supra* note 65.

[100] See The Forgery Act of 1861, 24 & 25 Vict., ch. 98, § 24, defining forgery to include unauthorized signings "per procuration," with intent to defraud.

[101] The Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, § 1(2).

[102] See Final Report, § 1754(d).

[103] See § 2-8A1(4)(i).

[104] The situation of a false agency signing was originally intended to be covered by the Model Penal Code's section on forgery. See Model Penal Code § 223.1. Comment, pp. 82-84 (Tent. Dr. No. 11, 1960). As finally formulated, however, the section on forgery seemingly does not reach this situation. See Model Penal Code § 224.1.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, "with intent to deceive or harm another person or a government, he (1) signs or endorses a written instrument purportedly on behalf of another person or a government without authority to do so, or (2) utters or possesses a written instrument that has been so signed or endorsed."

The intent element of this offense is the same as that in sections 1741 and 1742 and thus is meant to cover the current law concept of "intent to defraud" and to be interpreted broadly. The term "written instrument"—likewise used in the two previous sections—is, as has been discussed in connection therewith, defined in section 1747(i) and is also meant to be given an expansive interpretation. This statute thus reaches the same written instruments covered by the counterfeiting and forgery statutes, ensuring consistent treatment for what are similar offenses.

The phrase "purportedly on behalf of another person or a government" indicates that from the signature or endorsement it appears that the person signing the written instrument has done so as some sort of an agent for the person or government whose name is also endorsed or signed thereon. The phrase "without authority to do so" indicates, of course, that there is, in fact, no such agency relationship between the parties whose names appear on the written instrument.

B. Culpability

The conduct in this offense is signing or endorsing (paragraph (1)) or uttering or possessing (paragraph (2)) a written instrument purportedly on behalf of another person or a government. Since no culpability standard is specifically set forth in this section, the applicable state of mind that must be proved is, by the operation of section 303(b)(1), at a minimum "knowing," i.e., that the offender was aware that he was, e.g., signing or endorsing a written instrument in such a manner that it purported to be signed or endorsed on behalf of another person or a government.[105] The element that the signature or endorsement purportedly on behalf of another person or government was without authority is an existing circumstance. As no culpability level is specifically designated, the applicable state of mind to be shown is at least "reckless," i.e., that the defendant was aware of but disregarded a substantial risk that there was no authority to sign or endorse in such a manner.[106]

4. Jurisdiction and Grading

Because of the Committee's belief that the conduct prohibited in this section is essentially similar to forgery, the jurisdictional and grading provisions of this section are comparable to those provided in the forgery section (1742). The discussion of those provisions in the portion of this report relating to forgery should therefore be consulted here.

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[105] See section 302(b)(1).

[106] See sections 303(b)(2) and 302(c)(1).

SECTION 1744. CRIMINAL ISSUANCE OF A WRITTEN INSTRUMENT

1. In General

This section is designed to cover those current statutes in title 18 that prohibit the unauthorized issuance and use of certain specified written instruments. The offense differs from forgery in that the written instrument involved does not falsely purport to be written by another person. To the contrary, the written instrument involved is authentic. The section is designed to reach the case, for example, where an agent possesses a validly drawn written instrument, with instructions as to when it is to be used, and issues the written instrument, with the necessary criminal intent, in violation of those instructions. As the written instrument involved in such a situation is, in fact, authentic, the focus of the statute is not upon protection of the integrity of written instruments (as is the focus of the counterfeiting and forgery statutes) but rather upon protection of the principal from the agent's breach of authority.

Both the Final Report and S. 1, as introduced in the 93d Congress, contained comparable provisions.[107] Section 1744 reflects the Committee's similar conclusion that offenses involving the unauthorized use of authentic written instruments belong in the counterfeiting and forgery series as related offenses that should receive like treatment.[108]

2. Present Federal Law

The statutes intended to be covered by section 1743 are set out below in numerical order. In general, they fall into three categories: (1) protection of Federal obligations and securities; (2) protection of Federal documents; and (3) protection of documents entrusted to employees of Federal lending agencies and Federally insured financial institutions.

18 U.S.C. 334. This section makes it an offense for certain specified people to issue "any Federal Reserve Notes, without complying with or in violation of the provisions of law regulating the issuance and circulation of such" notes. The statute also makes it an offense for "an officer acting under the provisions of chapter 2 of title 12" (relating to national banks) to countersign or deliver "any circulating notes contemplated by that chapter except in strict accordance with its provisions." The penalty is imprisonment for up to five years.

18 U.S.C. 335. This statute prohibits certain persons connected with a corporation created by an Act of Congress, the charter of which has expired, from issuing any securities of such corporation. Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 500. This section prohibits the issuance of postal money orders without having received or paid the full amount payable therefor, for the purpose of fraudulently obtaining from the United States any sum of money. The section also prohibits the transmis-

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[107] See Final Report, § 1753; S. 1, § 2-8E6.

[108] As the National Commission pointed out, there is no really meaningful difference between the utterer of a forged written instrument and an agent who issues an authentic written instrument in violation of his instructions. In both cases, the offense involves a misuse of a written instrument that purports to be something it is not. See Working Papers, p. 969.

sion or presentment of a money order knowing it to have been unlawfully issued. The punishment is up to five years' imprisonment.

18 U.S.C. 501. This statute prohibits, *inter alia,* the delivery, with intent to defraud, of any postage stamp, postage meter stamp, stamped envelope, or postal card "to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster General and the seal of the Post Office Department or the Postal Service, to receive it." Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 1004. This section prohibits officers, directors, agents, and employees of Federal Reserve banks or member banks of the Federal Reserve System from certifying a check before the amount thereof has been regularly deposited in the bank, as well as doing any other thing in order to evade regulations relating to certification of checks. Violations are punishable by imprisonment not to exceed five years.

18 U.S.C. 1005. This section applies to the same agents of Federal Reserve banks and member banks as those specified in 18 U.S.C. 1004, as well as agents of national banks and Federally insured banks, and prohibits them from issuing, without authority, any notes of such banks, certificates of deposit, drafts, orders, bills of exchange, acceptances, notes, debentures, bonds, or other obligations, or mortgages, judgments, or decrees. The penalty provided is imprisonment for not more than five years.

18 U.S.C. 1006. This section prohibits certain persons connected with specified Federal lending agencies from issuing various securities without authority. Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 1022. This section prohibits, *inter alia,* anyone who is authorized to deliver "any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property used or to be used in the military or naval service," from doing so "without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States." [109] The penalty is up to ten years' imprisonment.

18 U.S.C. 2197. This section prohibits, *inter alia,* the use of printing by one not entitled to do so, of any "certificate, license, or document issued to vessels, or officers or seamen by any officer or employee of the United States authorized by law to issue the same." Violations are punishable by imprisonment not to exceed five years.

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, "with intent to deceive or harm another person or a government, he (1) issues a written instrument without authority; or (2) utters or possesses a written instrument that has been so issued." [110] As noted in connection with sections 1741 and 1742, the intent element in this statute is meant to cover the current law concept of

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[109] This conduct could also be reached by section 1301 (Obstructing a Government Function by Fraud), which grades the offense at the same level as does this section.

[110] Section 2-8E6 of S. 1, as originally introduced in the 93d Congress, prohibited only the initial issuance.

"intent to defraud" and is to be read broadly. The terms "person" and "government" are defined in section 111.

The term "written instrument" is expansively defined in section 1747(i). It has been discussed in relation to sections 1741 and 1742 and that discussion should be consulted here.

It should be reemphasized that the written instrument involved in an offense under this statute is an authentic written instrument, as opposed to a written instrument that has been falsely made or falsely executed in some manner, as is the case with the written instruments covered by the counterfeiting and forgery statutes. Thus, the criminality involved in an offense under this section lies not in the nature of the written instrument but rather in the conduct of the actor in issuing a particular written instrument without authority.

The phrase "without authority" indicates an agency relationship [111] and is intended to mean that the agent, on the specific occasion called into question, is acting in a manner which has not been authorized by the principal.

B. Culpability

The conduct in this offense is issuing (paragraph (1)) or uttering or possessing (paragraph (2)) a written instrument. Since no culpability level is specifically assigned, by operation of section 303(b)(1), the applicable mental state that must be proved is, at a minimum, "knowing," i.e., that the offender was aware that he was issuing, uttering, or possessing a written instrument.[112] The element that the written instrument was issued without authority is an existing circumstance. Since no culpability standard is specifically prescribed, by operation of section 303(b)(2), the applicable mental state to be shown is at least "reckless," i.e., the offender was aware of but disregarded a substantial risk that the circumstance existed and the risk was of such a nature that its disregard constituted a gross deviation from the standard of care that a reasonable person would exercise in the circumstances.[113] Thus, for example, the Government must show that the person issuing a particular written instrument spurned a substantial risk that he was without authority to issue it.

4. Jurisdiction

The jurisdictional bases provided in this section are, with two exceptions, limited to those situations where there is a Federal interest in protecting the principal from breach of authority by his agent. This is in keeping with the focus of the statute and essentially adopts the recommendation of the National Commission of providing jurisdiction identical to that for the counterfeiting and forgery offenses.[114]

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[111] This statute is not intended to reach the situation covered by subchapter D of this chapter where one unlawfully takes a written instrument from the owner thereof and subsequently disposes of it to another.

[112] See section 302(b)(1).

[113] Section 302(c)(1).

[114] See Final Report, § 1753(3). Note, however, that the jurisdictional bases contained in section 1741(c)(2) (C) and (E), which would expand Federal jurisdiction over this offense without apparent need or reason, are not included in this section.

Under subsection (c), there is Federal jurisdiction over this offense in six situations. The first four exist if the offense is committed within the special jurisdiction of the United States or if the written instrument involved is or purports to be (1) made or issued by or under authority of, or guaranteed by, the United States, (2) a security made or issued by or under the authority of a foreign government, or (3) a security issued by a national credit institution, and the offense is committed by an agent of such institution. The fifth situation in which Federal jurisdiction exists is if the written instrument is or purports to be a ticket or other document accepted or issued by an air carrier for the interstate or international air transportation of a person. These bases are all contained in section 1741-1743 and have been explained in relation to those provisions.

The last situation in which jurisdiction is afforded occurs where "the government intended to be deceived or harmed is the government of the United States." This is the one exception in the jurisdictional provisions to the focus upon protecting the principal from breach of authority by his agent. Here the thrust is rather protecting the United States from being defrauded as a result of such a breach of authority. Identical provisions are contained in the three preceding sections.

5. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison) if the written instrument is issued or uttered, and it is or purports to be a Treasury check, or an obligation of the United States, that has a value in excess of $500, and a Class A misdemeanor if, under the same circumstances, the value of the instrument is $500 or less. If the actor issues or utters the written instrument under any other circumstances, the offense is a Class D felony (up to six years' imprisonment. The offense is graded as a Class E felony (up to three years in prison) in any other case. This is similar to the grading scheme under the previous section and adopts a distinction between the simple possession offense and the three more serious offenses defined in this section.

SECTION 1745. TRAFFICKING IN A COUNTERFEITING IMPLEMENT

1. In General

This section consolidates a number of different provisions now found in title 18. The statute is intended to cover the types of situations where an individual, with the intent to use them in making a counterfeited or forged written instrument, makes, traffics in, or possesses counterfeiting or forging implements.

The National Commission recommended a similar provision,[115] but limited coverage to implements "uniquely associated with or fitted for the preparation of" specified written instruments. This concept was not defined. Nevertheless, it is clear that such language was used in order to exclude from coverage implements which are normally put to legitimate uses.[116] The result, however, is a narrowing of the coverage of current law. For example, it is conceivable that most contemporary printing equipment would not be covered, although such equipment is commonly used to counterfeit United States currency, because the equipment is not "uniquely associated with" counterfeiting but has a common legitimate use. The Committee, therefore, believes that this statute should reach all implements that are designed or suited for use in counterfeiting and forging (without necessarily being uniquely so designed or suited), when such implements are made, trafficked in, or possessed, with the necessary intent. The requirement of a criminal intent will, of course, protect the innocent maker, seller, or possessor of an implement which may be used in counterfeiting or forging but which also has a legitimate use.

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[115] See *id.*, § 1752.

[116] See Working Papers, p. 967.

2. Present Federal Law

Current titles 18 and 26 contain a variety of statutes that would be replaced, in whole or in part, by this section. Those statutes are briefly described, as follows:

18 U.S.C. 474. This section applies to persons having custody, control, or possession of any implements[117] used for the printing of genuine United States obligations and securities, and prohibits such persons from printing any such obligations or securities except for the use of the United States. This section also prohibits the making of any implement designed for the printing of United States obligations or securities, as well as the selling or importing of any such implements with the intent that they be used for printing United States obligations and securities. The statute also reaches counterfeited or forged implements, obligations or other securities made or executed, in whole or in part, in the likeness of any obligation or security of the United States, and any paper similar to that adopted by the Secretary of the Treasury for the obligations and other securities of the United States. The penalty provided is imprisonment for up to fifteen years.

18 U.S.C. 476. This section makes it an offense for anyone, without authority, to procure or make an impression, stamp, or imprint of, from or by the use of any implement used or intended to be used in the making of obligations and securities of the United States, or in the making of implements from which such obligations and securities are made. The punishment is imprisonment for not more than ten years.

18 U.S.C. 477. This section proscribes the possession or sale with intent to defraud of any of the items specified in 18 U.S.C. 476. The punishment is the same as that provided in section 476.

18 U.S.C. 481. This section prohibits the unauthorized custody, control, or possession of implements used in printing foreign securities. The statute also reaches the making and importation of such implements. Violations may be punished by imprisonment not to exceed five years.

18 U.S.C. 487. This section punishes the unauthorized making of any likeness of any implement designed for the making of any of the "coins coined at the mints of the United States." The statute

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[117] The term "implement" will be used throughout this discussion as a shorthand expression for the various items specified in the particular statutes. Thus, the term will be used to refer, *inter alia,* to plates, stones, engravings, photographs, prints, impressions, stamps, imprints, tools, instruments, dies, hubs, molds, distinctive papers, etc.

also prohibits the unauthorized possession of such implements. The penalty is imprisonment for not more than fifteen years.

18 U.S.C. 488. This statute is identical to 18 U.S.C. 487 except that it applies to the coins of foreign governments. The penalty, however, is not as severe, being imprisonment for not more than five years.

18 U.S.C. 500. This section prohibits, *inter alia,* the unauthorized receipt, possession, or disposal of "any postal money order machine or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms." Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 501. This section prohibits the forging or counterfeiting of any die, plate, or engraving for any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope or postal card. The section also forbids the use, sale, or possession with intent to use or sell any such implement. Finally, the statute prohibits the same conduct in regard to "any paper bearing the watermark of any stamped envelope or postal card." The penalty is imprisonment for not more than five years.

18 U.S.C. 503. This section makes it a crime for anyone to make, knowingly use or sell, or possess with intent to use or sell any forged or counterfeited postmarking stamp, die, plate, or engraving. Violations are punishable by imprisonment for not more than five years.

18 U.S.C. 509. This section prohibits the unauthorized control or possession of any implements used for the printing of government travel requests, as well as the making or engraving, use, or importation of any such implements. The maximum sentence is imprisonment for not more than ten years.

18 U.S.C. 1426. This section prohibits, *inter alia,* the engraving, possession, sale, or importation of any plate similar to plates designed for the printing of naturalization and citizenship documents. The section also covers the possession of "a distinctive paper adopted . . . for the printing or engraving of" certain naturalization and citizenship documents. Violators may be punished by imprisonment for not more than five years.

18 U.S.C. 1546. This section makes it an offense for anyone knowingly to engrave, sell, import, control, or possess any plate similar to plates designed for permits or other documents required for entry into the United States. In addition, the section covers the possession of a "distinctive paper which has been adopted . . . for the printing of such visas, permits, or documents." The penalty is imprisonment not to exceed five years.

18 U.S.C. 2314. This statute prohibits, *inter alia,* the transportation in interstate or foreign commerce of any implement "used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps." The penalty is imprisonment for not more than ten years.

18 U.S.C. 2315. This section punishes anyone who receives in interstate or foreign commerce, or anyone who "conceals, stores, barters, sells, or disposes of, any . . . implement . . . used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which

is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp." Offenders are subject to imprisonment for not more than ten years.

26 U.S.C. 5676. This section prohibits, *inter alia,* the making, using, or selling of any die for printing or making any false or counterfeit stamp or device. The penalty is imprisonment for not more than five years.

26 U.S.C. 7208. This statute forbids, *inter alia,* the making, using, selling, or possessing of any material in imitation of the material used in the manufacture of "any stamp, coupon, ticket, book, or other device" prescribed under authority of this title [title 26] for the collection or payment of any tax imposed by this title." Violations are punishable by imprisonment for not more than five years.

3. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he makes, traffics in, or possesses a counterfeiting or forging implement with intent that it be used in making a counterfeited or forged written instrument.

Unlike S. 1, as originally introduced in the 93d Congress,[118] this section specifically covers implements which might be used in forging as well as in counterfeiting. A similar approach was adopted in the Final Report.[119] The principal reason for such coverage stems from the Committee's belief that one who, with the necessary criminal intent, makes, traffics in, or possesses an implement which is designed or suited for making a forged written instrument is deserving of the same sanctions as are meted out to one who engages in the same conduct in regard to implements designed or suited for making a counterfeited written instrument. For example, one who possesses a machine that is designed for filling in the blanks of a postal money order and intends so to use it with criminal intent is equally culpable as the person who possesses an engraving plate designed for the production of United States currency and intends so to use it with criminal intent.

The term "counterfeiting implement" is defined in section 1747(b) to mean "an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed for or suited for the making of a counterfeited written instrument."[120] The definition of "forging implement" in section 1747(d) is identical to the definition of "counterfeiting implement" except that it is limited to things which are "designed for or suited for the making of a forged written instrument." It is intended that both definitions be construed broadly so as to include all materials that could be used in producing the prohibited items, including those items that have a legitimate use. Thus, it is intended that the definitions be read to include not only the specified items and related items, but also, for example, printing presses, distinctive paper, and any other items which might be employed in producing counterfeited or forged written instruments.

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[118] § 2-8E3(a)(1).

[119] Final Report, § 1752. Coverage for such implements is also provided in a number of State statutes. See, e.g., McKinney's Rev. N.Y. Penal Law, § 170.40; Minn. Stat. Ann. § 609.625. See also Model Penal Code, § 5.06 (P.O.D. 1962).

[120] Recalling that a "counterfeited written instrument" (section 1747(a)) is a written instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety, it will be seen that the section is sufficient to cover the individual who, for example, possesses genuine implements for use in manufacturing currency of the United States with the intent that they be so used. The term "traffic" is defined in section 111 to mean "(a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing." Thus, this section prohibits, among other things, the sale, disposal, or possession with intent to dispose, of a counterfeiting or forging implement.

The term "traffic" is defined in section 111 to mean "(a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing." Thus, this section prohibits, among other things, the sale, disposal, or possession with intent to dispose, of a counterfeiting or forging implement.

B. Culpability

The conduct in this section is making, trafficking in, or possessing an implement (subsection (a)). Since no culpability standard is specifically designated, by operation of section 303(b)(1), the applicable mental state to be proved is at least "knowing," i.e., that the offender was aware, e.g., that he was making an implement.[121]

The fact that the implement was a forging or counterfeiting implement is an existing circumstance. Since no culpability level is specifically set forth in this section, the applicable mental state that must be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded a substantial risk that the implement was designed for or suited for the making of a forged or counterfeited written instrument.[122] The definition of "reckless", along with the requirement of a specific culpable intent, effectively eliminates any possibility that an innocent manufacturer of an implement which has a legitimate use, but which might also be used in producing a forged or counterfeited written instrument, could successfully be prosecuted for a violation of this section.[123]

This section contains two specific intent elements. One is encompassed in the definition of "traffic"[124] and applies to the conduct of buying, receiving, possessing, or obtaining control of a counterfeiting or forging implement, where prosecution is dependent on the government establishing that the conduct was engaged in with the intent that the counterfeiting or forging implement be sold, transferred, distributed, dispensed, or otherwise disposed of to another person.[125]

The other specific intent element, as noted above, conditions successful prosecution upon the government proving that the defendant's conduct was for the particular purpose of using the implement in making a counterfeited or forged written instrument.

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[121] See section 302(b)(1).

[122] See sections 303(b)(2) and 302(c)(1).

[123] Section 302(c)(1).

[124] See the definition of "traffic" in section 111.

[125] See Final Report, § 1752(5).

4. Jurisdiction

There is Federal jurisdiction over the offenses specified in this section in six situations. These provisions are substantially identical to those recommended by the National Commission,[126] with two exceptions, i.e., the Committee has rejected as inappropriate for this offense the National Commission's provision for ancillary or "piggyback" jurisdiction, and the Committee has extended jurisdiction to offenses dealing with counterfeit implements used to make corporate or State or local government securities.

The first situation where Federal jurisdiction exists arises if the offense is committed within the special jurisdiction of the United States, as defined in section 203. This achieves uniform application of this section throughout the various States when such offenses are committed on Federal enclaves and affords jurisdiction over certain places of exclusive Federal cognizance (e.g., the high seas).

Secondly, Federal jurisdiction will exist where the implement is designed for or suited for the making of "a written instrument purporting to be made or issued by or under the authority of, or guaranteed by, the United States."[127]

The third situation in which Federal jurisdiction exists arises where the implement is designed for or suited for the making of "a security purporting to be made or issued by or under the authority of a foreign government." This carries forward 18 U.S.C. 488.

The fourth situation parallels the addition to the jurisdictional bases for sections 1741 through 1743 and covers implements designed for the making of certain types of securities purporting to be made or issued by organizations or by State or local governments.

The final situations in which Federal jurisdiction is provided under this section exists where the implement (A) is moving in interstate or foreign commerce or constitutes or is part of interstate or foreign commerce, or (B) is moved across a State or United States boundary in or after the commission of the offense.[128] This brings forward the jurisdictional purview of 18 U.S.C. 2314 and 2315.

5. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison) if the implement is designed for or suited for the making of a counterfeited or forged obligation of the United States.[129] In all other cases, the offense is graded as a Class D felony (up to six years in prison). These grading distinctions in general parallel the grading provisions for counterfeiting and forgery in the belief that the offenses covered by this section should be treated at the same level as the conduct relating to the written instruments which are made from them. The distinctions also reflect the more severe treatment in current law of offenses relating to obligations of the United States.[130]

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[126] See the discussion of this point in connection with sections 1741 and 1742.

[127] The meaning of "made or issued by or under the authority of, or guaranteed by, the United States" is explained in connection with the discussion of the jurisdictional provisions of sections 1741 and 1742, and reference is made to that discussion for an analysis of the phrase.

[128] The term "commission of an offense" includes the attempted commission, consummation, and immediate flight from the commission of an offense. See section 111.

[129] The term "obligation of the United States" is defined in section 1747(e).

SECTION 1746. TRAFFICKING IN A COUNTERFEIT LABEL FOR A SOUND RECORDING OR MOTION PICTURE

1. In General and Present Federal Law

This section is designed to reach the commerce in counterfeit labels for various articles currently covered by 18 U.S.C. 2318 which punishes the transportation, receipt, sale, or offer to sell in interstate or foreign commerce, with fraudulent intent, of any phonograph record, disk, wire, tape, film, or other article in which sounds are recorded, to which is stamped or affixed any label, if the actor knows the label is forged, falsely made, or counterfeit. First offenses under that section carry a maximum penalty of one year in prison and a $10,000 fine. Second offenses have a maximum penalty of two years in prison and a $25,000 fine.

2. The Offense

Subsection (a) provides that a person commits an offense if he traffics[131] in, or traffics in material that includes, a counterfeit label for a copy of a sound recording, a motion picture, or an audiovisual work.

The conduct is trafficking in a counterfeit label, or in material containing such a label, to which a "knowing" state of mind is applies.[132] The fact that the label is affixed to or designed to be affixed to one of the listed products is an existing circumstance to which a "reckless" state of mind applies.[133]

In testimony before the Committee, the Motion Picture Association of America, Inc., and the Recording Industry Association of America urged the adoption of a separate offense dealing with counterfeiting of labels.[134] They pointed out that this offense does not so much protect the copyright holder as the consumer buying a mediocre copy to which an apparently genuine label or cover has been attached. Traditionally labels have not been copyrighted so they would not be protected by section 1738. Even if the manufacturers were to begin copyrighting labels, this protection would not be afforded to older records. Thus one could freely counterfeit labels of old recordings of the Boston Symphony, but works of more recent vintage could not be counterfeited.

In response to these concerns the Committee has created the trafficking in counterfeit labels as a separate offense.

3. Definitions

The terms "audiovisual work", "copy", "motion picture", and "sound recording" have the meaning given in 17 U.S.C. 101, except that "copy" includes "phonorecord" as defined in that section.

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[130] See 18 U.S.C. 474, 487.

[131] The term "traffic" is defined in section 111 to mean the sale, pledging, transfering, distributing, dispensing, or otherwise disposing of something to another person as consideration for anything of value or buying, receiving, possessing or obtaining control of something with intent to do any of the other acts.

[132] See section 303(b)(1).

[133] See section 303(b)(2).

[134] See Hearings, Part XIV, pp. 10694-10705.

The term "counterfeit label" has a definition that parallels that of "counterfeit written instrument" in section 1747, but specifies that the matter involved is an identifying label or container, ensuring coverage of record jackets, cassette boxes, and other items in which these products are generally sold with identifiable wrapping or printed materials.

4. Grading

The offense is graded as a Class D felony (carrying a maximum penalty of six years) in recognition of the great potential for defrauding the public. No distinction is made on the basis of the number of labels involved since it is unlikely anyone would traffic in a single label.

5. Jurisdiction

Federal jurisdiction is carefully limited to trafficking in the special jurisdiction of the United States,[135] trafficking when the United States mail or a facility of interstate or foreign commerce is used in the commission of the offense, and trafficking when the label purports to be for a copy of a copyrighted sound recording, motion picture, or audiovisual work.

SECTION 1747. DEFINITIONS FOR SUBCHAPTER E

This section contains several special definitions applicable to the provisions of this subchapter. These definitions have been explained in the context of the substantive offenses to which they apply, and no further discussion is necessary here.

SUBCHAPTER F.—COMMERCIAL BRIBERY AND RELATED OFFENSES

(Sections 1751–1754)

This subchapter embraces three distinct forms of bribery: commercial (section 1751), labor (section 1752), and sports (section 1753). All of these are covered to a large extent in current statutes. The proposed sections mainly clarify and, to a limited extent, expand coverage into areas where Federal jurisdiction seems plainly warranted. The sections have been drafted, insofar as is practicable, to parallel the offenses in subchapter F of chapter 13, dealing with bribery in relation to public servants, except that offenses under the Foreign Corrupt Practices Act (15 U.S.C. 78dd–2 and 78ff) are covered in section 1751(a)(2) by cross-reference.

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[135] See section 203.

SECTION 1751. COMMERCIAL BRIBERY

1. In General

This section carries forward those bribery offenses, not involving public servants of the Federal, State, or local government,[1] that are deemed by the Committee to be most serious and to warrant felony treatment. The section will replace and somewhat expand 18 U.S.C. 215 and 216, relating to bribery in the banking industry, 41 U.S.C. 54, relating to bribery of employees of a prime contractor or subcontractor on a contract to which the United States is a party, and 26 U.S.C. 9012(e), relating to illegal payments in connection with campaign expenses of candidates or their committees, and will carry forward the provisions of 15 U.S.C. 78dd-1 and 78dd-2, relating to bribery of certain foreign public servants by domestic business concerns. Other specific bribery provisions, discussed *infra*, are proposed to be retained as misdemeanors but transferred to title 18 Appendix of the United States Code.

2. Present Federal Law

The commercial bribery aspects of Federal regulation of the banking industry are currently covered in 18 U.S.C. 215 and 216.

Under 18 U.S.C. 215, the officers, employees, and agents of banks the deposits of which are insured by the Federal Deposit Insurance Corporation, as well as certain other specified financial institutions,[2] are prohibited from stipulating for, receiving, or agreeing to receive anything of value from any person, firm, or corporation "for procuring or endeavoring to procure," for the giver or for anyone else, "any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by" any such bank or financial institution. The penalty is imprisonment for up to one year.

Significantly, this statute does not reach the bribe offeror, but only the recipient of the bribe, although the offering party can be punished by means of the aiding and abetting or conspiracy statutes. This statute has been held to punish receipt of a gift for procuring a loan even though the loan was completed before the gift or fee was received.[3] Because of the inclusion of the term "stipulates for," it has also been construed to proscribe the action of a bank officer who stipulated that a commission for obtaining a loan from the bank be paid to a third party. The court found that Congress' purpose under this statute was to protect the deposits of Federally insured banks by preventing unsound and improvident loans to be made from such banks and that it was thus immaterial who received the commission.[4]

18 U.S.C. 216 is a somewhat broader statute that reaches payments made to employees and officials of Federal land bank institutions and small business investment companies. It punishes by up to one year in prison whoever, being an employee or official of

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[1] See section 1351.

[2] The other specified institutions are a "Federal intermediate credit bank" and a National Agricultural Credit Corporation.

[3] See *Ryan* v. *United States*, 278 F.2d 836 (9th Cir. 1960).

[4] See *United States* v. *Lane*, 464 F.2d 593 (8th Cir.), cert. denied, 409 U.S. 876 (1972).

the type described above, "is a beneficiary of or receives any fee . . . or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer . . . or employee thereof, and a reasonable fee paid by such association or bank to such officer . . . or employee for services rendered." This statute also penalizes whoever causes or procures a Federal land bank institution or small business investment company to charge or receive any consideration not specifically authorized.

Experience under this statutory scheme has led to the conclusion that the above laws are inadequate and obsolete because they neither cover all of the individuals or institutions that should be covered nor all of the activities that should be illegal.[5] As a result legislation has been introduced [6] in Congress that would combine 18 U.S.C. 215 and 216 into a single statute, punishing both bribe offerors or givers and bribe recipients, and expanding the institutions covered to include every financial institution the transactions of which the Federal government has a substantial interest in protecting against undue influence by bribery (e.g., in addition to those presently covered under 18 U.S.C. 215 and 216, any member of the Federal Home Loan Bank System and any Federal Home Loan Bank; any institution the deposits of which are insured by the Federal Savings and Loan Insurance Corporation; any credit union the deposits of which are insured under the Federal Credit Union Act of 1934, as amended, etc.). The Committee concurs that such extension in coverage is needed and has embodied this suggested increased scope of jurisdiction in this proposed section.[7]

18 U.S.C. 214 punishes by up to one year in prison whoever stipulates for or gives or agrees to give or receive anything of value for procuring or endeavoring to procure an advance, loan, extension of credit, or discount or purchase of any obligation or commitment with respect thereto, from a Federal Bank.

41 U.S.C. 51 prohibits the payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity, by or on behalf of a subcontractor, as defined in 41 U.S.C. 52, to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into with an agency or department of the United States for the furnishing of supplies or services of any kind, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor, or as an acknowledgement of a subcontract or order previously awarded. Under 18 U.S.C. 54, anyone who shall "knowingly, directly or indirectly, make or receive any such prohibited payment" may be imprisoned for up to two years.

It is not necessary under 41 U.S.C. 54 to prove a specific intent to induce or influence the award of a particular subcontract,[8] nor is knowledge by the bribe giver of the terms of the prime contract essential.[9] The crime is complete with the bribe offer or acceptance and it is immaterial whether any subcontract or other benefit is awarded.[10]

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[5] E.g., 18 U.S.C. 215 is limited to the procuring of loans and similar credit transactions, unlike 18 U.S.C. 216, which extends to all matters "in connection with any transaction or business" of the designated institution.

[6] H.R. 6531 and S. 1428, 93rd Cong., 1st Sess. (1973).

[7] The National Commission proposed an even more drastic extension of jurisdiction. See Final Report § 1758.

[8] *Howard* v. *United States*, 345 F.2d 126 (1st Cir.), cert. denied, 382 U.S. 838 (1965). Of course, the statute by its terms requires that a payment be received as "an inducement for the award of a subcontract" so that knowledge of the purpose of the bribe is required. *Id.* at 128-129.

26 U.S.C. 9012(e), which became effective in 1973, punishes by up to five years in prison whoever knowingly and willfully gives or accepts any kickback or illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. The terms "eligible candidates," "authorized committees," and "qualified campaign expense" are defined in 26 U.S.C. 9002.[11] No reported cases under this statute exist.

A statute similar to 26 U.S.C. 9012(e) is 26 U.S.C. 9042(d), enacted as part of the Presidential Primary Matching Payment Account Act in 1974, which penalizes by up to five years in prison whoever "knowingly and willfully" gives or accepts "any kickback or any illegal payment in connection with any qualified campaign expense of a candidate, or his authorized committees, who receives payments under section 9037." The terms "qualified campaign expense," "candidate," and "authorized committee" are defined in 26 U.S.C. 9032. Section 9037 has been discussed in connection with section 1731(c)(30) (theft).

15 U.S.C. 78dd-1 and 78dd-2, enacted in 1977, contain parallel provisions concerning bribery of foreign officials by domestic concerns. 15 U.S.C. 78dd-1 concerns such bribery by an issuer of a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934 [12] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934,[13] by an officer, director, employee, or agent of such an issuer, or by a stockholder of such an issuer acting in the issuer's behalf. 15 U.S.C. 78dd-2 concerns bribery of foreign officials by domestic concerns not covered by 15 U.S.C. 78dd-1, by their officers, directors, employees, or agents, and by their stockholders acting on their behalf. Both sections prohibit the organizations and individuals covered from using the mails or any means or instrumentality of interstate commerce "corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to a foreign official, or foreign political party or official thereof, or candidate for foreign political office, to influence an act or decision of the official or party or induce the official or party to use influence with a foreign government or instrumentality to affect or influence an act or decision of the government or instrumentality, in order to assist the business concern to obtain or retain business. Both sections also prohibit the same acts done indirectly by offering, paying, promising to pay, or authorizing payment to, any person of anything of value if the business concern or person acting for it knows or has reason to believe that all or part of the thing of value will be offered, given, or promised, directly, or indirectly, to a foreign official, or to a foreign political party or offi-

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[9] See *United States* v. *Grossman*, 400 F.2d 951, 954 (4th Cir.), cert. denied, 393 U.S. 982 (1968).

[10] See *Travers* v. *United States*, 361 F.2d 753, 755 (1st Cir.), cert. denied, 385 U.S. 834 (1966).

[11] Notably, the term "eligible candidates" reaches only the candidate of a political party for President and Vice President of the United States; candidates for congressional office and their campaign committees are not covered.

[12] 15 U.S.C. 781.

[13] 15 U.S.C. 78o(d).

cial thereof, or to a foreign political candidate, for one of the proscribed purposes. "Foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality thereof. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical." [14] "Domestic concern" is defined as "(A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." An issuer who violates section 78dd-1 or a domestic concern other than an issuer who violates section 78dd-2 is subject to a maximum fine of $1,000,000.[15] An individual violator is subject to a maximum fine of $10,000 or imprisonment for not more than five years, or both.[16] A fine imposed on an individual who is an officer, director, stockholder, employee, or agent of an issuer or other domestic concern may not be paid, directly or indirectly, by the issuer or other domestic concern.[17] The Securities Exchange Commission may investigate a violation of,[18] and bring a civil action to enjoin a violation of, section 78dd-1 [19]; the Attorney General may bring a civil action to enjoin a violation of section 78dd-2.[20]

42 U.S.C. 1395nn(b)(1) makes it an offense punishable by up to 5 years' imprisonment and a $25,000 fine to solicit or receive remuneration, including a kickback, bribe, or rebate, directly or indirectly, in return for referring an individual for services or items paid for under the Health Insurance for the Aged Act (Medicare). 42 U.S.C. 1395nn(b)(2) provides similar punishment for the offeror or payer of such remuneration.

42 U.S.C. 1396h(b)(1) and (b)(2) contain provisions parallel to 42 U.S.C. 1395nn(b)(1) and (b)(2) for services or items paid for under the provisions of title XIX of the Social Security Act (Medicaid).

49 U.S.C. 11904(a)(3) makes it a 2-year felony for a person to pay anything of value to induce a common carrier subject to jurisdiction of the Interstate Commerce Commission or its officer or agent to discriminate against another consignor or consignee in the transportation of property.

49 U.S.C. 11907(a) makes it a 2-year offense for a person to offer or give anything of value to a person acting for or employed by a rail carrier subject to jurisdiction of the Interstate Commerce Commission to influence an action relating to transportation of property, and 49 U.S.C. 11907(b) relates to the solicitation or receipt of anything of value by the agent or employee of the rail carrier.

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[14] 15 U.S.C. 78dd-1(b) and 78dd-2(2).

[15] 15 U.S.C. 78ff(c)(1) and 78dd-2(b)(1)(A).

[16] 15 U.S.C. 78ff (c)(2) and (c)(3); 15 U.S.C. 78dd-2 (b)(1)(B), (b)(2), and (b)(3).

[17] 15 U.S.C. 78ff(c)(4) and 78dd-2(b)(4). If a fine is imposed on an individual who is a domestic concern, this rule does not apply.

[18] 15 U.S.C. 78u(a).

[19] 15 U.S.C. 78u(d).

[20] 15 U.S.C. 78dd-2(c).

In addition to the above statutes, there are two provisions in chapter 11 of title 18 that lie somewhat in between bribery of public servants (covered in chapter 13 of the subject bill) and commercial bribery, covered in this section. They are 18 U.S.C. 212 and 213. 18 U.S.C. 212 punishes by up to one year in prison any officer or employee of a large group of enumerated banks who gives any loan or gratuity of value to a bank examiner. 18 U.S.C. 213 provides an identical punishment for the receipt of any loan or gratuity by a bank examiner from one of the designated banks or a person connected therewith.[21] The Committee has proposed that these offenses, which are rarely prosecuted under current law, be transferred to title 18 Appendix. In a sufficiently grievous case, where a Federal bank examiner is bribed in his official capacity, e.g., with a *quid pro quo* involved, the general bribery (section 1351) and graft (section 1352) provisions of the proposed Code may be utilized to punish the conduct at a felony level. Similarly, employees of Federal Reserve banks are public servants as that term is defined in section 111, so that coverage under chapter 13 provisions is available in an aggravated case.

49 U.S.C. 11907(b) is another statute dealing with commercial bribery that will not be brought forward by this section. It punishes by up to two years in prison whoever offers, gives, or causes the offer or gift of any thing of value to any person acting for or employed by any carrier by railroad, with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles used in the transportation of property. The statute also prohibits the solicitation, acceptance, or receipt of such a bribe by any person acting for or employed by a carrier by railroad, with intent to be influenced as provided above. This statute will be retained in title 49 as a misdemeanor.[22]

Other specific commercial bribery statutes not proposed for inclusion in title 18 are 47 U.S.C. 508, proscribing "payola" in the record industry, and 47 U.S.C. 509, punishing fraudulent practices on televised quiz shows. These infrequently prosecuted offenses, which are currently misdemeanors, will be retained in title 47.

3. The Offense

Subsection (a)(1) provides that a person commits an offense if (A) he offers, gives, or agrees to give to an agent or fiduciary of another person, or (B) as an agent or fiduciary, he solicits, demands, accepts, or agrees to accept from another person who is not his employer, principal, or beneficiary "anything of value for or because of the recipient's conduct in any transaction or matter concerning the affairs of the employer, principal, or beneficiary."

This formulation follows the lead of the previously introduced legislation to consolidate 18 U.S.C. 215 and 216. It is written in sufficient breadth to cover any transaction instead of only banking matters, but the actual scope of the provision is limited by the jurisdictional subsection which makes the offense applicable only if a participant is an agent or fiduciary of a financial institution, a prime contractor or subcontractor, a person who furnishes items or services under Medicare or Medicaid, a common carrier, the administrator of a federally financed program, or the offense involves a kickback in connection with a Presidential election campaign, or if the offense constitutes a violation of State bribery law and a State or United States boundary is crossed or a facility of interstate or foreign commerce or the mails is used in the commission of the offense.

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[21] No specific intent is required under these offenses. See *United States* v. *Bristol*, 473 F. 2d 439 (5th Cir. 1973).

[22] The National Commission proposed to include it as a felony and to expand coverage to all employees or agents of all interstate facilities. See Final Report, § 1758(3)(d). This represented an extension of Federal power not deemed by the Committee to be justified by any as yet demonstrated need.

As noted above, 18 U.S.C. 216 excepts from coverage the payment by a financial institution of the usual fees and salaries given to its attorneys, agents, and employees for services rendered. The proposed version accomplishes the same result by requiring that the offer of "anything of value" [23] be to the agent or fiduciary "of another" or that the solicitation, etc., of anything of value be by an agent or fiduciary "from another person who is not his employer, principal, or beneficiary." As a consequence, payment by the financial institution to its own employees or attorneys will not violate the statute. Moreover, such payments would be excluded irrespective of whether they involved a payment for services rendered or were made as a result of an arms length transaction between the bank and its employees.[24]

The phrase "in any transaction or matter" adopts the broad style of 18 U.S.C. 216 in defining the types of transactions covered, rather than the narrower method used in 18 U.S.C. 215 of attempting to list the specific kinds of transactions reached.

The Committee has used the terms "agent or fiduciary," as recommended by the National Commission, to describe the classes of potential participants in the offense. The Committee believes that the general meaning of these terms encompasses any person likely to be involved in a commercial bribe.[25]

However, the Committee rejected the National Commission's proposal to add an element to this offense that is unknown to current Federal statutes in this area. The Final Report would require that the payment of anything of value be "without the consent" of the employer, principal, or beneficiary. This element that the employer be not privy to the payment was apparently taken from New York law. The Committee has not incorporated this suggestion since the gravamen of commercial bribery is the gaining of an economic advantage by means of an unfair competitive practice—bribery. The knowledge or consent of the employer of the employee bribed (or of the employee who solicits a bribe) is irrelevant to the harm to be avoided. It is also possible that high officials in a bank might be aware of improper payments even if not sharing in the profits themselves. Their consent, implied or actual, might bind the financial institution and thereby create a defense (under the Commission's version) for both the bribe offeror and the recipient.

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[23] The term "anything of value" is defined in section 111.

[24] See *Speeter* v. *United States*, 42 F.2d 937 (8th Cir. 1930), holding that 18 U.S.C. 216 was not intended to reach transactions between a bank and its employees even though the employees profited thereby.

[25] The term "agent" is defined in section 111 to include "employee" except in the context of receipt of service of process.

The conduct in subparagraph (A) is offering, giving, or agreeing to give, and in subparagraph (B) the conduct is soliciting,[26] demanding, accepting, or agreeing to accept. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[27]

The element, common to both subparagraphs, that the offer or solicitation be "for or because of the recipient's conduct in any transaction or matter concerning the affairs of the employer, principal, or beneficiary" states the specific purpose for which it must be shown that the actor performed the prohibited conduct.

The remaining elements in subparagraphs (A) and (B), e.g., that the offer, etc., was "to an agent or fiduciary of another person," and constituted "anything of value" are existing circumstances. Since no culpability level is set forth in this section, the applicable state of mind that must, at a minimum, be established is "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[28]

Subsection (a)(2) provides that a person is guilty of an offense if he violates 15 U.S.C. 78dd-2 (b)(1), (b)(2), or (b)(3), or 15 U.S.C. 78ff (c)(1), (c)(2), or (c)(3), relating to bribery of foreign officials. The term "violates" is defined in section 111 to mean in fact to engage in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. Whether a mental state need be proved as to the fact that the conduct violates the statute is to be determined by reference to the statute and not pursuant to section 303(d)(1)(A). Thus, the provision brings forward unchanged the elements of the offenses (including jurisdiction [29] and culpability [30] elements) in current law.

4. Jurisdiction

Subsection (c) sets forth several circumstances in which Federal jurisdiction attaches to an offense described in this section. The first three of these, subsections (d)(1) (A), (B), and (C), relate to the banking industry and can be considered together. These cover instances in which a participant in the offense is an agent or fiduciary of a national credit institution, small business investment company, or bank or savings and loan holding company. These categories embody the scope suggested in previously introduced legislation to revise and expand 18 U.S.C. 215 and 216 and cover all financial institutions the transactions of which the Federal government has a substantial interest in safeguarding against bribery.[31]

The fourth jurisdictional base, subsection (c)(1)(D), covers cases in which a participant in the offense is a prime contractor holding a negotiated contract entered into by the United States government for the furnishing of supplies, material, equipment, or services of any kind, or a subcontractor, as defined in 41 U.S.C. 52, holding a subcontract under such a prime contract, and the recipient's conduct is related to such prime contract or subcontract. This carries forward the present purview of 41 U.S.C. 54, discussed above.

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[26] "Solicit" is intended to have the same meaning as in section 1351 (Bribery). See also section 111.

[27] See sections 303(b)(1) and 302(b)(1).

[28] See sections 303(b)(2) and 302(c)(1).

[29] See section 201(b)(2).

[30] See section 303(a)(2).

[31] The term "national credit institution" is defined in section 111 to include all the financial institutions presently reached under 18 U.S.C. 215 and 216 as well as, e.g., federally insured credit unions, savings and loan companies, and Federal home loan banks.

The fifth jurisdictional base, subsection (c)(1)(E), covers cases in which a participant in the offense is an agent or fiduciary of an authorized committee or an eligible candidate, as defined in the Presidential Election Campaign Fund Act (26 U.S.C. 9002 (1) and (4)), and the conduct relates to a qualified campaign expense, as defined in such act (26 U.S.C. 9002(11)). This carries forward the bribery and kickback offense contained in 26 U.S.C. 9012(e), discussed *supra*.

The sixth jurisdictional base, subsection (c)(1)(F), reaches cases in which a participant in the offense is an agent or fiduciary of an authorized committee or candidate, as defined in 26 U.S.C. 9032, and the conduct relates to a qualified campaign expense, as defined in that same statute. This brings forward the kickback and illegal payment offenses contained in 26 U.S.C. 9042(d), discussed *supra*.

The seventh jurisdictional base, subsection (c)(1)(G), reaches cases in which the agent or fiduciary is an agent or fiduciary of a person who furnishes items or services for which payment may be made pursuant to title XVIII or XIX of the Social Security Act relating to the Medicare and Medicaid programs. This brings forward the kickback and illegal payment provisions of 42 U.S.C. 1395nn and 1396h if the offense involves an agent or fiduciary.

The eighth jurisdictional base provides jurisdiction if the agent or fiduciary is an agent or fiduciary of a common or rail carrier subject to jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49, United States Code. This carries forward the provisions of 49 U.S.C. 11904(a)(3), relating to illegal payments or offers to common carriers to induce them to provide discriminatory rates against other consignors, and 49 U.S.C. 11907, relating to payments or offers to influence an action of an agent or fiduciary of a rail carrier with regard to transportation of property.

The ninth jurisdictional base creates Federal cognizance over an offense of commercial bribery if the agent or fiduciary is of an organization charged by a Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, and if the recipient's conduct is related to the administration of such program. This base complements the one added to section 1352 (Graft) to cover corrupt payments to administrators of Federal programs where such administrators are State or local government public servants. The concept is to protect the integrity of the vast sums of money distributed pursuant to Federal programs from undue influence through bribery, by creating Federal jurisdiction when the conduct sought to be affected is related to the administration of the program. No similar basis for Federal prosecution exists today, and unfortunately, although understandably, States and localities are often reluctant to pursue such cases out of a belief that the aggrieved party is primarily the Federal government.

The final jurisdictional bases, subsections (c)(2)(A) and (c)(2)(B), confer Federal jurisdiction over an offense described in subsection (a)(1) when the offense constitutes a violation of the bribery laws of the State in which the conduct occurs, the offense involves anything of pecuniary value, and a State or national boundary is traversed by a person, or the mails or interstate or foreign commerce is used, in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense. This carries forward Travel Act jurisdiction and is in accord with the recent Supreme Court holding in *Perrin* v. *United States* that the Travel Act (18 U.S.C. 1952) applies to commercial bribery situations.[32]

The National Commission recommended extending Federal jurisdiction over these offenses to Federal enclaves. However, such jurisdiction for commercial bribery would involve the Federal Criminal Code in regulating minor commercial transactions on Federal parks, forts, and the like. The Committee deemed that assimilation of State law under section 1861 should be sufficient in this area, as it has been in the past under 18 U.S.C. 13.

The National Commission also proposed to afford ancillary jurisdiction with respect to this offense. It is, however, difficult to imagine how commercial bribery could be committed in the course of another Federal crime in circumstances under which a prosecutor would wish to proceed on the bribery charge rather than on the underlying offense (i.e., murder). The Committee, therefore, has not proposed to afford ancillary jurisdiction with respect to this offense.[33]

This section contains no provision setting forth the extent to which there is Federal jurisdiction of offenses described in subsection (a)(2). Thus jurisdiction over those offenses is governed by section 201(b)(2), which incorporates the scope of jurisdiction of the underlying statute to which cross-reference is made. Thus, jurisdiction over the offense described in subsection (a)(2)(A) is defined in 15 U.S.C. 78dd-2, and jurisdiction over the offense described in subsection (a)(2)(B) is defined in 15 U.S.C. 78dd-1.

5. Grading

An offense under subsection (a)(2) is a Class D felony. This approximates closely the maximum prison term for the offense specified in 15 U.S.C. 78dd-2 and 78ff and the maximum fine for an organizational offender under those provisions, while increasing the maximum fine for an individual violator from $10,000 to $250,000.

An offense under subsection (a)(1) is graded as a Class E felony (up to three years in prison) if what is offered, given, or agreed to be given, or solicited, demanded, accepted, or agreed to be accepted, has a value in excess of $100; otherwise the offense is a Class A misdemeanor (up to one year in prison). This has the effect of increasing the level of the kind of offenses now covered by 18 U.S.C. 215 and 216 from a misdemeanor to a felony. The Committee considers this increase justified in recognition of the strong Federal interest in deterring such crimes as they affect the banking industry. Commercial bribery with regard to government contractors under

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[32] 511 444 U.S. 37 (1979).

[33] The National Commission's additional suggested jurisdictional base which involved military service clubs is unnecessary since the agents, employees, and fiduciaries of such establishments, even if of foreign nationality, are included in the definition of "public servant" and thus covered in sections 1351 and 1352. See also *Harlow* v. *United States*, 301 F.2d 361 (5th Cir.), cert. denied, 371 U.S. 814 (1962).

41 U.S.C. 54 is presently treated as a felony, as are all the other offenses specifically covered through the jurisdictional bases for this section.

An exception from felony treatment is, however, provided for an offense under subsection (a)(1) where the bribe is relatively insignificant in amount and thus is less likely to have affected the recipient's conduct.

SECTION 1752. LABOR BRIBERY

1. In General

This section brings forward 18 U.S.C. 1954 and 29 U.S.C. 186 (a)(4) and (b)(1). In addition, paragraph (3) herein creates new offenses: bribery in union membership procedures and work placement, and the improper expenditure of union assets or funds. The section expands present law by also covering Federal employee unions as to all forms of prohibited labor bribery.

The National Commission attempted to combine the offenses of commercial and labor bribery into a single section.[34] The Committee, however, has rejected this approach, despite the desire to consolidate offenses wherever possible, for a variety of reasons. First, payments to influence actions of labor union officials in labor matters and payments to influence decisions dealing with employee welfare and pension plans are essentially different offenses with differing terminology and elements. The failure to distinguish between them, and the inclusion of both concepts within commercial bribery, leads to an imprecise statute with an unavoidable expansion of Federal jurisdiction. Second, the elements of the commercial bribery statute are somewhat different from those contained in 18 U.S.C. 1954 and 29 U.S.C. 186 which form the basis of the labor bribery statute. For instance, 18 U.S.C. 1954 specifies four separate groups of individuals to whom payments are to be barred. Commercial bribery, on the other hand, speaks only of payments to an "agent or fiduciary." That language is adequate for the typical payment to a bank official, but lacks the precision of the statute dealing with payments to officials of an employee benefit plan. Moreover, the purposes of the conduct prohibited by labor bribery are defined more restrictively than are the prohibited purposes of commercial bribery.

Third, and perhaps most important, experience has shown that labor-management offenses are apt to involve extensive litigation with specific emphasis on the definition of who is or is not covered by the statute. This results in the need for a number of specially defined terms—employer, employee organization, administrator, etc.—which are not all necessary or related to the commercial bribery statute.

2. Present Federal Law

18 U.S.C. 1954 reaches four groups of persons: (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan, (2) an officer, counsel, agent, or employee of an employer any of whose

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[34] See Final Report § 1758.

employees are covered by such plan, (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan, or (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan. The statute provides that whoever, being a person in one of the above categories, "receives or agrees to receive or solicits" anything of value because of or with intent to be influenced with respect to, any of his actions, decisions or other duties relating to any question or matter concerning such plan or any person who "gives or offers, or promises to give or offer," anything of value may be punished up to three years in prison. The terms "employee welfare benefit plan" and "employee pension benefit plan" are defined by reference to the provisions of title I of the Employee Retirement Income Security Act of 1974. The terms "administrator" and "employee organization" are also defined by reference to that Act.[35] The section also contains a proviso, excepting from its coverage the payment or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as one of the categories of persons to whom the section applies.

29 U.S.C. 186(a) contains four offenses each identically graded as a misdemeanor. The first three offenses are essentially regulatory in nature, barring such things as gifts between employers and union officials with no specific improper purpose or intent to influence required. These offenses will be retained in title 29.

29 U.S.C. 186(a)(4) states the offense to be carried forward in proposed section 1752 as a felony. It provides that it shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to do so, any thing of value to "any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization."

29 U.S.C. 186(b)(1) makes it unlawful for any person to "request, demand, receive, or accept, or agree to receive or accept, any . . . thing of value prohibited by subsection (a) of this section."

These provisions are carried forward in section 1752 in furtherance of the Committee's decision that all of the most serious criminal offenses should be set forth in the new criminal code. The Committee considers it anomalous that under current law 29 U.S.C. 186(a)(4), which reaches payments made with a specific intent to influence union affairs, is punished at the same level as a mere Christmas gift between an employer and a union official.

29 U.S.C. 186(c), like the provision in 18 U.S.C. 1954, excepts a number of items from the category of anything of value, such as salary, money in satisfaction of a judgment, and the like.

29 U.S.C. 186(d) provides that whoever "willfully violates" any of the provisions of subsections (a) or (b) shall be guilty of a misdemeanor punishable by up to one year in prison.

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[35] See 29 U.S.C. 302(3) and 304(b) (1) and (2).

The culpability standard "willfully" in this statute has been interpreted not to require proof of an evil motive. Indeed, supported by dictum in a Supreme Court decision,[36] one court of appeals has construed the offense as "malum prohibitum" in nature, requiring no proof of conscious wrongdoing, but only knowledge as to the status (e.g., an employer of employees that the receiver represented).[37] At the other extreme, another court of appeals has construed "willfully" to contemplate proof either of an awareness of the restrictions of section 186 or a reckless disregard for that section, the latter consisting of actual knowledge by the defendant of the facts surrounding the proscribed conduct, plus an objective test as to whether a reasonable man would be aware that such conduct would likely be illegal.[38]

Section 186, in terms of its proscription against demanding or requesting a payment, has been held to state a separate offense from extortion under the Hobbs Act, 18 U.S.C. 1951, so as to support convictions under each of those enactments for coercive acts arising out of the same course of conduct.[39] Each unlawful payment under 29 U.S.C. 186 is also subject to separate and cumulative punishment, notwithstanding the payments are part of a single course of conduct.[40]

Section 186, however, does not reach all unlawful activity by labor or management officials affecting employees. The purpose of the various prohibitions, as found by the Supreme Court, was to deal with problems peculiar to collective bargaining. Thus, embezzlement by an employee representative from an employer-financed welfare fund would not violate 29 U.S.C. 186, and the Supreme Court has held that the same result obtains even though, at the time of a lawful payment by an employer to a trust fund for the benefit of his employees,[41] the union officer receiving the check intended to and did convert it to his own use.[42]

3. The Offense

Section 1752 contains four separate offenses. Paragraph (1) provides that a person commits an offense if, being an employer, he offers, gives, or agrees to give anything of value to a labor organization, or to an officer, agent, or counsel of a labor organization, for or because of the recipient's conduct in any transaction or matter concerning such organization.

With some changes, this carries forward the prohibition in 29 U.S.C. 186(a)(4). Thus, as in that present statute, the source of the illegal payment is limited to employers and is not written in the broader terminology of "any person." The term "employer" is defined in subsection (b)(4) to include a group or association of employers, and a person acting directly or indirectly as an employer or as an agent of or in the interest of an employer. This definition is taken in part from the Taft-Hartley Act[43] and in part from 29 U.S.C. 186. The Committee intends thereby to preserve the body of case law interpreting this language which would be applicable as well under this section. The reference in 29 U.S.C. 186(a) to "labor relations expert, adviser, or consultant" is omitted as redundant since these classes of persons are included within any reasonable interpretation of the definition of "employer."

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[36] *United States* v. *Ryan*, 350 U.S. 299, 305 (1956).

[37] *United States* v. *Ryan*, 232 F.2d 481 (2d Cir. 1956) (opinion of L. Hand); see also *United States* v. *Ryan*, 128 F. Supp. 128 (S.D. N.Y. 1955).

[38] See *United States* v. *Keegan*, 331 F.2d 257, 261-262 (7th Cir.), cert. denied, 379 U.S. 828 (1964).

[39] See *United States* v. *Kramer*, 355 F.2d 891, 895-896 (7th Cir.), cert. denied on issue, 384 U.S. 100 (1966).

[40] *United States* v. *Keegan*, *supra* note 38 at 260 n. 3.

[41] Such payments are among the specific categories exempted in 29 U.S.C. 186(c).

[42] See *Arroyo* v. *United States*, 359 U.S. 419 (1959).

The most significant change in the definition of the term "employer" under this section is that it does not retain the exemptions set out in the Taft-Hartley Act, 29 U.S.C. 152(c), which apply under 29 U.S.C. 186. Current law exempts the government of the United States and the government of any State or political subdivision. The Committee believes that the growth and proliferation of government employee unions in recent years justifies elimination of the exemption. There would seem to be no reason to immunize bribery merely because it occurs in the public rather than the private sector. A pay-off by a local politician to a union official to buy labor peace in his city pending an election should not be exempt. The conduct is the same in either case. For these reasons the Committee has not carried forward the Taft-Hartley Act exclusion of certain employers from bribery coverage.[44]

As previously noted, 29 U.S.C. 186(c) excepts a number of items from the category of anything of value, such as salary, money in satisfaction of a judgment, payments to certain employee trust funds, and the like. These exceptions are intended to be preserved by the simpler mechanism of the Committee's definition of "anything of value" in section 111 to exclude "bona fide salary, wages, fees, or other compensation paid in the usual course of business." The Committee intends that all the particular exclusions in 29 U.S.C. 186(c) be deemed embraced within the definition of "anything of value".[45]

Section 1752 continues the requirement (expressed in 29 U.S.C. 186 by an "intent" clause) that the purpose of the payment of anything of value be "for or because of" the recipient's conduct with respect to union affairs. No connection between the payor-employer and the union matter in question is necessary. It was clearly Congress' intent to forbid the subversion of union officials in the performance of their duties by an employer "even if the employer and the subverted official's union have absolutely no relation with each other."[46] Section 1752 carries out this congressional intent. Moreover, the Committee's language makes it clear that the payment can come after the desired conduct has been performed, as well as before.

Thought was given to detailing the kind of conduct that the payment would be intended to influence. The Committee rejected this in favor of the general term (used also in the previous section) "in any transaction or matter concerning such organization." This insures that serious but unforeseen forms of conduct will not be omitted inadvertently. By way of illustration only, the Committee intends that the following acts be included among the types of conduct to be influenced:

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[43] 29 U.S.C. 152(2).

[44] The Taft-Hartley Act also excludes from the term "employer" persons subject to the Railway Labor Act or any labor organization. These exclusions for intentional bribery of union officials have likewise been deleted because of the seriousness of the offense and because the Committee perceives no reason for retaining them in this context. Until recently the Taft-Hartley Act also excluded non-profit hospitals from the definition of "employer", but this exclusion was deleted by Public Law 93-360.

[45] The term "bona fide" is inserted to make clear that bad faith, excessive payments in the nature of kickbacks are not excluded from this section, even if such kickbacks are paid in the usual course of business.

[46] S. Rept. No. 187, 86th Cong., 1st Sess., p. 98 (1959).

(1) the representation of the employees of any employer (including a competitor of the payor);

(2) the resolution of any ongoing or threatened labor dispute;

(3) the negotiation, enforcement, or interpretation of any collective bargaining agreement;

(4) the providing of the services of members of the labor organization or any other persons to any employer, or the establishment of the conditions under which such services will be provided; or

(5) the initiation or cessation of any strike.

The Committee notes that the word "conduct" has been employed in place of the words "actions, decisions, or duties" in 29 U.S.C. 186(a)(4). The definition of "conduct" in section 111 includes the full coverage of present law.

The illegal payment under this paragraph is, *inter alia*, to be made to an "officer, agent, or counsel of a labor organization." This is somewhat broader than the language of 29 U.S.C. 186(a)(4), which refers only to an "officer or employee of a labor organization." The change, in all probability, will not add many recipients to the coverage of the offense, and the words "officer, agent or counsel" are repeated in the second and third offense subsections dealing with employee welfare and pension plans and other union activities. The terms "agent, or fiduciary," used in the preceding section, were rejected for labor bribery because the term "fiduciary" has rarely been used in labor-management relations, whereas "officer" and "counsel" are frequently used. "Counsel" and "agent" are not specifically defined; subsection (b)(6) does, however, contain a special definition for the term "officer" to avoid perpetuating an unfortunate interpretation of that word in existing law.

In interpreting the word "officer" as used in other parts of the Taft-Hartley Act, the Supreme Court held that the term applies only to those persons designated as officers in the union's constitution.[47] Thus, it would not include persons who perform the functions of officers but are not so designated. In short, those performing the duties of officers without titles could thereby avoid potential criminal liability. Although, under the Committee's draft, such persons would likely fall within the term "agent," as defined in section 111, and thus still be covered, the Committee nevertheless believes it advisable to avoid any such restrictive definition of the word "officer" in the context of this offense. Congress has in another context defined "officer" to include not only the officers designated in a union's constitution, but also "any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization."[48] This definition has been adopted in subsection (b)(6).[49]

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[47] *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 356 U.S. 264 (1956).

The expression "labor organization," as used in this section, is defined in subsection (b)(5) to incorporate the definition in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(i), which is the Congress' most recent definition of the term, as well as to extend to Federal employee unions. It is anomalous that there exists today no Federal coverage of acts of bribery by or directed at the officials of Federal employee unions, and the Committee proposes to correct the anomaly.

The conduct in this offense is offering, giving, or agreeing to give. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[50] The element that what is given, offered, or agreed to be given is "for or because of the recipient's conduct in any transaction or matter concerning" a labor organization states the specific purpose for which it must be shown that the conduct was done. This specific intent requirement, coupled with the need to show that the conduct was performed at least knowingly, is deemed to be an appropriate scienter standard for bribery. The Committee thus does not endorse or intend to continue the existing case law requirement, arising from a construction of the word "willful" under 29 U.S.C. 186(d), that the offender be shown to have acted in reckless disregard of the fact that his conduct was prohibited by law.[51] Such a mental state is unrelated to the purpose of the offense, which is to prohibit the knowing tender of a thing of value with intent to influence the recipient's conduct *vis-a-vis* a labor organization. Whether or not the payor knew or should have known that his conduct was subject to criminal sanctions is irrelevant and is not an element under the offense in this paragraph.

The remaining elements—e.g., "anything of value" and "labor organization"—are existing circumstances. Since no culpability level is specifically set forth, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[52]

Subsection (a)(2) of section 1752 provides that a person commits an offense if he offers, gives, or agrees to give anything of value to (A) an administrator, agent, trustee, or counsel of an employee benefit plan (B) an employer, agent, or counsel of an employer, any of whose employees are covered by such plan, (C) an agent or counsel of an employee organization, any of whose members are covered by such a plan, or (D) a person who, or an agent or counsel of an organization that, provides benefit plan services, and in all the cases above, the offer, gift, or agreement to give was "for or because of the recipient's conduct relating to any transaction or matter concerning such plan." [53]

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[48] See section 3(n) of the Labor-Management Reporting Disclosure Act of 1959, 29 U.S.C. 402(n).

[49] However, this definition does not under paragraph (2) apply to officers of an employee benefit plan, who are not officers of a "labor organization."

[50] See sections 303(b)(1) and 302(b)(1).

[51] See *United States* v. *Keegan, supra* note 38.

[52] See sections 303(b)(2) and 302(c)(1).

This paragraph carries forward, in part, 18 U.S.C. 1954.[54] Thus the Committee has retained the four classes of recipients who are barred from receiving payments to influence actions involving an employee benefit plan. Minor changes in terminology have been effected. The term "custodian," currently in 18 U.S.C. 1954, has been omitted because its meaning is encompassed within the other words used.

The terms "administrator," "employee benefit plan," and "employee organization" are defined in subsection (b) by reference to the Employee Retirement Income Security Act of 1974. The only change is an addition to the definition of "employee benefit plan" so as to include "any trust fund established by an employer or by an employee organization, or by both, to provide any benefit to the members of the organization or to their families." [55]

Existing law allows unions to negotiate for trust funds for pooled vacations, apprenticeships, and other educational benefits. The assets of such trusts are not covered under current bribery or embezzlement statutes. Moreover, such trusts are not subject to the reporting requirements covering welfare and pension funds and therefore are not open to public scrutiny. Experience indicates that the employer-appointed trustees do not participate in the management of such funds, so that total control, for all practical purposes, resides in trustees appointed by the unions. The increasing number and size of such trusts indicates a need to extend the same kind of protection to their beneficiaries as is currently extended to the beneficiaries of welfare and pension benefit funds. Coverage under criminal law is as necessary and logical as coverage of the misapplication of welfare and pension fund assets, whether through bribery or mismanagement. The language adopted by the Committee is broad enough to cover all such trust funds now in existence as well as others that may be created in the future.

The general phrase "anything of value" is defined in section 111. It is broad enough to cover the terms "fee, kickback, commission, gift, loan, money or other thing of value" currently employed in 18 U.S.C. 1954. The exception explicitly stated in present law for the payment or acceptance by any person of bona fide salary, compensation, etc., is preserved by virtue of the exclusion from the definition of "anything of value" of "bona fide salary, wages, fees, or other compensation paid in the usual course of business."

As in paragraph (1), the specific intent element is here carried forward by means of the expression "for or because of the recipient's conduct," etc. The change is principally one of style and is not meant to embody any substantial change in the required *scienter*. The Committee's formulation does, however, make plain that the payment may be made after the desired conduct has been performed.[56]

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[53] The phrase "to such a plan" after "benefit plan services," which appeared in earlier versions, was deleted because the language was subject to an unintended interpretation that the plan to which the services are to be provided must be in existence at the time of the bribe. The Committee intends to cover a payment to a person who provides benefit plan service in order to influence conduct with respect to anticipated services to the payor's benefit plan.

[54] The part not brought forward here is embraced within paragraph (4) of this section covering, *inter alia*, the solicitations, etc. of anything the offering of which would be an offense under paragraph (2).

[55] The Committee has proposed a similar addition to the definition in connection with the theft section. See section 1731(c)(15).

As under current law, the proscribed payment may be made by any person, not just by employers, as under paragraph (1).

The conduct in paragraph (2) is offering, giving, or agreeing to give. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is "knowing," i.e., that the offender was aware of the nature of his actions.[57]

The element that the offer or payment was made "for or because of the recipient's conduct relating to any transaction or matter concerning" one of the covered "plans" states the purpose for which it must be proved that the prohibited conduct was performed.

The remaining elements—e.g., that the recipient was an administrator, agent, or counsel of an employee benefit plan—are existing circumstances. Since no culpability level is designated in this section, the applicable state of mind that must be shown is at least "reckless," i.e., that the defendant was aware of but disregarded a substantial risk that the circumstance existed.[58]

Subsection (a)(3) of section 1752 provides that a person commits an offense if he offers, gives, or agrees to give anything of value to an officer, agent, trustee, or counsel of a labor organization for or because of the recipient's conduct relating to (A) the admission of any person to membership or to a class of membership, or the issuance to any person of the indicia of membership or of a class membership, in the labor organization, (B) the work placement of any person by the labor organization, or (C) any transaction or matter concerning the expenditure, transfer, investment, or other use of the funds, moneys, securities, property, or other assets of the labor organization.

There is no counterpart to this paragraph in existing law, which expands Federal criminal coverage to reach corrupt practices in labor-management relations. The offenses here proposed strike at two different abuses: (1) bribery involving union membership and work placement; and (2) improper expenditure of union funds. As explained below, this paragraph would fill a serious gap in current law and afford much needed additional protection to employees of labor organizations.

Subparagraph (A) is intended to apply to those cases in which union officials take advantage of their positions and of strict admission standards to profit from the inability of an individual worker to obtain benefits of union membership through normal channels.

Subparagraph (B) is closely related to the preceding paragraph and, in conjunction with paragraph (4), makes it illegal for a union officer to demand or accept a payment from any person for or because of his administration of a work placement system. An analogous but narrower statute, 18 U.S.C. 874, prohibits the extortion of kickbacks from workers on Federally financed projects, but it is based upon the more limited jurisdictional ground of the Federal interest in the work being done. No controls, either civil or criminal, presently exist in the area of work placement. In order to proscribe all such arrangements, the term "work placement" is comprehensively defined in subsection (b)(7).

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[56] Also as in paragraph (1), the term "conduct" which is defined in section 111, has been used to replace the existing statutory phrase "actions, decisions, or . . . duties."

[57] See sections 303(b)(1) and 302(b)(1).

[58] See sections 303(b)(2) and 302(c)(1).

Finally, subparagraph (a)(3)(C) of section 1752 is intended, in combination with paragraph (4), to prohibit the giving and acceptance of kickbacks to influence the expenditure of union assets in the same manner as 18 U.S.C. 1954 presently prohibits such conduct in relation to the assets of welfare and pension funds.

This offense would provide coverage over clearly reprehensible activities such as profiting by union officers by accepting payments designed to influence the purchase of commodities needed by the union. A typical scheme, over which no effective Federal jurisdiction exists today, is as follows. A union officer, after notifying a friend that the union is looking for a place on which to erect a new headquarters building, arranges with the friend to have him purchase a piece of property for that purpose. The officer then uses his persuasive or dictatorial powers to see to it that the union purchases his friend's land at a highly inflated price and later receives a kickback from his friend for performing this service.[59]

If this series of events involved the expenditure of benefit plan funds, it would be prosecutable (both as to the officer and as to the friend) under 18 U.S.C. 1954, but no Federal violation of any kind exists under the provision, 29 U.S.C. 501(c), prohibiting the embezzlement and conversion of union funds. Yet the danger to the union's membership is as great in one case as in the other, and the purpose of section 501 is to prevent union officers from realizing such a personal gain. Section 1752 would fill the void in the present law.

In the Committee's view, the offenses in this paragraph each would significantly strengthen existing Federal protection of employee labor organizations by punishing forms of corrupt practices not now subject to effective penal sanctions.

The conduct in subsection (a)(3) of section 1752 is offering, giving, or agreeing to give. As no culpability standard is set forth in this section, the applicable state of mind that must be proved with respect to this element is at least "knowing," i.e., that the offender was aware of the nature of his conduct.[60]

The element that the offer, gift, or agreement to give was "for or because of the recipient's conduct relating to" one of the matters enumerated in subparagraphs (A) through (C) states the particular purpose for which it must be shown that the conduct was performed.

The remaining elements—e.g., that the recipient was an officer of a labor organization are existing circumstances, as to which the applicable state of mind to be proved is at least "reckless." [61]

The terms "officer," and "labor organization" used in this paragraph, are defined in subsection (b) and the term "anything of value" is defined in section 111. These terms have been discussed in connection with the foregoing paragraphs.

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[59] Another example of the kind of situation sought to be reached by this section includes the conduct of a union official, who is seeking a loan from a bank for his personal use, agreeing to transfer a substantial amount of the union's funds to that bank if it will provide the needed loan. Frequently these amounts will be transferred into accounts bearing less interest, but even when they are not, there can be no justification for a union officer's using his union's assets to promote his personal gain.

[60] See sections 303(b)(1) and 302(b)(1).

[61] See sections 303(b)(2) and 302(c)(1).

Paragraph (4) provides that a person commits an offense if he solicits,[62] demands, accepts, or agrees to accept anything of value, the offering of which constitutes an offense described in paragraphs (1) through (3). In order to constitute an offense under this paragraph, the person soliciting, accepting, etc., the property would have to do so with the same kind of culpable mental state ("for or because of") necessary for an offense under one of the foregoing paragraphs.

This carries forward, *inter alia,* the offense in 29 U.S.C. 186(b) (1)[63] and the aspect of 18 U.S.C. 1954 dealing with soliciting or receiving a bribe. Quite clearly the person who, with the requisite culpable intent, demands, solicits, or accepts a bribe is as blameworthy as the person who offers or gives it and should be equally subject to penal sanctions. This paragraph insures such coverage.

Both 29 U.S.C. 186(b) (1) and 18 U.S.C. 1954 include the word "receives." The Committee has deleted this word as fully encompassed within the term "accepts." It is intended that "accepts" be given a broad interpretation so as to include the indirect as well as the direct receipt of a payment.[64]

The conduct in this offense is soliciting, demanding, accepting, or agreeing to accept. Since no culpability standard is specifically prescribed, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[65]

The fact that what was solicited, etc., was "anything of value"[66] is an existing circumstance, and, as no culpability level is set forth in this section, the applicable state of mind that must be shown is at least "reckless."[67]

The element that the offering of the thing of value would constitute an offense under paragraph (1), (2), or (3) requires no proof of any mental station on the part of the defendant.[68]

4. Jurisdiction

Subsection (d) provides that there is Federal jurisdiction over an offense in this section if the employer or labor organization is engaged in, or the employee benefit plan covers employees engaged in, an industry affecting interstate or foreign commerce. This carries forward the jurisdictional criteria used in 18 U.S.C. 1954 and 29 U.S.C. 186. The Committee considered but decided against expanding Federal jurisdiction to include enclaves and ancillary jurisdiction (i.e., jurisdiction where labor bribery was committed in the course of another Federal offense), on the ground that the "affecting commerce" base is sufficiently broad to reach virtually every labor bribery incident in which there is a substantial Federal interest.

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[62] "Solicits" is intended to have the same meaning as in section 1351 (Bribery). See also section 111.

[63] As applied to 29 U.S.C. 186(a)(4).

[64] See *United States* v. *Lanni,* 466 F.2d 1102, 1108–1109 (3d Cir. 1972), and cases cited therein.

[65] See sections 303(b)(1) and 302(b)(1).

[66] This term has been amply discussed in connection with paragraph (1) and that discussion should be consulted here.

[67] See sections 303(b)(2) and 302(b)(1).

[68] See section 303(d)(1)(A).

5. *Grading*

An offense under section 1752 is graded as a Class E felony (up to three years in prison). This represents an increase from the current one-year penalty under 29 U.S.C. 186(a) (4), but a decrease from the five-year maximum penalty currently authorized under 18 U.S.C. 1954. As previously indicated, the Committee deems the increase with respect to the title 29 offenses here carried forward to be justified by the seriousness of the offense, which includes a specific intent element, as compared to the other essentially regulatory offenses in 29 U.S.C. 186 which will be retained as misdemeanors.

SECTION 1753. SPORTS BRIBERY

1. *In General and Present Federal Law*

This section brings forward 18 U.S.C. 224 as well as part of the coverage of 18 U.S.C. 1952. A special provision dealing with sports bribery was deemed justified by the unique nature of this offense.

18 U.S.C. 224 punishes by up to five years in prison whoever "carries into effect" (or attempts or conspires to do so) any "scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest." The term "sporting contest" is defined to mean any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence. The term "scheme in commerce" is defined to mean any scheme effectuated in whole or part through the use in interstate or foreign commerce of any facility for transportation or communication.

This statute was enacted in 1964 in response to the periodic "point-shaving" and game-throwing that occurred in sports, particularly college basketball. When amateur and professional sports became a target of organized crime and gamblers, Congress concluded that national legislation was needed.[69] However, since its enactment, there have been few prosecutions under this statute.[70]

18 U.S.C. 1952, the so-called Travel Act, also reaches sports bribery. It punishes by up to five years in prison whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to (1) distribute the proceeds of any "unlawful activity," (2) commit any crime of violence in furtherance of any "unlawful activity," or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, etc., of any "unlawful activity" and who thereafter performs or attempts to perform any of the acts specified in the above subparagraphs. The term "unlawful activity" is defined, *inter alia*, to include bribery in violation of the laws of the State in which committed or of the United States.

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[69] See S. Rept. No. 593, 88th Cong., 1st Sess., p. 2 (1963).

[70] See *United States* v. *Nolan*, 402 F.2d 552 (5th Cir. 1969), cert. denied, 400 U.S. 819 (1970).

As of 1960, some thirty-two States proscribed sports bribery in some form.[71] Since then the number of States having such statutes has increased,[72] although the content of the statutes varies greatly.

2. The Offense

Subsection (a) provides that a person commits an offense if, with intent to affect the outcome, result, or margin of victory of a publicly exhibited sporting contest, (1) he offers, gives, or agrees to give anything of value to a participant, official, or other person associated with the contest, or (2) as a participant, official, or other person associated with the contest, he solicits, demands, accepts, or agrees to accept anything of value. "Solicits" as used here is defined in section 111 and does not mean the conduct described in section 1003 (Criminal Solicitation). It is intended to bear the same meaning as in section 1351 (Bribery).

The term "publicly exhibited sporting contest" is defined in subsection (b) to mean a contest in any sport involving human beings or animals, whether as individual participants or teams of participants, the occurrence of which is publicly announced in advance of the event.

This definition, which is similar to that suggested by the National Commission,[73] is derived from 18 U.S.C. 224. No substantial change is intended, except that the present definition makes clear that contests involving animals (e.g., dog racing) are included.[74]

The Committee determined, as did the National Commission, not to punish mere knowing participation in a rigged sports contest.[75] The normal complicity requirement of an active role in the bribery (see section 401) is considered an appropriate standard, here as elsewhere, for the imposition of criminal liability.[76]

The term "anything of value" is defined in section 111. In order to avoid including such legitimate conduct as the rendering of an athlete's services on behalf of his team or association, the term specifically excludes bona fide salary, wages, fees, or other compensation paid in the usual course of business.

The conduct in paragraph (1) is offering, giving, or agreeing to give, and in paragraph (2) the conduct is soliciting, demanding, accepting, or agreeing to accept. Since no culpability standard is specifically designated, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions." [77]

The remaining elements in paragraph (1) and (2) are existing circumstances. Since no culpability level is prescribed in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed (e.g., that the offer involved "anything of value" and was made to a "participant").[78]

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[71] See Note. *Control of Nongovernment Corruption by Criminal Legislation,* 108 U. Pa. L. Rev. 848, 858 (1960).

[72] See H. Rept. No. 1053, 88th Cong., 1st Sess., p. 2 (1963).

[73] See Final Report. § 1757(3).

[74] See *United States* v. *Pinto,* 503 F.2d 718, 724 (2d Cir. 1974), holding harness racing within the present statute and characterizing as "surprising" the defendant's assertion that a harness race is not a sporting contest within the meaning of the statute because it involves "animals rather than 'individual contestants' ".

[75] See Final Report, § 1757. Comment, p. 233; Working Papers, pp. 972–973.

[76] By contrast, the Model Penal Code proposed to penalize a player who is not himself bribed, but who is aware that other participants have been bribed but does nothing about it. See Model Penal Code, § 224.9 (P.O.D., 1962).

[77] See sections 303(b)(1) and 302(b)(1).

The element common to both offenses of an intent to affect the outcome, result, or margin of victory of a publicly exhibited sporting contest states the purpose for which it must be proved that the conduct was performed.

3. Jurisdiction

There is Federal jurisdiction over an offense described in this section in two instances. The first is if the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense. This basically brings forward the jurisdictional scope of 18 U.S.C. 224 and part of the scope of 18 U.S.C. 1952.

The second instance is when movement across a State or United States boundary by the actor, or by a participant, official, or other person associated with the sporting contest occurs in the planning, promotion, etc., of the offense. This carries forward the aspect of 18 U.S.C. 1952 covering interstate or foreign travel but broadens it to embrace such travel not only by the offender but by the other listed categories of persons.

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This represents a reduction in grading from the maximum five-year prison term currently imposable.

SECTION 1754. DEFENSE PRECLUDED FOR SUBCHAPTER F

This section provides that it is not a defense to a prosecution for an offense under section 1751, 1752, or 1753 that the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft). A similar defense precluded provision applies to the offenses of witness bribery (section 1321), bribery (section 1351), extortion (section 1722), and blackmail (section 1723). The provision is designed to forestall a defense based on the theory that bribery and extortion, or bribery and theft, are mutually exclusive crimes.[79]

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[78] See sections 303(b)(2) and 302(c)(1).

[79] See discussion under section 1321 (Witness Bribery).

SUBCHAPTER G.—INVESTMENT, MONETARY, AND ANTITRUST OFFENSES

(Sections 1761–1764)

This subchapter brings forward, by cross-reference and unchanged, various offenses currently outside title 18, relating to the securities, banking, and commodities fields, all of which are subject to complex regulatory requirements. Section 1761 deals with securities offenses; it preserves current law as to the definitions of the offenses. Sections 1762 (Monetary Offenses) and 1763 (Commodities Exchange Offenses) carry forward certain serious offenses in titles 7, 12, and 31, United States Code, without substantial change. Section 1764 (Antitrust offenses) incorporates the felony provisions of 15 U.S.C. 1, 2, and 3.

SECTION 1761. SECURITIES OFFENSES

1. In General and Present Federal Law

This section incorporates into the Federal Criminal Code the felony provisions of the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (except the provisions of section 30A (15 U.S.C. 78dd–1),[1] the Public Utility Holding Company Act (15 U.S.C. 79 *et seq.*), and the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) and the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) and the Interstate Commerce Act as codified by Public Law 95–473, enacted October 17, 1978 (49 U.S.C. 11911). No attempt has been made to alter the contents of the offenses. Rather the technique used was to draft the offenses in terms of a person who "violates" the underlying statutes, thereby preserving the elements of the offenses as fashioned by the Congress and by the courts through a wealth of judicial interpretation.[2]

The Securities Act of 1933 was enacted to protect investors in securities by requiring registration of securities with the Securities and Exchange Commission and to assure accuracy and completeness in prospectuses used in the sale of registered securities. Under section 5 of the Act [3] it is unlawful to use any means or instruments of transportation or communication in interstate commerce or the mails to sell an unregistered security, to transmit a prospectus relating to a registered security if the prospectus does not meet the requirements of section 10 [4] of the Act, or to offer to sell or buy an unregistered security or a security as to which the registration statement is subject to a refusal order or stop order, or before the effective date of the registration statement under section 8.[5] Section 17(a) [6] makes it unlawful to use the mails or interstate commerce in the fraudulent sale of, or an offer to sell, securities. Section 17(b) [7] bars the use of the mails or interstate commerce for publication or circulation of a description of a security which does not purport to be an offer for sale but for which description consideration is received, unless disclosure of that receipt is made. Section 23[8] makes it unlawful to represent that the filing of a registration statement or the nonexistence of a stop order indicates a finding by the Commission of the truth and accuracy of the registration statement or an indication of the merits of the registration statement. Under section 24,[9] a willful violation of a provision of the Act or the rules and regulations under it, is a five-year felony, with a maximum fine of $10,000. In addition the willful making of an untrue statement of a material fact in a registration statement filed under the Act or omission from the registration statement of a material fact required to be stated in it or necessary to make the statements in it not misleading is also punishable by up to five years in prison and a fine of up to $10,000.

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[1] See section 1751(a)(2).

[2] In the conforming amendments, each of the felony provisions listed in section 1761(a) is amended to make a cross-reference to section 1761.

[3] 15 U.S.C. 77e.

[4] 15 U.S.C. 77j.

[5] 15 U.S.C. 77h.

[6] 15 U.S.C. 77q(a).

[7] 15 U.S.C. 77q(b).

The Trust Indenture Act of 1939[10] safeguards the purchasers of debt securities by requiring the registration and qualification of trust indentures for public offerings of debt securities in the aggregate amount of one million dollars or more. Under section 306(a),[11] it is unlawful to use the mails or a means of transportation or communication in interstate commerce to sell a security not registered under the Securities Act of 1933 and to which the subsection applies, unless the security is issued under an indenture and an application for qualification is effective as to the indenture. Under section 306(b),[12] it is unlawful to use the mails to transmit a prospectus relating to such a security unless the prospectus contains the information prescribed in rules and regulations of the Commission to be disclosed as to an analysis of specified provisions of the indenture, or to sell or deliver securities after sale unless the required information is attached or precedes the delivery or sale. Section 306(c)[13] prohibits the offer for sale of unregistered securities for which no registration statement has been filed unless there is an indenture and an application for qualification has been filed as to the indenture, or where the application is the subject of a refusal order or a stop order or, prior to qualification, public proceedings, or examination by the Commission under section 307(c).[14] Section 324 of the Act[15] prohibits a person offering, selling, or issuing a security from falsely representing that action or failure to act of the Commission indicates the approval of the Commission to a trustee, indenture, or security, or falsely representing that action or inaction of the Commission with regard to a statement or report filed with or examined by the Commission indicates the truth and accuracy of the statement or report. Under section 325,[16] it is a five-year felony with a maximum fine of $10,000, willfully to violate a provision of the Act, or a rule, regulation, or order issued thereunder, or willfully to make an untrue statement in an application, report, or document filed or required to be filed under the

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[8] 15 U.S.C. 77w.
[9] 15 U.S.C. 77x.
[10] 15 U.S.C. 77aaa *et seq.*
[11] 15 U.S.C. 77fff(a).
[12] 15 U.S.C. 77fff(b).
[13] 15 U.S.C. 77fff(c).
[14] 15 U.S.C. 77ggg(c).
[15] 15 U.S.C. 77xxx.
[16] 15 U.S.C. 77yyy.

Act, or omit a material fact required to be stated or necessary to make the statements not misleading.

The Securities Exchange Act of 1934 [17] expands the coverage of the Federal securities laws to regulate trading on national securities exchanges and over-the-counter markets.[18] The Act creates numerous offenses to accomplish this purpose. Among these: [19] Section 7 prohibits the extension of credit for purchase of stock in violation of the rules and regulations of the Board of Governors of the Federal Reserve System [20] and the receipt of such a loan if the loan is prohibited.[21] Section 9(a) describes certain unlawful practices used to manipulate stock prices by creating a false impression of the state of the market in a security. Section 10(a) [22] prohibits short sales or employment of stop-loss orders with respect to a security registered on a national securities exchange in contravention of the rules and regulations of the Securities and Exchange Commission. Section 10(b) [23] prohibits stock manipulation in connection with the purchase or sale of such securities in contravention of Commission rules and regulations. Rule 10b–5 of the rules and regulations issued under the Securities Exchange Act of 1934 [24] prohibits the use of the mails or interstate commerce or a facility of a national security exchange to defraud, to make an untrue or misleading statement, or to engage in a deceitful or fraudulent practice in connection with the purchase or sale of a security. Under section 14(a),[25] it is unlawful to solicit proxies in contravention of the rules and regulations issued by the Commission. Rule 14a–9 [26] prohibits false or misleading statements in solicitations for proxies and false representation of approval by the Commission of a proxy statement or other material relating to proxy solicitation.

Section 14(c) of the Act [27] requires that if the management of the issuer of securities has not solicited proxies from the holders of those securities, it must submit to those holders prior to any annual or other meeting of the stockholders the same material which the management would have been required to submit in conjunction with a solicitation of proxies. Rule 14c–6 [28] prohibits false or misleading statements in the information statements sent to stockholders and false representation of approval of an information statement by the Commission. Section 16(a) of the Act [29] requires the beneficial owner of more than ten percent of a registered security, and the directors and officers of the issuers of such securities, to file periodic reports of the amount of all equity securities of the issuer he owns. Section 16(c) [30] prohibits certain short sales of securities by beneficial owners of more than ten percent of a security and by the officers and directors of the issuers of equity securities. Section 32 (a) [31] provides that willful violation of a provision of the Act (other than section 30A of the Securities Exchange Act, added by Public Law 95-213 [32]) or a rule or regulation thereunder is a five-year felony, except that a violation by an exchange is subject to a penalty of $500,000 rather than the fine of $10,000 applicable to others. A willful and knowing false or misleading material statement in an application, report, or document required to be filed under the Act or a rule or regulation thereunder or in an undertaking contained in a registration statement filed under section 15(d) [33] is also a five-year felony, with a violation by an exchange subject to a fine of $500,000.

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[17] 15 U.S.C. 78a, *et seq.*

[18] 15 U.S.C. 78b.

[19] See also, e.g., section 5 of the Act (15 U.S.C. 78e, relating to transactions with unregistered exchanges), section 8 (15 U.S.C. 78h, relating to restrictions on borrowing and lending by exchange members, brokers, and dealers), and section 9 (b) and (c) (15 U.S.C. 78i (b) and (c), relating to manipulation of security prices).

[20] 15 U.S.C. 78g (c) and (d).

[21] 15 U.S.C. 78g(f).

[22] 15 U.S.C. 78j(a)

[23] 15 U.S.C. 78j(b).

[24] 17 C.F.R. § 240.10b–5.

[25] 15 U.S.C. 78m(a).

[26] 17 C.F.R. § 240.149–9.

[27] 15 U.S.C. 78n(c).

[28] 17 C.F.R. § 240c–6.

[29] 15 U.S.C. 78p(a).

The Public Utility Holding Company Act of 1935 [34] regulates gas and electric utility holding companies and the financing of such companies. The Act provides for a number of criminal offenses designed to carry out these purposes. Among these: [35] Section 12(h) [36] prohibits political contributions by registered holding companies. Section 17(a) [37] requires that officers and directors of registered holding companies file periodic statements of their holdings of stock in the registered holding company and subsidiaries thereof. Under section 29,[38] a willful violation of the Act or a rule, regulation, or order thereunder,[39] or the willful making of a materially false or misleading statement in an application, report, document, account, or record filed or kept or required to be filed or kept under the Act or a rule, regulation, or order thereunder, is a five-year felony, except that the fine for a violation of section 4 (a) or (b) [40] by a holding company which is not an individual is $200,000 rather than $10,000.

The Investment Company Act of 1940 [41] regulates companies engaged in the business of investing, reinvesting, and trading in the securities of other companies. Among the offenses provided by the Act: Section 7(a) prohibits transactions by unregistered investment companies in securities issued by the investment company or by another person. Section 7(b) prohibits transactions by depositors, trustees, and underwriters of unregistered investment companies in a security of the company.[42] Section 7(c) [43] prohibits the promoter of a proposed investment company from using the mails or interstate commerce to offer for sale, sell, or deliver after sale, in connection with a public offering, a preorganization certificate of subscription for a proposed investment company. Section 7(d) [44] bars the use of the mails or interstate commerce by foreign investment companies or a depositor, trustee, or underwriter of such a company, for sales of securities in the company unless the Commission issues an order permitting registration of the company after finding that the provisions of the Act can be legally and practically enforced against the company. Section 17(a) [45] prohibits certain transactions such as stock purchases and loans between persons affiliated [46] with a registered company and the company or a company controlled by the registered company.

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[30] 15 U.S.C. 78p(c).

[31] 15 U.S.C. 78ff(a).

[32] 15 U.S.C. 78dd-1, covered by section 1751(a)(2).

[33] 15 U.S.C. 78o(d), which requires the filing of a registration statement by any issuer having total assets of $1,000,000 or more, or at least five hundred shareholders of any class of its stock.

[34] 15 U.S.C. 79 *et seq.*

[35] See also, e.g., section 4 of the Act (15 U.S.C. 79d) relating to transactions by unregistered holding companies and section 9 of the Act (15 U.S.C. 79i) relating to restrictions on acquisition of securities or utility assets or other interests.

[36] 15 U.S.C. 791(h).

[37] 15 U.S.C. 79g(a).

[38] 15 U.S.C. 79z-3.

[39] A violation of an order under section 11 (b), (d), (e), or (f) (15 U.S.C. 79k (b), (d), (e), or (f)) is not a criminal offense. See 15 U.S.C. 79z-3.

[40] 15 U.S.C. 79d (a) or (b).

[41] 15 U.S.C. 80a-1 *et seq.*

[42] 15 U.S.C. 80a-7 (a) and (b).

[43] 15 U.S.C. 80a-7(c).

Section 17(d) [47] prohibits an affiliated person with a registered company or an underwriter of such company from acting as principal to effect a joint or joint and several transactions with the registered company or a company controlled by it. Section 17(e) [48] prohibits receipt of compensation, other than salary or wages, for the sale or purchase of property by an affiliated person for a registered company, and prohibits such person, in acting as a broker, from receiving more than the specified commissions in connection with the sale of securities to or by the registered company. Section 21 [49] prohibits loans by registered management companies if they are in violation of the investment policies of the company or if the recipient of the loan is the controller or under common control with the registered company. Section 30(f) [50] makes applicable (1) to the beneficial owners of more than ten percent of a class of outstanding securities issued by a registered closed-end company, and (2) to the officers, directors, members of advisory boards, investment advisers, and affiliated persons of an investment adviser of such a company, the provisions of section 16 of the Securities Exchange Act of 1934.[51] Section 34(b) [52] makes it unlawful for a person to make an untrue statement of a material fact, or to omit a material fact, in a registration statement, application, report, account, record, or other document filed or transmitted pursuant to the Act. Under section 49,[53] willful violation of the Act or a rule, regulation, or order thereunder is a five-year felony, with a maximum fine of $10,000. Willfully making a material false statement or omitting a material fact in a document filed or required to be kept under the Act is also a five-year felony.

The Investment Advisers Act of 1940 [54] is designed primarily to protect against conflicts of interest by investment advisers by a regulatory scheme similar to the Securities Exchange Act of 1934 scheme for registration of brokers. Among the offenses provided by the Act: Sections 206 (1) and (2)[55] prohibit fraud by investment advisers. Section 206(3)[56] prohibits sales by investment advisers involving apparent conflict of interest without disclosure to the client whose account is involved and without obtaining the consent of the client. Under section 217,[57] a willful violation of the Act or a rule, regulation, or order under the Act, is a five-year felony with a maximum fine of $10,000.

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[44] 15 U.S.C. 80a-7(d).

[45] 15 U.S.C. 80a-17(a).

[46] The term "affiliated person" is defined in 15 U.S.C. 80a-2(a)(3) in terms of the amount of voting security held by a person in another person or *vice versa*, or the degree of common control of the two persons; it also includes an officer, director, partner, copartner, or employee of the other person, or a member of an advisory board of an investment adviser, or a depositor of an incorporated investment company with no board of directors.

[47] 15 U.S.C. 80a-17(d).

[48] 15 U.S.C. 80a-17(e).

[49] 15 U.S.C. 80a-21.

[50] 15 U.S.C. 80a-29(f).

[51] 15 U.S.C. 78p.

[52] 15 U.S.C. 80a-17(e).

[53] 15 U.S.C. 80a-48.

[54] 15 U.S.C. 80b-1 *et seq.*

The Interstate Commerce Act as codified by Public Law 95-473, enacted October 17, 1978, provides that a director, officer, attorney, or agent of a carrier that knowingly agrees to or concurs in an issue of securities or assumption of obligations or liability in violation of section 11301, a disposition of securities in violation of an order of the Interstate Commerce Commission, or an application not authorized by the Commission of the funds derived by the carrier through a disposition of securities, or a person that violates certain restrictions on officers and directors, shall be fined at least $1,000 but not more than $10,000, imprisoned for at least one year but not more than 3 years, or both.

2. The Offense

Subsection (a)(1) provides that a person commits an offense if he violates section 24 of the Securities Act of 1933 (15 U.S.C. 77x).

Subsection (a)(2) provides that a person is guilty of an offense if he violates section 325 of the Trust Indenture Act of 1939 (15 U.S.C. 77yyy).

Subsection (a)(3) provides that a person is guilty of an offense if he violates section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)).

Subsection (a)(4) provides that a person is guilty of an offense if he violates section 29 of the Public Utility Holding Company Act (15 U.S.C. 79z-3).

Subsection (a)(5) provides that a person is guilty of an offense if he violates section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a-48).

Subsection (a)(6) provides that a person is guilty of an offense if he violates section 217 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-17).

Subsection (a)(7) provides that a person is guilty of an offense if he violates section 11911 of subtitle IV of title 49, United States Code.

While the term "person" is defined in section 111 to mean an individual or organization, each of the securities laws the violation of which is made an offense by the section covers particular categories of persons, and the identity of those persons is not altered by this section.

The term "violates" is defined in section 111 to mean in fact to engage in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. The use of the term "violates" effectively incorporates all the elements of the offenses (including culpability elements) contained in title 15. Those offenses use the terms "willfully" and "willfully and knowingly." These have given rise to conflicting interpretations.[58] Generally, the courts have not construed the terms to require proof that the defendant knew that he was violating the law,[59] but have construed them to require proof that the defendant had some evil purpose or a realization that he was doing a wrongful act. By leaving the culpability standards as they are in current law, the Committee leaves to the ongoing development of the case law the appropriate definition of "willfully" in the securities laws.

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[55] 15 U.S.C. 80b-6 (1) and (2).

[56] 15 U.S.C. 80b-6 (3).

[57] 15 U.S.C. 80b-17.

Under subsection (b), the provisions of section 1346(c)(2) that apply to section 1343 (Making a False Statement) apply under this section if the conduct described in section 1343(a)(1) is an element of the offense being prosecuted under this section. Section 1346(c)(2) contains an affirmative defense of retraction that applies if the defendant retracted the false statement within seven days, soon enough that it did not substantially impair, affect, impede, or otherwise influence the outcome or course of the government matter involved, and before it became apparent that the falsification would be exposed. That defense is discussed in connection with the offenses in subchapter E of chapter 13, and that discussion should be consulted here.

It should be noted that the brief descriptions of the statutes cited in subsections (a)(1) through (a)(7), contained in parentheses, are not to be construed as limiting the scope of application of those enactments.[60]

Except for the change in penalty described below, and the clarification concerning state of mind with regard to jurisdictional elements, the offenses in this section are designed to bring forward the body of case law under current statutes which for the most part has been highly protective of the interests of the investing public.[61]

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction attaches to an offense herein. Federal jurisdiction is therefore governed by the provisions of section 201(b)(2), which adopt the scope of the underlying statutes to which cross-reference is made. It should be noted that the existing confusion in the securities area on the question whether the offender has to know that interstate commerce or the mails were used in the perpetration of the offense[62] will be obviated by the provision of section 303(d)(2) that "proof of state of mind is not required with respect to any matter that is solely a basis for federal jurisdiction."

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[58] E.g., *United States* v. *Dixon*, 536 F. 2d 1388, 1395–1398 (2d Cir. 1976); *United States* v. *Tarvested*, 418 F. 2d 1043, 1047 (8th Cir. 1969), cert. denied, 397 U.S. 935 (1970), and cases cited therein; *United States* v. *Custer Channel Wing Corp.*, 376 F. 2d 675, 680 (4th Cir.), cert. denied, 389 U.S. 850 (1967); *United States* v. *Peltz*, 433 F. 2d 48, 54–55 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971); *United States* v. *Schwartz*, 464 F. 2d 499, 508–510 (2d Cir. 1972), cert. denied, 409 U.S. 1009 (1973); *United States* v. *Simon*, 425 F. 2d 796, 808–810 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970).

[59] Some of the securities laws permit lack of knowledge of the existence of a statute to be a defense, see 15 U.S.C. 79z–3; 15 U.S.C. 80a–48, or to preclude a sentence of imprisonment, see 15 U.S.C. 78ff(a). Other securities offenses, like all others, will be subject to the prevailing defense carried forward in section 501, as to mistake of fact or law, under which such a mistake will exculpate a defendant only if it negates a mental state required for proof of the offense.

[60] See section 112(b).

[61] E.g., *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); *United States* v. *Simon, supra* note 60: *United States* v. *Peltz, supra* note 60; *Travis* v. *United States;* 247 F. 2d 130 (10th Cir. 1957); *United States* v. *Wolfson.* 405 F. 2d 779 (2d Cir. 1968), cert. denied. 394 U.S. 946 (1969): *United States* v. *Buckner,* 108 F. 2d 921 (2d Cir.), cert. denied, 309 U.S. 669 (1940); *Seeman* v. *United States,* 90 F. 2d 88 (5th Cir. 1937); *United States* v. *Abrams,* 357 F. 2d 539 (2d Cir.), cert. denied, 384 U.S. 1001 (1966); *United States* v. *Manning,* 509 F. 2d 1230 (9th Cir.) (1974).

5. Grading

The offenses described in subsections (a)(1) through (a)(6) are graded as Class D felonies (up to six years in prison), while the offense described in subsection (a)(7) is graded as a Class E felony (up to three years). This is generally consistent with current law.

With two exceptions, the fines for offenses under this section will be as high or higher than they are under existing law. The statutes now provide $10,000 maximum fines for offenders convicted under the securities laws, except that an exchange convicted under section 32 of the Securities Exchange Act of 1934, as amended,[63] is subject to a $500,000 maximum fine, while a holding company not an individual which is convicted under section 29 of the Public Utility Holding Company Act of 1935[64] is subject to a $200,000 maximum fine.

Under section 2201 of the subject bill, an individual convicted of a felony ordinarily would be subject to a maximum fine of $250,000 and an organization convicted of a felony, to a maximum fine of $1,000,000.

SECTION 1762. MONETARY OFFENSES

1. In General and Present Federal Law

This section carries forward the basic reporting and recordkeeping offenses contained in 12 U.S.C. 1730d, 1829b, 1951–1959, and 31 U.S.C. 1051–1143, enacted together in 1970. The above provisions are designed to obtain financial information and to insure the keeping of records having a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[65]

The statutes were enacted following extensive hearings concerning the unavailability of foreign and domestic bank records of customers thought to be engaged in activities entailing criminal or civil liability. Under the Act, the Secretary of the Treasury is authorized to prescribe by regulation certain recordkeeping and reporting requirements for banks and other financial institutions in this country. Criminal penalties attach only upon violation of regulations promulgated by the Secretary.[66]

The title 12 statutes contain the general recordkeeping requirements for banks and other financial institutions. 12 U.S.C. 1829b applies only to Federally insured banks and requires that such banks record the identities of persons having accounts with them and of persons having signature authority over such accounts. It also mandates, to the extent that the Secretary determines by regulation that such records would have a "high degree of usefulness," the creation and maintenance of microfilm or other reproduction of each check, draft, or other instrument received by it for deposit or collection, along with an identification of the party for whose account it is to be deposited or collected. The above section also authorizes the Secretary to require insured banks to maintain a record of the identity of all individuals who engage in transactions that are reportable by the bank under Title II of the Act.

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[62] Compare *Price* v. *United States*, 200 F.2d 652, 655 (5th Cir. 1953), with *United States* v. *Attaway*, 311 F. Supp. 683, 684 (W.D. La. 1962).

[63] 15 U.S.C. 78ff.

[64] 15 U.S.C. 79z-3.

[65] 31 U.S.C. 1051; 12 U.S.C. 1829(a)(2); 1951(b).

[66] See *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 25–27 (1974).

12 U.S.C. 1730d amends the National Housing Act to authorize the Secretary to apply similar recordkeeping requirements to institutions insured thereunder. 12 U.S.C. 1953 empowers the Secretary to issue regulations applying similar recordkeeping requirements to uninsured banks and institutions or any person engaging in the business of (1) issuing or redeeming checks, money orders, travelers' checks, or like instruments, except as an incident to the conduct of its own nonfinancial business, (2) transferring funds or credits domestically or internationally, (3) operating a currency exchange or otherwise dealing in foreign currencies or credits, (4) operating a credit card system, or (5) performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

12 U.S.C. 1952 authorizes the Secretary to require reports with respect to the ownership, control, and management of uninsured banks and institutions if he determines by regulation that such reports have a "high degree of usefulness" in criminal, tax, or regulatory investigations or proceedings.

The regulations promulgated by the Secretary require the copying of checks only in excess of $100 that are drawn by the bank or issued by it and exempt certain checks such as dividends and payroll checks. The regulations also require banks to maintain records of the identity of each person maintaining a financial interest in each deposit or share account opened after June 30, 1972, and to microfilm various other financial documents. All financial institutions are required to maintain a copy of each extension of credit in excess of $5,000 unless secured by real property, and to microfilm each request or instruction given or received regarding the transfer of funds or credit in amounts exceeding $10,000 to a person, account, or place outside the United States.[67]

12 U.S.C. 1957 imposes a maximum five year prison sentence and a maximum fine of $10,000 on whoever "willfully violates any regulation under this chapter (i.e., sections 1951–1959), section 1829b of this title, or section 1730d of this title, where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year."

The title 31 statutes contain foreign and domestic financial reporting requirements. 31 U.S.C. 1101 requires anyone connected with a transaction involving the transportation of monetary instruments in excess of $5,000 into or out of the United States to submit reports. The report, as provided by the Secretary's regulation, must include information as to the amount and form of the instrument, the date of receipt and the person from whom it was received. The report must also indicate the legal capacity in which the person filing the report is acting with respect to the monetary instruments transported and the origin, destination, and route of the transportation.

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[67] See *id.* at 32–34.

The subject enactments also provide for certain reports of domestic transactions where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. 31 U.S.C. 1081 and 1082 empower the Secretary to require reports of currency transactions involving the payment, receipt, or transfer of United States currency or such other monetary instruments as the Secretary may specify, and to require them from either the domestic financial institution involved, the parties to the transaction, or both. In the implementing regulations, the Secretary has required only the financial institutions to make reports, limited to each deposit, withdrawal, exchange of currency, or other payment or transfer that involves a transaction in currency of more than $10,000. Certain exemptions for intrabank transactions and such other exceptions as the Secretary may make are afforded.[68]

31 U.S.C. 1059 imposes a maximum five-year prison sentence on whoever "willfully violates any provision of this chapter where the violation is (1) committed in furtherance of the commission of any other violation of Federal law, or (2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period." A maximum fine of $500,000 is also provided.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates 12 U.S.C. 1957 (relating to records and reports by uninsured banks and institutions, banks insured by the Federal Deposit Insurance Corporation, and institutions insured by the Federal Savings and Loan Insurance Corporation) or 31 U.S.C. 1059 (relating to records and reports concerning domestic currency transactions, exports and imports of monetary instruments, and foreign monetary transactions).

This provision brings forward unchanged the elements of the offense (including jurisdictional[69] and culpability[70] elements) in current law. The term "violates" is defined in section 111 to mean in fact to engage in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. Whether a mental state needs be proved as to the fact that the conduct violates the statute or regulation is to be determined by reference to the underlying statute and not by section 303(d)(1)(A). The description in parenthesis of the underlying statute is not to be construed as limiting this scope of application.[71]

3. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists over an offense herein. Accordingly, Federal jurisdiction is governed by the provisions of section 201(b)(2), which incorporate the scope of the underlying statutes to which cross reference is made.

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[68] See *id.* at 37–40.

[69] See section 201(b)(2).

[70] See section 303(a)(2).

[71] See section 112(b).

4. Grading

An offense under this section is graded as a Class D felony (up to six years in prison), consistent with current law. Under section 2201(b), the maximum fine for an offense under this section is $250,000 if the offense is committed by an individual and $1,000,000 if the offense is committed by an organization.

SECTION 1763. COMMODITIES EXCHANGE OFFENSES

1. In General and Present Federal Law

This section incorporates into the proposed Criminal Code the felony provisions of 7 U.S.C. 13 (b), (d), and (e), and 12 U.S.C. 617. No attempt has been made to modify the definition of the offenses. Rather, the section is drafted in terms of whoever "violates" the foregoing statutes. Thus, the elements of the offense as set forth in current law are left intact, but the penalty will henceforth be prescribed by this section, in keeping with the general policy that all serious offenses be included within title 18.

7 U.S.C. 13(b) makes it an offense for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect the price of any commodity in interstate commerce.[72] The penalty is up to five years' imprisonment. The terms "person," "commodity," future delivery," and "interstate commerce" are defined in 7 U.S.C. 2.

7 U.S.C. 13 (d) and (e) were enacted in 1974 as section 401 of Public Law 93-463. Subsection (d) makes it a five-year felony for a commissioner of the Commodity Futures Trading Commission or any employee or agent thereof to participate, directly or indirectly in any transaction in commodity futures or any transaction of the character of an option, privilege, indemnity, bid, offer, put, call, advance guaranty, or decline guaranty, or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity. The subsection contains an exception for an investment transaction in an actual commodity where the person buys an agricultural commodity or livestock for use in his own farming or ranching operation or sells an agricultural commodity which he has produced in connection with his own farming or ranching operation. There is also an exception for any transaction in which a person sells livestock that he has owned at least three months.

Subsection (e) makes it an offense for a commissioner of the Commodity Futures Trading Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, in an actual commodity, or in any transaction of the character of an option, privilege, indemnity, etc., as enumerated in subsection (d). Subsection (e) also makes it an offense for any person to acquire such information from any commissioner of the Commodity Futures Trading Commission or any employee or agent thereof and to use such information in any transaction in commodity futures, in an actual commodity, or in any transaction of the character of an option, privilege, indemnity, etc. The maximum penalty prescribed for all the offenses in subsection (e) is five years in prison.

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[72] U.S.C. 13(a) is essentially a theft statute applicable to futures commission merchants and is carried forward in the proposed Code by a jurisdictional provision in the theft offense (section 1731(c)(19)).

12 U.S.C. 617 makes it an offense for any director, officer, agent, or employee of a corporation organized under 12 U.S.C. 611–631 (i.e., principally for the purpose of engaging in foreign banking or financial operations) to use or conspire to use the credit, funds, or power of the corporation to fix or control the price of any commodities traded in by such corporation. The penalty is set at between one and five years in prison. No reported prosecutions under this statute evidently exist.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates: (1) section 9(b) of the Commodity Exchange Act, as amended (7 U.S.C. 13(b)) (relating to manipulation of the price of a commodity in interstate commerce), or section 9(d) or (e) of that Act (7 U.S.C. 13 (d) or (e)) (relating to transactions in commodity futures by commissioners, employees, or agents of the Commodity Futures Trading Commission); or (2) the eleventh paragraph of section 25(a) of the Act of December 23, 1913, as added by the Act of December 24, 1919 (12 U.S.C. 617) (relating to the prohibition on the use of corporate funds to manipulate the price of a commodity by an agent of a corporation organized to do foreign banking).

The word "violates" is defined in section 111 and means in fact to engage in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. Hence, the precise elements contained in 7 U.S.C. 13 (b), (d), and (e), and 12 U.S.C. 617 (including culpability requirements) constitute the offenses described in this section. Whether a mental state needs to be proved as to the fact that the conduct violates the statute or regulation is to be determined by reference to the underlying statute and not by section 303(d)(1)(A). The brief descriptions of the incorporated sections of titles 7 and 12 in parentheses are not to be construed as limiting the scope of application thereof.[73]

3. Jurisdiction

This section contains no subsection setting forth the jurisdiction. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2), which incorporates the scope of the statutes "violated".

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[73] See section 112(b).

4. *Grading*

An offense under this section is graded as a Class D felony (up to six years in prison). This preserves the current felony status of the offenses.

SECTION 1764. ANTITRUST OFFENSES

1. *In General and Present Federal Law*

This section incorporates into the Federal Criminal Code the felony provisions of 15 U.S.C. 1, 2, and 3. No attempt has been made to alter the content of the offenses. Rather, the technique used, as in the preceding section, was to draft the offenses in terms of whoever "violates" the underlying statutes, thereby preserving the elements of the offenses as fashioned by the Congress and by the courts through a wealth of judicial interpretation.[74]

15 U.S.C. 1 makes every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations" illegal.[75] The final sentence of section 1 provides that every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 (15 U.S.C. 1-7) to be illegal [76] is guilty of a felony punishable by up to three years in prison and a maximum fine of $100,000, except that, in the case of a corporation, the maximum fine is $1,000,000.[77]

15 U.S.C. 2 makes it an offense for any person to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several States, or with foreign nations. The penalty is identical to that in section 1.

15 U.S.C. 3 declares every contract or combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory and any State or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or foreign nation, illegal. The penalty is the same as that prescribed in section 1.

2. *The Offense*

Subsection (a) provides that a person commits an offense if he violates section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3) (relating to agreements in restraint of trade and monopolizing trade).

The term "violate" is defined in section 111 to mean in fact to engage in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Hence, this section carries forward the precise elements (including culpability elements) contained in the sections referred to. Note that, under section 1004(b), the offenses set forth in chapter 10 (i.e., criminal attempt, criminal conspiracy, and criminal solicitation) are inapplicable to an offense under this section. The purpose of this provision is to retain the present scope of the antitrust offenses, without the dramatic changes in this specialized area that would be created through application of the offenses in chapter 10. The Committee concurs in the observations in a published article,[78] that application of the chapter 10 offenses to this section would be inappropriate in that it would both destroy the valuable body of case law as to attempt and conspiracy that has been developed over nearly a century in the antitrust field and would add to the current, delicately balanced statutory scheme in 15 U.S.C. 1, 2, and 3 a solicitation offense that is not justified on grounds of public policy. Accordingly, the Committee has made an exception to the general policy of uniform application of the chapter 10 provisions so as to preserve the precise contours of the present antitrust crimes.

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[74] See, e.g., *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). In the conforming amendments the final sentences of 15 U.S.C. 1, 2, and 3 are each amended so as to make a cross-reference to section 1764.

[75] A complex exception, involving a proviso and a proviso to the proviso, exists with respect to contracts or agreements prescribing minimum prices for the resale of commodities.

[76] Only sections 1 through 3 define acts that are illegal.

[77] See P.L. 93-528, December 21, 1974, which increased the offenses in 15 U.S.C. 1, 2, and 3 to their current levels. Formerly, the offenses were misdemeanors carrying a maximum one-year prison sentence and a fine of $50,000.

3. Jurisdiction

This section contains no subsection setting forth the extent of jurisdiction. Therefore, Federal jurisdiction is governed by the provisions of section 201(b)(2), which incorporates the scope of jurisdiction of the statutes "violated".[79]

4. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). This preserves the present penalty levels applicable to 15 U.S.C. 1, 2, and 3, as enacted by Public Law 93-528.

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[78] *Reform of the Federal Criminal Law: A major change in Criminal Antitrust Liability,* Mark Crane, Antitrust Bulletin 493, 499-506 (1974).

[79] *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 443-455 (2d Cir. 1945), holding that extraterritorial jurisdiction exists over these offenses.

CHAPTER 18.—OFFENSES INVOLVING PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE

This chapter is divided into seven subchapters. Subchapter A covers organized crime offenses; subchapter B covers drug offenses; subchapter C covers explosives and firearm offenses; subchapter D covers riot offenses; subchapter E covers gambling, obscenity, and prostitution offenses; subchapter F covers public health offenses; and subchapter G covers miscellaneous offenses.

SUBCHAPTER A.—ORGANIZED CRIME OFFENSES

(Sections 1801-1806)

The activities of organized crime are presently subject to prosecution under a broad range of Federal criminal laws. With the exception of a few statutes, however, these Federal laws have been drafted and applied so as to reach all violators, irrespective of their organized crime connections, and are not aimed solely or even primarily against organized crime. The reasons for this are probably historical; the basic Federal criminal laws were enacted well before the existence of highly organized crime was perceived. More recently, however, a growing awareness of the impact of organized criminal activities in the United States and of the inability of State and local law enforcement officials to control organized crime has resulted in the enactment of significant Federal criminal legislation focused at the activities of organized crime and the problems involved in detecting, prosecuting, and punishing its members.[1]

Probably the most heavily relied upon provision in Federal criminal law for dealing with organized criminal activities is the conspiracy statute, 18 U.S.C. 371, which makes it a crime, punishable by a maximum term of imprisonment for five years, to conspire "to commit any offense against the United States, or to defraud the United States."[2] In addition to this statute, title 18 contains a number of prohibitions against activities commonly associated with members of organized crime, such as gambling (18 U.S.C. 1084, 1301, 1511, 1953, 1955), loansharking (18 U.S.C. 891-894), prostitution (18 U.S.C. 2421-2424), interference with commerce by robbery or extortion (18 U.S.C. 1951), interstate travel in aid of various racketeering enterprises (18 U.S.C. 1952), and infiltration of legitimate business (18 U.S.C. 1961-1968). Unlawful trafficking in narcotics, also considered to be an important organized criminal activity, is subject to prohibitions contained in title 21 (21 U.S.C. 841, *et seq.*). Other kinds of organized criminal activity proscribed by Federal law include bribery (18 U.S.C. 201, 224), counterfeiting (18

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[1] See generally Final Report, pp. 287-290; Working Papers, pp. 382-384, 1317-1318.

[2] Particular statutes will be discussed in more detail in connection with the sections of this subchapter to which they relate.

U.S.C. 471-474), hijacking (18 U.S.C. 659), interstate transportation of stolen property (18 U.S.C. 2314, 2315), dealing in pornography (18 U.S.C. 1461-1465), unlawful activities with respect to labor unions and pension and welfare funds (18 U.S.C. 664, 1954; 29 U.S.C. 186), bankruptcy, mail, and wire fraud (18 U.S.C. 152, 1341, 1343), trafficking in contraband cigarettes (18 U.S.C. 2341-2346), and obstruction of Federal law enforcement (18 U.S.C. 1501-1510).

In 1967, the President's Task Force on Organized Crime concluded that then current Federal and State criminal laws were "reasonably adequate" to deal with organized crime. Since that time, however, there has been enacted additional legislation, both substantive and procedural in nature, designed more fully to combat organized crime activities.

The most significant such substantive provisions are 18 U.S.C. 1961-1963,[3] 18 U.S.C. 1511,[4] and 21 U.S.C. 801-966 (chapter 136 of title 21).[5]

Sections 1961-1963 of title 18 were designed to meet the growing problem of organized criminal groups, particularly their infiltration of businesses, unions, and government. In general, the sections make punishable the investment of organized crime funds in businesses engaged in, or the activities of which affect, interstate or foreign commerce, or the acquisition or maintenance of an interest in, or participation in the conduct of, such a business by means of certain racketeering activities.

Section 1511 of title 18 makes it an offense to conspire to obstruct State or local law enforcement with intent to facilitate an illicit gambling business.

Chapter 13 of title 21 deals comprehensively with trafficking in narcotics and other dangerous drugs and provides severe penalties for offenders engaged in the drug traffic as a continuing criminal enterprise.

To strengthen law enforcement agencies in combatting organized crime, Congress also recently enacted several procedural and sentencing statutes.

18 U.S.C. 3331 provides for the creation of special grand juries periodically in judicial districts having more than four million inhabitants and elsewhere as the Attorney General, his Deputy, or designated Assistant certifies is necessary.

18 U.S.C. 3503 provides for the taking of depositions to preserve testimony in cases against persons believed to have participated in organized criminal activity.[6]

18 U.S.C. 3575 provides for the imposition of severe sentences (up to twenty-five years in prison) for organized crime offenders (and others) where the public cannot be adequately protected under ordinary sentencing standards. A similar dangerous special offender provision limited to drug offenders is found in 21 U.S.C. 849.

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[3] Title IX of the Organized Crime Control Act of 1970. P.L. 91-452, 84 Stat. 941. See generally, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, R. Blakey and B. Gettings, 53 Temple L.Q. 1009 (1980), reprinted in Hearings, Part XVI at 12432-12472.

[4] Title VIII of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 936.

[5] Title II of the Comprehensive Drug Abuse Prevention and Control Act, P.L. 91-513, 84 Stat. 1245.

[6] See *United States* v. *King*, 552 F.2d 833, 838-844 (9th Cir. 1976).

The Committee considers that, with the exception of the dangerous special offender sentencing provisions which will be superseded by the wholly revamped sentencing system contained in the bill, there is definitely a need to perpetuate the broad range of Federal substantive and procedural statutes currently available for prosecuting organized criminal activities. In the main, such provisions are continued in other parts of the proposed new Federal Criminal Code (e.g., sections 1002 (Criminal Conspiracy), 1841 (Engaging in a Gambling Business), 1843 (Engaging in a Prostitution Business), 1811 (Trafficking in an Opiate), 1721 (Robbery), etc. This subchapter in addition brings forward certain offenses primarily or exclusively directed at organized crime. Thus section 1802 (Racketeering) carries forward 18 U.S.C. 1962 (b) and (c); section 1803 (Washing Racketeering Proceeds) carries forward 18 U.S.C. 1962(a); section 1804 (Loansharking) would replace most of chapter 42 of title 18 (18 U.S.C. 891–896); and section 1805 (Trafficking in Contraband Cigarettes) brings forward the offenses in 18 U.S.C. 2344, enacted by Congress in 1978.

Beyond this, however, the Committee believes that leadership of an organized criminal syndicate should be made specially punishable. As has been seen, present law attempts to accomplish this result by use of special dangerous offender sentencing provisions applicable to organized crime leaders. This general approach was followed by the National Commission and S. 1, as originally introduced in the 93d Congress. However, for various reasons, including the considerable legal and practical difficulties in utilizing the dangerous special offender statutes [7] as well as the development in this Code of a new sentencing guidelines system that is expected to function as an effective substitute for such laws, the Committee, as noted earlier, has determined not to retain those statutes. In their stead, the Committee has concluded that further protection of the public is needed in the form of a new offense aimed strictly at the various types of leaders of organized crime activities, which offense would carry an appropriately severe penalty.[8] Utilization of this statute (section 1801 (Operating a Racketeering Syndicate)) in any given case would preclude resort to the special dangerous offender sentencing provisions, and *vice versa*.

SECTION 1801. OPERATING A RACKETEERING SYNDICATE

1. In General and Present Federal Law

As indicated, this section has no counterpart in present Federal law and is patterned after section 1005 of the National Commission's Study Draft. The offense consists of operating a racketeering syndicate, a term defined to mean, in essence, a group of five or more persons who engage on a continuing basis in any of enumerated racketeering activities.

In order to illuminate the reasons for the Committee's decision to include this offense in the proposed Federal Criminal Code, it is useful to examine in more detail the approach to organized crime offenders embodied in the proposals of the National Commission's Final Report. Basically the recommendations there consisted of a variation of the dangerous special offender concept recently added to current law. Under 18 U.S.C. 3575, as previously noted, a dangerous special offender may be sentenced to imprisonment for a term of up to twenty-five years, so long as the sentence is "not disproportionate" to the sentence otherwise authorized for the offense. Under section 3202 of the Final Report, by contrast, a dangerous special offender could be sentenced to imprisonment for a term within the upper range of the authorized sentence of his felony (e.g., for a Class A felony, he could receive twenty to thirty years).[9]

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[7] See, e.g., *United States* v. *Neary*, 552 F.2d 1184 7th Cir. 1977); *United States* v. *Duardi*, 529 F.2d 123 (8th Cir. 1975); *United States* v. *Kelly*, 519 F.2d 251 (8th Cir. 1975); *United States* v. *Bailey*, 537 F.2d 845 (5th Cir. 1976).

[8] This approach was recommended by S. 1400, as well as in the Study Draft of the National Commission, section 1005; see also Final Report, § 3202, Comment, p. 290.

It can be argued in support of this approach (which was also substantially adhered to in S. 1, as originally introduced in the 93d Congress) that: (1) factors warranting imposition of penalties more severe than ordinary relate to the treatment of offenders more than to substantive criminality; (2) the sentencing process is considerably more flexible regarding proof than is the convicting process; and (3) consideration of all the organized crime aspects of a case can be given more readily in the sentencing process than during a trial on the merits.

The competing arguments are that: (1) the special offender sentencing provisions are complex and difficult to implement;[10] (2) it can be expected that organized crime figures will be treated somewhat more severely than others without the need for special legislation; (3) organized crime offenders should be punished with "disproportionate" severity, and that is more properly accomplished under specific standards defined by the Congress, after trial and conviction in the traditional manner; and (4) making organized crime leadership a distinct Federal offense subject to severe punishment attacks the problem directly and would likely have a greater deterrent effect.

The Committee deems the latter arguments more weighty and, as noted above, has concluded that a superior approach is to make leadership of organized criminal operations a distinct offense. Through guidelines the Sentencing Commission established by the Code will, it is anticipated, make leadership in an organized criminal enterprise a circumstance warranting the imposition of a sentence in the upper range permitted by law. In that way, society will be afforded alternative means for deterring and punishing organized criminal activities and experience with each approach will be available to inform a future decision whether one or the other technique should be modified or abandoned.

The need to punish leadership of an organized criminal syndicate stems from the increased danger posed by such organizations. However serious may be the individual crimes committed by organized criminal elements, it is clear that the overriding threat to the community lies in the existence of a continuing criminal organization. Moreover criminal syndicates typically are operated so that leaders are well insulated from the crimes involved in day-to-day operations. Consequently, the syndicates and their bosses remain largely unaffected and unimpaired even when certain members' crimes are met with successful prosecution. Such considerations, in the view of this Committee, strongly support the concept of this section that operating an organized criminal syndicate should be a Federal offense in and of itself. To be sure, proving the offense will doubtlessly (as it should) be difficult. But the Committee does not anticipate that the practical problems will be insuperable. And, when organized crime leaders are faced with imprisonment for up to twenty years *because* of their position of leadership—i.e., when they are made to risk more than just a possible sentence for conspiracy to commit much lower graded felonies—then it may be that such persons will balk at creating or participating in highly organized criminal enterprises. That, at any rate, is one of the benefits which it is hoped will result from the enactment of this section.

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[9] The definition of "dangerous special offender" included two types of persons not covered by existing law: (1) a mentally abnormal person whose felony is committed as an instance of aggressive behavior with heedless indifference to the consequences of such behavior; and (2) a person who manifests special dangerousness by using a firearm or destructive device in the commission of the offense or flight therefrom. In all probability, neither of these additional categories would include organized crime leaders.

[10] Indeed, so difficult to satisfy are the criteria contained in 18 U.S.C. 3575 that the provisions of that statute have seldom been successfully invoked by the government since its enactment in 1970. See cases cited in note 7, *supra*. The extent to which utilization of these provisions might as a practical matter be inhibited was not, of course, apparent to the draftsmen of the National Commission, whose Final Report was published only a few months after 18 U.S.C. 3575 became law.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if he "organizes, owns, controls, manages, directs, finances, or otherwise participates in a supervisory capacity in a racketeering syndicate."

This section is designed to reach the entrepreneurs in a crime syndicate, those who direct or finance its operations in a general way, and the leaders and deputy leaders on a day-by-day basis (including any corrupt public servants). It is also intended to encompass, either directly or through the application of section 401, lawyers, accountants, and others who furnish managerial assistance. This section does not, however, embrace mere employees and "enforcers"—gunmen and thugs who carry out orders but who have no voice in the management of the syndicate nor any supervisory duties.[11]

The term "racketeering syndicate" is defined in section 1806(g) to mean a group of five or more persons who, individually or collectively, engage on a continuing basis in conduct constituting racketeering activity.

Several aspects of this definition deserve explication. The word "group" is defined in section 111 to mean, *inter alia*, an association of persons, whether or not a legal entity. Hence the word "group" imports a requirement that the persons comprising the syndicate be associated in some manner, such as by common goals, sharing in profits, or otherwise mutually deriving pleasure or benefits from the enterprise. For example, five or more smugglers who were not associated but independently plied their "trade" would not be a "group." If, however, the smugglers agreed to pool their profits or resources, coordinate their activities, or to act in concert or cooperation, they would constitute a group. The term "group" is also meant to encompass an association of persons in which not all engage in the same kind of racketeering activity. This is made explicit by the phrase "individually or collectively." Thus, a group of persons associated, e.g., for profit would come within the definition of "racketeering syndicate" even if each engaged in a different kind of illicit conduct falling within the definition of "racketeering activity." This enables the section to cover the situation, not uncommon in a large criminal organization, where some individuals are involved in loansharking, others in gambling, still others in narcotics offenses, etc.[12] On the other hand, it is not the Committee's intent that this offense be used to charge—and thereby label—a legitimate business entity a "syndicate" merely because five or more employees may be engaging in racketeering activity. For example, in the Committee's view, it would not be an appropriate use of this statute to bring charges under this section against a large corporation because a number of its employees were engaged in securities fraud on a continuing basis.

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[11] See Working Papers, p. 383. This section is far more definite and clear in its coverage than the New Jersey "gangster" statute declared unconstitutional on vagueness grounds in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

The group must engage in racketeering activity "on a continuing basis." What constitutes a continuing basis will depend on the circumstances and no doubt will be the subject of judicial interpretation. The Committee intends that the concept not be construed in terms of a fixed interval such as thirty days,[13] but that it depend upon the nature of the illicit activity being conducted. For instance, a group of persons that engaged in complex narcotics importation transactions might require several months to consummate the offenses, (and hence could not, until then, be said to be engaged in conduct constituting racketeering activity on a continuing basis), whereas a group formed to perform a series of bank robberies in the course of only a few days might well be regarded as engaged in such type of racketeering activity on a continuing basis. Viewed in this light, the Committee believes that the concept of engaging in conduct on a "continuing basis," while necessarily somewhat imprecise, is definite enough to give adequate warning to potential violators of the conduct prohibited.[14] An example of comparable legislation is 18 U.S.C. 1952, which uses the phrase "business enterprise." The phrase has been sustained against vagueness challenge.[15] There would seem little difference in terms of preciseness between the notions of engaging in conduct on a "continuing basis" and engaging in a "business enterprise." [16]

The term "racketeering activity"—which is a constituent of the definition of "racketeering syndicate"—is defined in section 1806(f). The definition has three distinct branches. The first consists of the enumeration of more than two score felonies under this proposed

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[12] Notwithstanding that the offense here requires at least five participants in the underlying "group," the Committee intends that the general conspiracy section (1002) be deemed applicable to an agreement, e.g., between less than five persons to form a criminal syndicate. Compare section 1841 (Engaging in a Gambling Business) and the discussion of the similar issue there involving the definition of "gambling business"; see also 18 U.S.C. 1955 and *Iannelli* v. *United States*, 420 U.S. 770 (1975).

[13] Unless, of course, such a construction is necessary in order to render the statute impregnable to vagueness attack. Cf. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367–374 (1971).

[14] See sustaining the phrase "continuing criminal enterprise" in 21 U.S.C. 848, *United States* v. *Manfredi*, 488 F.2d 588, 602–603 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); *United States* v. *Kirk*, 534 F. 2d 1262, 1277 (8th Cir. 1976), and cases cited therein.

[15] *United States* v. *Cozzetti*, 441 F.2d 344, 348 (9th Cir. 1971).

[16] Cf. also sections 1841 and 1843.

Code—types of conduct deemed most characteristic of organized criminal activity, such as trafficking in narcotics and other dangerous drugs,[17] bribery and graft, murder, kidnapping, arson, extortion, blackmail, loansharking, bankruptcy fraud, counterfeiting, smuggling, firearms violations, dissemination for profit of obscene material, criminal infringement of a copyright and so forth.[18] The second branch consists of conduct constituting a felony under a State statute relating to murder, kidnapping, arson, robbery, burglary, bribery, extortion, theft, trafficking in stolen property, trafficking in narcotics or other dangerous drugs, or engaging in a gambling business. This is derived from part of the definition of "racketeering activity" in 18 U.S.C. 1961 (1), which covers, in subparagraph (A), "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." These State offenses (to which the Committee has added theft and trafficking in stolen property) have also been selected because of their common association with organized criminal activity.[19] The third branch of the definition specifically brings forward conduct defined as "racketeering activity" in former 18 U.S.C. 1961 (1)(B), (C), or (D) and engaged in while those provisions were in effect. Those subparagraphs, in combination, contain a list of offenses comparable to those enumerated in the first branch of the instant definition. The purpose of including them here is a prophylactic one—i.e., to insure that violations of those pertinent offenses that occur between October 15, 1970 (the date of enactment of the Organized Crime Control Act of 1970) and the effective date of the new Federal criminal Code may be used as the basis for a prosecution and conviction under section 1801. Such use of a prior violation would not constitute *ex post facto* punishment, provided the government showed that the defendant had continued after the effective date of this proposed Code, to be the organizer, owner, etc., of a "racketeering syndicate," as defined above.[20]

B. Culpability

The conduct in this offense is organizing, owning, controlling, etc., a syndicate. Since no culpability standard is specifically prescribed, the applicable state of mind that must be shown is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[21]

The fact that the syndicate was a "racketeering syndicate" as defined in section 1806 is an existing circumstance. As no culpability level is designated in this section, the applicable state of mind to be proved is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the syndicate was of the prohibited type.[22]

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[17] See 21 U.S.C. 848, punishing a "continuing criminal enterprise" involving controlled substances.

[18] See Working Papers, pp. 383-384. The inclusion of the commercial dissemination of obscenity and criminal infringement of a copyright offenses in "racketeering" is new and reflects the experience of the Department of Justice indicating the increasing involvement of organized crime in these areas in the past few years.

[19] See Hearings, p. 8614 (testimony of G. Robert Blakey).

[20] *United States* v. *Campanale*, 518 F. 2d 352, 364-365 (9th Cir.), cert. denied, 423 U.S. 1050 (1975); cf also *United States* v. *Wechsler*, 392 F. 2d 344, 346-347 (4th Cir.), cert. denied, 392 U.S. 932 (1968); *United States* v. *Smith*, 464 F. 2d 1129, 1132-1135 (2d Cir.), cert. denied, 409 U.S. 1023 (1972).

[21] See sections 303(b)(1) and 302(b)(1).

3. Proof

Subsection (b) provides that proof that a person has shared in the proceeds from a racketeering syndicate to the extent of $5,000 or more in any thirty-day period constitutes *prima facie* evidence that the person has organized, owned, controlled, managed, directed, financed, or otherwise participated in a supervisory capacity in such syndicate. This provision is designed to obviate what otherwise might be insuperable problems of proof with respect to a defendant's role in a criminal syndicate. The Committee considers that the provision merely gives to the evidence its natural force since it would be highly unlikely that a person who shared to the extent of $5,000 or more from the proceeds of a criminal syndicate would not have some leadership role within the organization.

The provision is not intended to reach all persons who merely "receive" more than $5,000 from a racketeering syndicate in a thirty-day period. Such a provision would be too broad and could conceivably include many persons performing legitimate services for the syndicate, as well as persons in non-supervisory positions who receive a salary from the syndicate (e.g., a highly paid "enforcer" on contract to the syndicate). The phrase "shares in the proceeds from" is thus designed to narrow the provision to instances in which a person had a relationship whereby he obtained considerable monies generated by the activities engaged in by the syndicate.[23] For example, the crime boss who received tribute to the extent of $5,000 or more from others for the use of his "territory" would be subject to the inference, as would a member of a criminal syndicate who received $10,000 of the funds from a bank robbery. The term "proceeds" is intended to have essentially the same meaning as in 18 U.S.C. 1952 and to refer to monies generated from the syndicate's activities.[24]

The term "*prima facie* evidence" is defined in Rule 25.1 of the Federal Rules of Criminal Procedure, as proposed in the subject bill. In essence the consequences of the designation are that a judge may not dismiss a case for lack of other proof of a defendant's leadership role, once the fact that he shared to the extent of $5,000 in the proceeds from a racketeering syndicate is established (unless from other evidence no juror could find beyond a reasonable doubt that the person had a leadership position), and that the judge shall instruct the jury that the proven fact is one from which ordinarily it can be inferred that the defendant was an organizer, owner, etc., of such a syndicate.

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction over an offense herein is governed by the provisions of section 201(b)(2). This broad scope of jurisdiction is predicated principally upon findings expressed by the Congress in the Organized Crime Control Act of 1970.[25]

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[22] See sections 303(b)(2) and 302(c)(1).

[23] The activities providing the source of a $5,000 or more payment could be legitimate, if the government shows that the group also engages in "racketeering activity" on a continuing basis so as to come within the definition of "racketeering syndicate."

[24] Cf. *United States* v. *Jeffers*, 532 F. 2d 1101, 1115–1117 (7th Cir. 1976), aff'd on other grounds, 432 U.S. 137 (1977). *United States* v. *Marquez*, 449 F. 2d 89 (2d Cir. 1971), cert. denied, 405 U.S. 963 (1972).

5. Grading

An offense under this section is graded as a Class B felony (up to twenty-five years in prison). This high penalty is deemed warranted because of the focus of the offense on leadership in an organized criminal syndicate *per se*, and not on the incidental crimes that such an organization or its members may commit. In addition to the penalties attaching to its status as a Class B felony, a defendant convicted of having violated this section is also liable to the criminal forfeiture provisions set forth in section 2004 which require him to forfeit, among other things, any proceeds or property constituting his interest in the racketeering syndicate. The provision is derived from 18 U.S.C. 1963, which has been sustained as constitutional.[26]

SECTION 1802. RACKETEERING

1. In General and Present Federal Law

This section brings forward offenses defined in 18 U.S.C. 1962(b) and (c), part of the Organized Crime Control Act of 1970.

18 U.S.C. 1962(b) provides that it shall be unlawful for any person through [27] a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. 1962(c) provides that it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

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[25] Public Law 91-452, 84 Stat. 922, Section 1 provides in part that: "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact." See also 21 U.S.C. 801; *Perez* v. *United States*, 402 U.S. 146 (1971).

[26] See *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979); *United States* v. *Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973); cf. also *United States* v. *Rubin*, 559 F.2d 975, 990–993 (5th Cir 1977).

[27] The concept "through" is used in the sense of "by means of". See *United States* v. *Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir.) cert. dismissed, 439 U.S. 801 (1978); *United States* v. *Salvitti*, 451 F. Supp. 195, 197 (E.D. Pa.), aff'd 588 F.2d 824 (3d Cir. 1978); *United States* v. *Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1979), cert. denied, 441 U.S. 933 (1979). The Committee rejects holdings that limit the concept to "active" conduct or suggest that the racketeering must "advance" the affairs of the enterprise. See *United States* v. *Mandel*, 591 F.2d, 1347, 1374–76 (4th Cir.), aff'd *per curiam en banc*, 602 F.2d 653 (4th Cir. 1979), cert. denied, 100 S. Ct. 1647 (1980); *United States* v. *Webster*, 639 F.2d 174, 185 (4th Cir. 1981).

enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The term "pattern of racketeering activity" is defined in 18 U.S.C. 1961 to require at least two acts of racketeering activity (a term also defined in section 1961 and discussed in connection with the prior section), one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

The phrase "unlawful debt" is also defined in section 1961 and means, in essence, any debt which is unenforceable in whole or in part under State or Federal law because of "the laws relating to usury," any debt incurred in connection with an illegal gambling business, or any debt incurred in connection with the business of lending money or a thing of value at a usurious rate that is at least twice the enforceable rate under State or Federal law.

Finally, the word "enterprise" is defined in section 1961 to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if, "through [28] a pattern of racketeering activity, he acquires or maintains an interest in, or controls or conducts, an enterprise."

By combining the "acquires or maintains an interest in" offenses with the "conducts" offenses, this section consolidates 18 U.S.C. 1962 (b) and (c). The branch of the latter statute punishing whoever "participate[s] . . . in the conduct" of an enterprise by such means has been eliminated, in view of the general section dealing with accomplice liability.[29] Similarly, the phrase "directly or indirectly" in current law has been dropped as redundant since the concept of indirect action is implicit in all the verbs used. The verb "controls" has been added to insure coverage of top echelon racketeers who may effectively control an enterprise without having any legal interest therein.

The term "pattern of racketeering activity" is defined in section 1806(e) to mean "two or more separate acts of racketeering activity, at least one of which occurred after the effective date of this chapter, which have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." The phrase "racketeering activity" is also defined in section 1806 and is basically identical to the definition of that same term in 18 U.S.C. 1961.

The definition of "pattern of racketeering activity" continues the current law requirement of at least two acts of racketeering activity. However, whereas existing law on its face requires only the commission of two or more such acts within a ten-year period in order to show a "pattern," the subject bill eliminates that artificial time limitation but contains an express requirement of a nexus between the offenses in order to establish a "pattern"—i.e., that the acts be "interrelated by distinguishing characteristics" and not be mere "isolated events." [30]

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[28] See *supra* note 27.

[29] See section 401.

As under present law, this section provides that one of the acts of racketeering activity may precede the effective date of this chapter. Since the statute therefore mandates that the defendant commit at least one offense, related to that prior offense, *after* this chapter is enacted, it does not violate the *ex post facto* clause of the Constitution.[31]

The terms "acquires," and "maintains an interest" are designed to bear the same meanings as under present law. The word "conducts" (which is also taken from current law) is intended to be broadly interpreted and to reach any employee or agent of an enterprise, however low his position. In essence, "conducts" should be construed in the same manner as under present 18 U.S.C. 1955 and proposed section 1841.[32] The term "enterprise" is defined in section 111 to include any business or other undertaking by an individual, a "group", an "organization" or a government. When the definitions are consulted together, the term "enterprise" closely parallels the definition of that term in 18 U.S.C. 1961. The definition of "group," for example, specifically includes an association of persons, whether or not a legal entity, as does the term "enterprise" in section 1961.[33]

The Committee has made certain changes in current law with respect to the collection of an unlawful debt aspect. Under 18 U.S.C. 1962(b) and (c), the offense is committed either if a "pattern of racketeering activity" is engaged in (requiring at least two acts of racketeering activity) or if an enterprise is conducted "through collection of an unlawful debt." The latter branch requires only a single instance of such collection. The Committee considers this to be anomalous and believes that the severe penalties of the anti-racketeering statute should be available only when a pattern of racketeering activity, involving two or more acts of racketeering activity, can be established. Accordingly, the Committee has incorporated into the loansharking offense in section 1804 (one of the offenses included within the definition for "racketeering activity") that part of the present collection of an unlawful debt offense that relates to the collection of loans at usurious rates.[34] The part of the collection of an unlawful debt offense in current law that deals with collection of gambling debts has not been directly carried forward into the new Criminal Code, since the Committee believes that such activity in general is not necessarily associated with organized crime and hence is not appropriate for coverage in this section. However, two or more related acts of collecting a gambling debt would be covered in this section if those acts constituted, as they may, a violation of section 1841 (Engaging in a Gambling Business). In other words, acts of collecting gambling debts will be punished as racketeering under the proposed Code if the perpetrator did so as part of the operation or conduct of a gambling *business*, where there is a strong likelihood of a linkage of the activity to organized crime.

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[30] While it is necessary, in order to show a "pattern", to show that the acts are somehow related to each other, such relationship may be established by proof that the acts had a common goal of furthering or maintaining the enterprise. Thus, no radical change is intended from current case law interpreting the term "pattern". See, e.g., *United States* v. *Weismann*, 624 F.2d 1118, 1121-1123 (2d Cir. 1980); *United States* v. *Elliott*, 571 F.2d 880, 899 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The term "racketeering activity" is discussed at length in connection with section 1801.

[31] See *United States* v. *Campanale, supra* note 20.

[32] See, e.g., *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972) vacated and remanded on other grounds, 417 U.S. [illegible] (1974); *United States* v. *Riehl*, 460 F.2d 454 (3d Cir. 1972); *United States* v. *Hunter*, 478 F.2d 1019 (7th Cir.) cert. denied, 414 U.S. 857 (1973); *United States* v. *Palmer*, 465 F.2d 967 (6th Cir.), cert. denied, 409 U.S. 874 (1972). The meaning of "conducts" would not extend to the activities of a patron or customer of the enterprise.

[33] The term "enterprise" as used in 18 U.S.C. 1962 has been construed broadly to include a combination of individuals associated with various corporations. *United States* v. *Thevis*. 474 F. Supp. 134 (N.D. Ga. 1979), as well as businesses both foreign and domestic and illegal as well as legal. See, e.g., *United States* v. *Turkette*, ——U.S.—— (decided June 17, 1981); *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979). *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States* v. *Cappetto*, 502 F.2d 1351 (7th Cir. 1974), cert. denied. 420 U.S. 925 (1975); *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), cert. denied. U.S. (1977); *United States* v. *Sutton*, 642 F.2d 1001 (6th Cir. 1980) *(en banc)*. The Committee endorses these holdings. It has also been interpreted to include a unit of domestic government, in light of the explicit congressional findings that organized crime uses its money and power to "subvert and corrupt our democratic processes" and that its activities "threaten the domestic security and undermine the general welfare of the Nation and its citizens", *United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977) (holding a municipal police department to be an "enterprise"); *United States* v. *Frumento*, 552 F.2d 534 (3d Cir. 1977) (Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes held to be an "enterprise"); but see *United States* v. *Mandel*, 415 F. Supp. 997, 1020-1022 (D. Md. 1976) (State of Maryland not an "enterprise"). The Committee intends that the same broad interpretations be given to the term "enterprise" in this bill.

B. Culpability

The conduct in this offense is acquiring or maintaining an interest in, or conducting, some kind of venture through a pattern of racketeering activity. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[35]

The element that the type of venture involved was an "enterprise" is an existing circumstance. As no culpability level is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[36]

3. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, Federal jurisdiction over an offense herein is governed by the provisions of section 201(b)(2). This slightly expands current law, which requires that the enterprise be engaged in or affect interstate or foreign commerce. As a practical matter, virtually every enterprise's activities under this section would meet the "affect" criterion.[37] However, the Committee believes that it should not be necessary to show a nexus with interstate commerce in view of the findings and purpose expressed by Congress in the Organized Crime Control Act of 1970, to the effect that the activities of organized crime in the aggregate have a substantial adverse impact upon a variety of Federal interests, including but not limited to interstate and foreign commerce.[38]

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[34] See section 1804(a)(3); see also the definition of "unlawful debt" in 18 U.S.C. 1961 (6), set forth above. Minor changes with respect to the nature of the usurious loan have been made in order to conform the offense to existing definitions in the loansharking field.

[35] See sections 303(b)(1) and 302(b)(1). No proof of mental state is required, however, as to the fact that conduct constituting "racketeering activity" is defined as an offense or described in a statute. See section 303(d).

[36] See sections 303(b)(2) and 302(c)(1).

[37] Cf. *United States* v. *Altese, supra* note 32, at 108 (dissenting opinion).

4. Grading

An offense under this section is graded as a Class B felony (up to twenty-five years in prison). In the Committee's opinion, Class B felony status is justified by the heinous nature of the crime, which requires proof of a least two interrelated felonies constituting "racketeering activity." In addition to the punishment prescribed in this section, an offender is liable to the forfeiture provisions of proposed section 2004, which mandates, upon conviction, the forfeiture, among other things, of any proceeds from or interest of his in the "enterprise." This carries forward in expanded form the provisions of 18 U.S.C. 1963(c).

SECTION 1803. WASHING RACKETEERING PROCEEDS

1. In General and Present Federal Law

This section is intended to prevent the influence of organized crime from spreading throughout the legitimate business community. It closely follows the provisions of 18 U.S.C. 1962(a). That statute provides that it shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal (as defined in 18 U.S.C. 2) "to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The section contains what is in effect an exception for the purchase of securities on the open market for purposes of investment, and without intent to control or participate in the control of the enterprise or to assist another to do so if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the enterprise.

2. The Offense

A. Elements

Subsection (a) provides that a person commits an offense if "by using or investing proceeds from a pattern of racketeering activity, he acquires or maintains an interest in, or establishes or conducts, an enterprise."

The term "proceeds" is intended to receive a broad construction and to be at least the equivalent of the various phrases utilized in current law (e.g., "any income derived, directly or indirectly from"). It is meant to include any gross receipts from a pattern of racketeering activity as well as the fruits realized from those receipts.[39]

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[38] See section 1 of Public Law 91-452, set forth in part in connection with the discussion of jurisdiction accompanying section 1801, *supra* note 25; Cf. *Perez* v. *United States, supra* note 24, sustaining anti-loansharking legislation (18 U.S.C. 891-894) so drafted as to eliminate the need to prove an adverse effect on commerce in a particular case, on the basis of congressional findings that loansharking activities in aggregate have such an effect.

The terms "enterprise" and "pattern of racketeering activity" have been discussed in connection with the two preceding sections, and that discussion should be consulted at this point.[40] The definition of the latter phrase in the subject bill is essentially identical to that in current law, except that certain coverage pertaining to the "collection of an unlawful debt" aspect has been eliminated or narrowed.

As in section 1802, the phrase "directly or indirectly" in present law has been dropped as redundant. Moreover, in place of the words "in the operation of" an enterprise, the Committee has substituted the term "conducts," which is designed to have similar scope. The meaning of "conducts" has been explained in more detail in relation to section 1802 and that discussion is equally applicable here. The Committee has also made a minor change by adding the concept of maintaining an interest in an enterprise as a forbidden use of the proceeds from a pattern of racketeering activity, to conform with the scope of the preceding section (1802) and 18 U.S.C. 1962(b) both of which use the term "maintain."

B. Culpability

The conduct element in this section is acquiring or maintaining an interest in, or establishing or conducting some type of venture by using or investing funds. Since no culpability level is specifically prescribed, the applicable state of mind to be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[41]

The elements that the type of venture was an "enterprise" and that the funds were "proceeds from a pattern of racketeering activity" are existing circumstances. As no culpability standard is specifically designated, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstances existed.[42]

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the proceeds were used to purchase securities of the enterprise on the open market without intent to control or participate in the control of the enterprise, or to assist another person to do so, if the securities of the enterprise held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the enterprise.

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[39] See *United States* v. *Jeffers, supra* note 24, construing "income" in the related statute, 21 U.S.C. 848, to mean gross income or gross receipts.

[40] Significantly, the definition of "enterprise" in section 111 includes both legal and illegal entities, as under present law.

[41] See sections 303(b)(1) and 302(b)(1).

[42] See sections 303(b)(2) and 302(c)(1). No proof of a mental state is required however, as to the fact that "racketeering activity" which is the source of the proceeds is defined as an offense or described in a statute.

This carries forward, virtually verbatim, the present exception in 18 U.S.C. 1962(a). The rationale underlying the exception is not beyond cavil, for it can be persuasively contended that, assuming the proceeds from a pattern of racketeering activity can be traced, no legitimate use or investment thereof should be permitted, irrespective of how diluted the impact of such use or investment may be. However, the Committee has concluded, in part based on the recent vintage of the statute, that its provisions should be continued without major change. The reason for affording the defense is the notion that the severe sanctions of the criminal law should not punish the "washing" of racketeering proceeds where such "washing" by use or investment cannot result in the accumulation of a significant degree of power over another enterprise. In such circumstances the principal basis for disallowing use or investment of racketeering proceeds is to deny to malefactors the opportunity to reap any profits from their illegal activities. While this is a laudable objective, the Committee considers that civil law doctrines, particularly those traditionally associated with equity jurisdiction, are better suited to achieve the goal.[43]

4. Jurisdiction

Since this section does not contain a subsection setting forth the extent of Federal jurisdiction, Federal jurisdiction over an offense in this section is governed by the provisions of section 201(b)(2). This scope of jurisdiction is identical to that in section 1802 (which carries forward the other principal parts of 18 U.S.C. 1962), and the discussion there is incorporated here.

5. Grading

An offense under this section is graded as a Class C felony (up to twelve years in prison). Current law treats the racketeering and "washing" offenses under 18 U.S.C. 1962 equally for grading purposes (i.e., a maximum of twenty years' imprisonment).[44] The Committee believes that the racketeering offense is more serious and accordingly has created a distinction between the grading in this section and that in section 1802, for which Class B felony status is proposed. As under the prior two sections, in addition to the penalty provided here, an offender is liable to the forfeiture provisions of section 2003. This carries forward in expanded form the provisions of 18 U.S.C. 1963(c).

SECTION 1804. LOANSHARKING

1. In General and Present Federal Law

This section carries forward in a condensed form and with some modifications many of the provisions of chapter 42 of title 18 (18 U.S.C. 891-896).[45] As indicated in connection with section 1802, this section also plays a role in preserving an aspect of the racketeering offense in 18 U.S.C. 1962(b) and (c) relating to the collection of an unlawful debt.

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[43] See e.g., K. Patterson, *An Anti-Godfather Statute: Impressing a Constructive Trust on the Fruits of Crime*, 32 Fed. Bar J. 117 (1973).

[44] See 18 U.S.C. 1963(a).

[45] The section adopts in part the recommendation of the American Bar Association. Hearings, p. 5814.

18 U.S.C. 892(a) penalizes by up to twenty years in prison whoever "makes any extortionate extension of credit, or conspires to do so."

The term "extortionate extension of credit" is defined in 18 U.S.C. 891(6) to mean any extension of credit with respect to which it is the "understanding" of the creditor and the debtor[46] at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. The concept of an "extension of credit" is also defined in section 891 and means the making or renewal of any loan, or the entering into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

It has been held that the latter definition reaches gambling debts.[47] The word "understanding" has likewise been broadly interpreted as not connoting an actual agreement, but merely a comprehension by the parties that default could be visited with the use of violence or criminal means.[48]

18 U.S.C. 892(b) contains certain evidentiary provisions applicable to the offense in subsection (a). Thus it provides that in any prosecution under section 892, if it is shown that all of the following factors were present in connection with the extension of credit in question, such proof constitutes *prima facie* evidence that the extension of credit was "extortionate." The four factors enumerated are: (1) the repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable through civil judicial processes against the debtor at the time the extension of credit was made (A) in the jurisdiction within which the debtor, if a natural person, resided, or (B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business; (2) the extension of credit was made at a rate of interest in excess of an annual rate of forty-five percent calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal; (3) at the time the extension of credit was made the debtor reasonably believed that either (A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means, or (B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof; and (4) upon the making of the extension of credit, the total of the extensions of credit by the creditor to

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[46] The terms "creditor" and "debtor" are also defined in section 891.

[47] See *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973); *United States* v. *Keresty*, 465 F.2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972).

[48] See, e.g., *United States* v. *Annoreno*, 460 F.2d 1303, 1308-1309 (7th Cir.), cert. denied, 409 U.S. 852 (1972); *United States* v. *Nakaladski*, 481 F.2d 289, 297 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.[49]

18 U.S.C. 892(c) contains another proof provision dealing with the issue of the creditor's reputation. It provides that in any prosecution under section 892, if evidence has been introduced tending to show the existence of any of the circumstances described in subsections (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

A similar court-created rule has prevailed under the Hobbs Act, 18 U.S.C. 1951, carried forward in proposed section 1722 (Extortion).[50]

18 U.S.C. 893 punishes by up to twenty years in prison whoever willfully advances money or property, whether as a gift, loan, or investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit.

No reported prosecutions under this statute exist.

18 U.S.C. 894(a) punishes by up to twenty years in prison whoever knowingly participates in any way, or conspires to do so, in the use of extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof.

The offense of using extortionate means to collect an extension of credit is carried forward in sections 1722 (Extortion) and 1723 (Blackmail) and the discussion there should be consulted.

The term "extortionate means" is defined in 18 U.S.C. 891(7) and extends to any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

Constitutional challenges to the concept of "implicit threat" have been rejected.[51] The definition of "extension of credit" has been discussed in relation to section 892, above. The phrase "collect an extension of credit" is also defined by the Act and means to induce in any way any person to make a repayment thereof. In addition, the phrase "repayment of any extension of credit" is defined in 18 U.S.C. 891(4) to include the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

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[49] This provision was sustained against constitutional attack in *United States* v. *DeVincent,* 546 F.2d 452 (1st Cir. 1976), cert. denied, 431 U.S. 903 (1977), the Court holding that a juror presented with these facts could rationally conclude beyond a reasonable doubt that the extension of credit was extortionate.

[50] See *United States* v. *Tropiano,* 418 F.2d 1069, 1081 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); *Carbo* v. *United States,* 314 F.2d 718, 740–742 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

[51] *See United States* v. *Curcio,* 310 F. Supp. 351, 356–357 (D. Conn. 1970); see also *United States* v. *DeStafano,* 429 F.2d 344, 347 (2d Cir. 1970), cert. denied, 402 U.S. 972 (1971).

18 U.S.C. 894(b) is an evidentiary provision and states that in any prosecution under section 894, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

18 U.S.C. 894(c) is a parallel provision to section 892(c), permitting evidence of the reputation of the defendant to be introduced to show that any words or other means of communication employed carried an express or implicit threat. The provision has been sustained as constitutional and as consistent with established principles of the law of evidence.[52] As previously noted, a similar judicial doctrine has developed under other Federal extortion statutes.[53]

2. *The Offense*

A. Elements

Subsection (a) sets forth four distinct offenses. Paragraph (1) provides that a person commits an offense if he "makes or finances an extortionate extension of credit."

This carries forward 18 U.S.C. 892(a) and 893. The term "extension of credit" is defined in section 1806 to mean a loan, a renewal of a loan, or a tacit or express agreement concerning the deferment of the repayment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid, and however arising. This is identical, save for stylistic changes, with the definition of the same term in 18 U.S.C. 891. The Committee intends that the full breadth of the definition in current law be perpetuated here, including its applicability to gambling debts.[54]

The phrase "extortionate extension of credit" is also defined in section 1806 and means an extension of credit with respect to which it is the understanding of the creditor and the debtor,[55] at the time it is made, that delay in making repayment or failure to make repayment "could result in the use of force, or in threatening or placing any person in fear that any person will be subjected to bodily injury, kidnapping, or injury to reputation, or that any property will be damaged."

The definition is substantially identical to that in 18 U.S.C. 891 and implicit as well as explicit threats are intended to be within its purview. The part quoted above is designed to conform this section to the language in sections 1722 (Extortion) and 1723 (Blackmail), without being significantly different from the comparable portion of 18 U.S.C. 891 (i.e., "could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person"). The word "understanding" is intended to carry its present meaning.[56]

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[52] *United States* v. *Curcio, supra* note 50 at 357.

[53] See *supra* note 49.

[54] See, e.g., *United States* v. *Schaffer*, 539 F.2d 653 (8th Cir. 1976). Neither money nor any type of property need pass for there to be an extension of credit. See *United States* v. *Briola, supra* note 47.

[55] The terms "creditor" and "debtor" are defined in section 1806 in essentially identical language as used in 18 U.S.C. 891.

[56] See *United States* v. *Annoreno, supra* note 48; *United States* v. *Nakaladski, supra* note 48.

The word "finances" in this paragraph is not defined but is meant to comprehend what is now covered by 18 U.S.C. 893, that is to say, any advancement of money or property, even as a gift, with reason to believe that the recipient will subsequently use the money or property in making an extortionate extension of credit.

Paragraph (2) provides that a person commits an offense if he makes or finances an extension of credit (A) having, in fact, an aggregate value in excess of $100, including unpaid interest or similar charges and any other outstanding extensions of credit to the same debtor, (B) carrying a rate of interest at an annual rate that exceeds the higher of (i) 45 percent or (ii) twice the average annual yield on interest bearing obligations of the United States issued during the month preceding the month in which the extension of credit is made or financed, calculated according to the actuarial method of allocating payments between principal and interest under which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal, and (C) concerning which the repayment or the performance of any promise given in return would not in fact be enforceable through civil judicial process against the debtor (i) in the jurisdiction within which the debtor, if an individual, resided at the time the extension of credit was made, or (ii) in every jurisdiction within which the debtor, if an organization,[57] was incorporated or qualified to do business at the time the extension of credit was made.

This creates a new offense utilizing in substance, but with some modifications to take account of periods in which very high interest rates prevail, the *prima facie* evidence provisions of 18 U.S.C. 892(b) (except for 892(b)(3)). Those provisions, it will be recalled, in combination establish a *prima facie* case that an extension of credit was extortionate. The Committee, however, believes that a loan of such size, at such a high rate of interest, and the repayment of which is unenforceable by any lawful means is in fact loansharking, and that proof of all the specified earmarks of loansharking should obviate proof of the extortionate element as such. This is one of the significant modifications of existing law made by this section.

Paragraph (3) provides that a person commits an offense if he collects a repayment of an extension of credit that was made or financed unlawfully, such making or financing having been in violation of paragraph (a)(1) or (a)(2).

This brings forward 18 U.S.C. 894(a)(1), except that the element of the use of extortionate means has been omitted. The elimination of this element represents the Committee's view that in loansharking operations an extortionate aspect inheres in the dealings and is present, in however subtle a fashion, whenever payment occurs since the debtor is under a constant pressure to make his payments when due.[58] Accordingly, the Committee considers that anyone collecting for the creditor should be deemed guilty of an offense if he has the requisite state of mind (to be discussed subsequently) as to the nature of the indebtedness. The word "repayment" is defined in section 1806 in similar terms to those used in 18 U.S.C. 891 and includes (1) a return, in whole or in part, of an extension of credit, and (2) a payment of interest on, or of a charge for, an extension of credit.

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[57] The term "organization" is defined in section 111.

[58] See *United States* v. *Smith, supra* note 20; *United States* v. *Annoreno, supra* note 48, at 1309. It should be remembered that the concept of extortionate means includes implicit threats.

Paragraph (4) provides that a person commits an offense if he retaliates against any person for failing to repay an extension of credit made or financed in violation of paragraphs (a)(1) or (a)(2) by subjecting any person to bodily injury, kidnapping, or injury to reputation, or by damaging property.

This brings forward 18 U.S.C. 894(a)(2), but clarifies the current notion of "punish" by specifically referring to the same kinds of injury or damage as constitute extortionate means. The notion of "retaliation" is also deemed to convey more precisely the thrust of this offense.[59]

B. Culpability

The conduct in paragraph (1) is making or financing. Since no culpability standard is specifically prescribed, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the character of his actions.[60]

The element that the extension of credit made or financed was "extortionate" is an existing circumstance. As no culpability level is specifically designated, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances comprising that type of indebtedness existed.[61]

In paragraph (2), the conduct is again making or financing an extension of credit and the culpability to be established is at least "knowing." The remaining elements are existing circumstances as to which the requisite culpability is, at a minimum, "reckless," except that, by virtue of section 303(a)(2), no mental state need be shown as to the elements in subparagraphs (A) and (C) that follow the phrase "in fact," (i.e., that the extension of credit was more than $100 in aggregate and that it was unenforceable through civil judicial process in any of the jurisdictions described).

In paragraph (3), the conduct is collecting. Since no culpability level is set forth therein, the applicable mental state that must be proved is at least "knowing," i.e., that the defendant was aware of what he was doing.[62]

The element that the repayment collected was for an "extension of credit that was made or financed unlawfully" is an existing circumstance. As no culpability standard is contained in this section, the applicable state of mind to be established is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the risk that the circumstance existed. Thus, in order for criminal liability to attach to a collector under this section, he must disregard a substantial risk that the debt he is collecting was unlawfully made or financed (as well as being an "extension of credit" as defined in section 1806), and the risk must be such that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the circumstances.[63] The fact that the making or financing was in violation of paragraphs (a)(1) or (a)(2) is also an existing circumstance. However, by operation of section 303(d)(1)(A), no mental state need be shown as to this element.

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[59] See also section 1358 (Retaliating against a Public Servant).

[60] See sections 303(b)(1) and 302(b)(1).

[61] See sections 303(b)(2) and 302(c)(1).

[62] See sections 303(b)(1) and 302(b)(1).

In paragraph (4) the conduct is retaliating by subjecting any person to bodily injury, kidnapping, or injury to reputation, or by damaging property. Since no mental state is specifically prescribed, the applicable level that must be shown is at least "knowing."

The element that the retaliation was "for failing to repay an extension of credit" states the particular purpose for which it must be established that the conduct was performed.

The element that the extension of credit was made or financed in violation of paragraphs (a)(1) or (a)(2) is an existing circumstance as to which, however, by operation of section 303(d)(1)(A), no mental state need be proved. Thus, unlike the offense in paragraph (3), the offense here requires no proof of any awareness of the illegal nature of the extension of credit since the act of retaliating against a person for the nonrepayment of an extension of credit, by one of the prohibited means, itself warrants criminal sanctions.

3. Proof

Subsection (b) provides that if, in a prosecution under subsection (a)(1), evidence is introduced tending to show the existence of the circumstances described in subsections (a)(2) (B) or (C), and direct evidence is not available to show the understanding of the creditor and the debtor concerning the possible consequences of a delay in making repayment of a failure to make payment, for the purpose of showing that understanding the court may permit the introduction of evidence concerning the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension or credit.

This is derived from 18 U.S.C. 892(c) and 894(c) and is essentially self-explanatory. In view of the specific limitations on the use of the reputation evidence and the occasion when it may be introduced (only when no direct evidence is available), the Committee believes that the provision, like those in current law, is clearly valid.[64]

4. Jurisdiction

This section contains no subsection setting forth the circumstances in which Federal jurisdiction exists. Accordingly, Federal jurisdiction over an offense herein is governed by the provisions of section 201(b)(2). This broad scope of Federal jurisdiction (requiring, for example, no showing of an effect on interstate commerce) follows existing law and is based upon the findings expressed by Congress in section 201 of the Consumer Credit Protection Act of 1968.[65]

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[63] See section 302(c)(1).

[64] See *United States* v. *Curcio, supra* note 50. Compare also section 1724(b).

[65] P.L. 90-32, 82 Stat. 146. See *Perez* v. *United States, supra* note 25, sustaining the present loansharking statutes against a constitutional claim that some nexus with interstate or foreign commerce must be shown in an individual case. See also *United States* v. *Schaffer, supra* note 54.

5. Grading

In place of the uniform twenty-year maximum prison sentence applicable under 18 U.S.C. 892-894, the Committee has drawn grading distinctions predicated upon the type of offense under this section. The Committee deems the offense of making or financing an extortionate extension of credit to be the most serious loansharking activity and has graded it as a Class C felony, carrying a maximum prison term of twelve years. The new offense of making or financing an extension or credit, having all the earmarks of an "extortionate" extension of credit but not specifically requiring proof of an understanding that extortionate means may be used, is graded as a Class D felony (up to six years in prison). The offenses in paragraphs (a)(3) and (a)(4) of collecting a repayment of an extension of credit or retaliating against a person for his failure to repay an extension of credit will typically involve individuals in the lower echelons of organized crime, and the offenses, being in themselves somewhat less serious, are graded as Class E felonies (up to three years in prison). Of course, if serious personal injury or property damage is done in the course of a collection or retaliation, such additional offenses may be punished as defined in chapters 16 and 17 (e.g., section 1611 (Maiming) and 1701 (Arson)).

SECTION 1805. TRAFFICKING IN CONTRABAND CIGARETTES

1. In General and Present Federal Law

This section carries forward, at a felony level, the provisions of 18 U.S.C. 2342(a) and 2344(a), part of Public Law 95-575, relating to trafficking in contraband cigarettes. Public Law 95-575, effective November 2, 1978, was designed to outlaw the large scale smuggling of non-taxpaid cigarettes so as to evade the taxes into States which impose substantial taxes on cigarettes. Congress determined that there is a significant Federal interest in criminalizing such conduct because (a) of the increasing evidence of organized crime involvement in this offense, attracted by the potential for reaping huge profits, and (b) of the need to assist the States in their enforcement efforts in view of the interstate nature of the offense.

Public Law 95-575 added six new sections to title 18: sections 2341-2346. Section 2342(a) makes it unlawful for a person knowingly to ship, transport, receive possess, sell, distribute or purchase "contraband cigarettes". The term contraband cigarettes is defined in section 2341 to mean a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State in which they are found and which are in the possession of any person, other than four enumerated classes of persons such as a common or contract carrier transporting the cigarettes under a proper bill of lading, a licensed manufacturer, or an operator of a customs bonded warehouse. Section 2344(a) sets forth the penalty for a violation of section 2342(a) and provides that whoever knowingly violates that section is subject to imprisonment for up to five years. That is the offense which will be brought forward by this section. In addition Public Law 95-575 created other crimes, including making a false statement in records regulation promulgated by the Secretary of the Treasury pursuant to cigarettes in a single transaction (section 2342(b)), and violating a regulation promulgated by the Secretary of the Treasury pursuant to section 2343(a) or 2346. These offenses, which in current law are punishable by up to three years imprisonment (section 2344(b)), are reduced to Class A misdemeanors under the reported bill and transferred to title 18 Appendix.[66] The remaining parts of Public Law 95-575, including the definition of "contraband cigarettes" referred to above, are transferred to title 18 Appendix verbatim.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates 18 U.S.C. App. 2342 (relating to contraband cigarettes). The term "violates" is defined in section 111 to mean to engage in conduct that is described as an offense or declared unlawful. Since current 18 U.S.C. 2342(a) is brought forward without substantive change in title 18 Appendix,[67] the effect is to preserve unchanged the provisions of 18 U.S.C. 2342(a) and 2344(a).

3. Jurisdiction

This section contains no subsection setting out the circumstances under which Federal jurisdiction attaches to the offense. Therefore, by operation of section 201(b)(2), there is Federal jurisdiction over an offense under this section if it is committed within the general or special jurisdiction of the United States, as defined in sections 202 and 203. This is consistent with the present purview of the offenses in Public Law 95-575.[68]

4. Grading

An offense under this section is graded as a Class D felony, bearing a maximum prison term of six years. This is similar to the penalty in current law.

SECTION 1806. DEFINITIONS FOR SUBCHAPTER A

This section contains various definitions for the offenses in this subchapter. These definitions have been discussed in connection with the offenses to which they apply.[69]

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[66] See section 234 of the bill, as reported.

[67] See section 204(d) of the bill, as reported.

[68] The final clause of section 201(b)(2) indicates that, if an offense is described as a violation of a statute "outside this title", jurisdiction is to be determined by recourse to that underlying statute. Although in this instance the same result would be reached if that final clause were deemed to govern, the Committee does not intend that the reference to statutes "outside this title" include title 18 Appendix. Put another way, the Committee—just as is true with respect to the application of the general culpability provisions of chapter 3—intends that the term "this title" encompass the Appendix to title 18.

[69] S. 1722 in the last Congress contained a section (1805), titled Facilitating a Racketeering Activity by Violence, which enlarged upon 18 U.S.C. 1952(a)(2) to punish engaging in any conduct constituting an offense in the murder or maiming subchapters of the bill if done with intent to facilitate a racketeering activity. The offense was graded as a Class D felony. The offense was deleted from S. 1630 inasmuch as the conduct it proscribed is basically covered by the application of ancillary jurisdiction in sections 1601, 1602, 1611, 1612, and 1615 over serious crimes against the person which are committed in the course of an offense under section 1801, 1802, or 1804. Moreover, use of ancillary jurisdiction leads to a more sensible grading of the ancillary offense than the uniform Class D felony level afforded under former section 1805.

SUBCHAPTER B.—DRUG OFFENSES

(Sections 1811-1815)

The four offenses in this subchapter consolidate, and, with some significant changes, recodify, the criminal provisions of the Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*[1] The offenses in this subchapter are Trafficking in an Opiate (section 1811); Trafficking in Drugs (section 1812); Possessing Drugs (section 1813); and Violating a Drug Regulation (Section 1814).[2] Section 1815 contains definitions and a defense applicable to the foregoing sections.

Present Federal law will be discussed in relation to each of the proposed offenses. As background to such discussion, however, the following brief history is pertinent.

Until October 1970 heroin, cocaine, marihuana, LSD, peyote, and numerous other dangerous drugs were regulated under a variety of Federal statutes. Many of the statutes were based on the taxing power; others, on the power to regulate commerce. Most Federal laws relating to unlawful dealings in narcotics and marihuana were found in the Internal Revenue Code. Penalties applying to such crimes were set forth in 26 U.S.C. 7237. In addition other statutes provided penalties of from five to twenty years' imprisonment for narcotic or marihuana offenses. Among them were those (1) making illegal the importation of narcotics contrary to law and forbidding any dealing in or transporting of illegally imported narcotics (21 U.S.C. 174); (2) doing the same with regard to marihuana (21 U.S.C. 176a); and (3) outlawing the possession of narcotics on vessels (21 U.S.C. 184a). Section 1403 of title 18 of the United States Code provided a penalty of from two to five years in prison for the use of communication facilities to violate other narcotic laws, and 21 U.S.C. 176b established a sentence of from ten years to life imprisonment, or a possible death penalty, for sale of heroin to juveniles. Finally, portions of the Food, Drug, and Cosmetic Act contained provisions and penalties relating to illegal dealings in depressant and stimulant substances such as LSD, peyote, amphetamines, and barbiturates (former 21 U.S.C. 231(v), 331(q), and 333(b)).

On October 27, 1970, the Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted into law.[3] The Act is divided into four titles. Title I establishes, under the jurisdiction of the Department of Health, Education, and Welfare, certain rehabilitation programs relating to drug abuse. Title IV provides for annual reports to the Congress by the Secretary of Health, Education and Welfare regarding certain advisory councils. Titles II and III constitute a complete revision and consolidation of all Federal statutes relating to dealings in narcotics, marihuana, and other dangerous drugs, both licit and illicit. Title II is known as the Controlled Substances Act (21 U.S.C. 801 *et seq.*); title III, as the Controlled Substances Import and Export Act (21 U.S.C. 951, *et seq*).

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[1] Sections 1811-1815 accept the recommendations of the American Bar Association. Hearings, p. 5815.

[2] The Committee does not at this time anticipate a Federal policy of experimental opiate maintenance which would imply the decriminalization of all but large-scale sales of drugs and the treatment of addiction- and usage-related offenses as symptomatic of disease rather than crime. This British system has had considerable practical success (see Statement of John Buckley, Sheriff, Middlesex County, Mass., Hearings p. 3195 *et seq.*), but is not without its opponents (Hearings, pp. 3206-3223). For a comparison of this ambulatory maintenance scheme and present civil commitment programs, see Hearings, pp. 3227-3243.

[3] P.L. 91-513, 84 Stat. 1236.

SECTION 1811. TRAFFICKING IN AN OPIATE

1. In General

This section and section 1812 substantially restate provisions contained in the Controlled Substances Act and the Controlled Substances Import and Export Act, i.e., 21 U.S.C. 841, 952(a), 953(a), 955, and 959. This section deals with opiates. Section 1812 regulates transactions in non-opiate drugs and substances.

2. Present Federal Law

A. 21 U.S.C. 841

21 U.S.C. 841(a) makes it unlawful for any person, except as authorized by this subchapter (i.e., the Controlled Substances Act), "knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute or dispense or possess with intent to distribute or dispense, a counterfeit substance."

Most of the terms used in this section are defined in 21 U.S.C. 802. For example, the term "controlled substance" is defined in 21 U.S.C. 802(6) to mean a drug or other substance, or immediate precursor,[4] included in schedule I, II, III, IV, or V of part B of this subchapter (i.e., 21 U.S.C. 811–812). The term "counterfeit substance" is defined in 21 U.S.C. 802(7) to mean a controlled substance which, or the container or labeling of which, without authorization bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

The word "dispense" is defined in 21 U.S.C. 802(10) as meaning to "deliver" a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner,[5] including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery.

The terms "deliver" and "delivery" are defined in 21 U.S.C. 802(8) to mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship. The purpose of the latter clause was to overrule a line of cases under the narcotic laws in force prior to the Drug Abuse and Control Act of 1970 holding that a defendant could not be convicted of selling narcotics to the purchaser if he acted as the agent of the purchaser (although he could be convicted, under another provision, of having facilitated the sale).[6]

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[4] The term "immediate precursor" is defined in 21 U.S.C. 802(22).

[5] The term "practitioner" is defined in 21 U.S.C. 802(20).

The word "distribute" is defined in 21 U.S.C. 802(11) to mean to deliver (other than by administering or dispensing) a controlled substance. "Administer" in turn is defined in 21 U.S.C. 802(2) to refer to the direct application of a controlled substance to the body of a patient or research subject by (A) a practitioner (or, in his presence, by his authorized agent), or (B) the patient or research subject at the direction and in the presence of the practitioner, whether such application be by injection, inhalation, ingestion, or any other means.

The term "manufacture" is defined in 21 U.S.C. 802(14) to mean the production, preparation, propagation, compounding, or processing of a drug or other substance either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with the applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice.

The penalties for a violation of section 841(a) are set forth in a complex array of provisions in 21 U.S.C. 841(b), 844, and 845, and vary depending upon such factors as the type of controlled substance involved, whether the offender had a previous conviction, and whether the offense involved a distribution to a person under twenty-one years of age.

Section 841(b) provides that, except as otherwise provided in 21 U.S.C. 845, where a schedule I or II narcotic is involved, the penalty is ordinarily up to fifteen years in prison; a special parole term of at least three years must also be imposed. If the offender has previously been convicted of any felonious violation of the Drug Abuse and Control Act of 1970 or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, and the conviction has become final, the maximum prison sentence is increased to thirty years plus a minimum special parole term of at least six years. The same penalties (except for a special parole term) are applicable if the offense involves more than 1000 pounds of marihuana.

When the offense involves phencyclidine (PCP), the violation is normally liable for up to ten years in prison and a special parole term of at least two years. In the case of a subsequent offender as described in the preceding paragraph, both penalties are doubled.

When a schedule I or II non-narcotic substance or a schedule III substance is involved, the violator is ordinarily subject to imprisonment for up to five years, plus a special parole term of at least two years. In the case of a subsequent offender, both penalties are doubled.

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[6] E.g., *Lewis* v. *United States*, 337 F.2d 541 (D.C. Cir. 1964), cert. denied, 381 U.S. 920 (1965); *Adams* v. *United States*, 220 F.2d 297 (5th Cir. 1955); *United States* v. *Sawyer*, 210 F.2d 169 (3d Cir. 1954).

When a schedule IV substance is involved, the penalty customarily is imprisonment for up to three years, plus a special parole term of at least one year. In the case of a subsequent offender, both penalties are doubled.

When a schedule V substance is involved, the penalty normally is imprisonment for up to one year. However, if the violator is a subsequent offender, the maximum sentence is increased to two years in prison.

An offender who distributes a "small amount of marihuana for no remuneration" is to be treated as though he has violated 21 U.S.C. 844, which prohibits the unauthorized possession of a controlled substance. The penalty under that section is the same as that provided when a schedule V substance is involved, except that a special procedure is afforded whereby the court may, if the offense is the first offense of the defendant involving narcotics, marihuana, or depressant or stimulant substances, with the consent of the defendant, and without entering judgment, defer further proceedings and place him on probation subject to such reasonable conditions as the court may impose. The successful completion of the probationary period results in the expungement of the conviction (but no such expungement may occur more than once with respect to any person).

21 U.S.C. 845(a) provides that a person at least eighteen years of age who violates section 841(a)(1) by distributing a controlled substance to a person under twenty-one years of age is ordinarily punished by a term of imprisonment up to, and a special parole term at least, twice, that authorized in section 841(b). In the case of a violator previously convicted under section 845(a), or under former 21 U.S.C. 333(b), the maximum prison and special parole terms are three times those prescribed in section 841(b).

In addition to all the foregoing penalties, 21 U.S.C. 849 provides a procedure for the classification of a defendant as a "dangerous special drug offender," authorizing the imposition of a sentence of imprisonment up to twenty-five years. A complex definition of "special drug offender" is set forth in 21 U.S.C. 849(e). A defendant is deemed to be "dangerous" if a period of confinement longer than that provided for his felonious act is required for the protection of the public from further criminal conduct on his part. As explained in connection with section 1801 (Operating a Racketeering Syndicate), these provisions will not be brought forward in the Code.[7]

B. 21 U.S.C. 952(a)

This statute makes it unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedules I or II, or any narcotic drug in schedules III, IV, or V. Paragraphs (1) and (2) of this subsection contain certain exceptions to this prohibition. Paragraph (1) permits the importation of as much crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes. Paragraph (2) allows the importation of such amounts of any controlled substance in schedules I or II, or any narcotic drug in schedules III, IV, or V as the Attorney General finds to be necessary for the medical, scientific, or other legitimate needs of the United States. However, such importations are permitted only during an emergency in which domestic supplies of such drugs are found to be inadequate or when competition among domestic manufacturers is inadequate and cannot be made adequate by registering more manufacturers.

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[7] 21 U.S.C. 848 describes in effect a separate offense of being a leader of a continuing criminal enterprise involving five or more persons who engage in a series of felonious violations of the Drug Abuse and Control Act of 1970. This offense is incorporated into proposed section 1801 (Operating a Racketeering Syndicate).

The term "import" is defined in 21 U.S.C. 951(a)(1) to mean, with respect to any article, "any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States)."

The term "customs territory" is defined in 21 U.S.C. 951(a)(2) to have the meaning assigned to such term by general headnote 2 to the Tariff Schedules of the United States.

The term "United States" is defined in 21 U.S.C. 802(26) to mean "all places and waters, continental or insular, subject to the jurisdiction of the United States." [8]

The penalties for a violation of section 952(a) are prescribed in 21 U.S.C. 960 and 962. Under section 960, whoever "knowingly or intentionally" imports a schedule I or II narcotic drug may be imprisoned up to fifteen years. Any term of imprisonment must be accompanied by a special parole term of not less than three years. If the offense involves any other controlled substance, the maximum penalty is five years in prison; any sentence of imprisonment imposed must include a special parole term of not less than two years if the substance is in schedules I, II, or III, and one year if it is in schedule IV.

Section 962 deals with subsequent offenses and provides that, if a person has been previously convicted of a felony relating to narcotic drugs, marihuana, or depressant or stimulant drugs, the maximum permissible prison term for conviction of any offense in this subchapter (i.e., the Controlled Substances Import and Export Act) is doubled.

C. 21 U.S.C. 953(a)

This statute makes it unlawful to export from the United States any narcotic drug in schedules I, II, III, or IV, unless (1) it is exported to a country which is a party to certain international narcotic control conventions, (2) the destination country has an adequate narcotic import control system, (3) the destination country has issued the consignee a narcotic import license, (4) the exporter establishes that the narcotic is to be used for medical or scientific purposes in the destination country, and (5) the Attorney General has issued an export permit. 21 U.S.C. 953(b) contains a further exception allowing the Attorney General to authorize the exportation of any narcotic drug in schedules I–IV to any country which is a party to the international agreements mentioned in subsection (a) if the particular drug is to be applied to a special scientific purpose in the country of destination and the authorities of such country will permit its importation for such purpose.

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[8] Cf. *United States* v. *Matthews*, 427 F.2d 992 (5th Cir. 1970), holding, under predecessor statutes, that a person committed an offense by bringing a narcotic from a possession of the United States (the Panama Canal Zone) into a State.

The penalties are prescribed by 21 U.S.C. 960 and 962 and are the same as those applicable to section 952(a).

D. 21 U.S.C. 955

This section renders it unlawful for any person to bring or possess on board any vessel or aircraft, or on board any vehicle of a carrier, arriving in or departing from the United States or the customs territory thereof, a controlled substance in schedules I or II or a narcotic drug in schedules III or IV, unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft, or vehicle.

The penalties are identical to those in section 952(a).

E. 21 U.S.C. 959

This statute makes it unlawful for any person to manufacture or distribute a controlled substance in schedules I or II intending or knowing that such substance will be unlawfully imported into the United States. The section specifically states that it is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States, and fixes venue for trial as the district where an accused enters the United States, or the District of Columbia.

The penalties for a violation of this section are the same as for 21 U.S.C. 952(a).[9]

3. The Offense

Subsection (a) provides that a person commits an offense if he:

(1) manufactures or traffics in an opiate;

(2) creates or traffics in a counterfeit substance containing an opiate;

(3) imports or exports an opiate, or possesses an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or

(4) manufactures or traffics in an opiate for import into the United States.

The term "opiate" is defined in section 1815(a)(5) to mean a mixture or substance containing a detectable amount of any narcotic drug[10] that is a controlled substance listed in schedule I or II, other than a narcotic drug consisting of (a) coca leaves; (b) a compound, manufacture, salt, derivative, or preparation of coca leaves; or (c) a substance chemically identical thereto.

The terms "controlled substance," "counterfeit substance," "narcotic drug," and "manufacture" are all defined in section 1815(a)(1) to have the meaning given to those terms in 21 U.S.C. 802.

The word "traffic" is defined in section 111 to mean (a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing. "Traffic" is defined in section 1815(a)(7) as including "to distribute or dispense, whether or not as consideration for anything of value." This is to be read in conjunction with, and as partly superseding, the general definition of the same term in section 111. Thus, the two terms "manufacture" and "traffic" are fully as broad as under present law.

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[9] 21 U.S.C. 846 and 963 punish an attempt or conspiracy to commit any offense in the Drug Abuse and Control Act of 1970. These statutes are carried forward in sections 1001 (Criminal Attempt) and 1002 (Criminal Conspiracy) of the subject bill.

[10] The concept of a "detectable amount" carries forward current law. See *United States* v. *Nelson*, 499 F.2d 965 (8th Cir. 1974); *United States* v. *Sudduth*, 458 F.2d 1222, 1224 (10th Cir. 1972).

The term "distribute" is defined in section 1815(a)(1) to have the meaning designated in 21 U.S.C. 802. The term "dispense" is defined in section 1815(a)(3) to mean to "deliver a controlled substance to an ultimate user or research subject by, or pursuant to the order of, a practitioner, including the prescribing or administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery." This carries forward the definition of "dispense" in 21 U.S.C. 802, with the principal modification that the word "lawful" before "order of a practitioner" has been deleted. The presence of this word in the current definition creates troublesome ambiguities and has given rise to conflicting interpretations with respect to the relationship between the offenses of "dispensing" and "distributing" as regards physicians or other practitioners under the statute. Taken literally, the word "lawful" could be read to preclude a conviction of a physician licensed to dispense narcotics, even in a case where he "dispensed" such drugs not in the regular course of practice. The First, Sixth, Ninth, and Tenth Circuits have indeed held that in such a case the prosecution may be brought under the "distributing" branch of 21 U.S.C. 841; [11] the Fifth Circuit disagrees.[12] To obviate this unnecessary problem, the Committee has eliminated the adjective "lawfully," permitting a prosecution of a physician either for distributing or dispensing. If the dispensing was "lawful," the practitioner-defendant is afforded a defense that his conduct was authorized by the provisions of the Controlled Substances Act.[13]

The term "customs territory of the United States" is defined in section 1815(a)(2) to have its identical meaning in current law (21 U.S.C. 951).[14] With respect to "import," however, the Committee has essentially adopted in this subchapter the definition in the offense section of present law, 21 U.S.C. 952(a). Thus, the term is defined in section 1815(a)(4) to mean to "import into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States." [15] The following illustrates the effect of this language. If

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[11] See *United States* v. *Fellman*, 549 F.2d 181 (10th Cir. 1977), and cases cited therein.

[12] *United States* v. *Leigh*, 487 F.2d 206 (5th Cir. 1973); but see *United States* v. *Harrison*, 651 F.2d 353 (5th Cir. 1981). In *United States* v. *Moore*, 423 U.S. 122 (1975), the Supreme Court did not resolve this question, but did hold that a licensed physician may be prosecuted under 21 U.S.C. 841 and not only, as the court below had held, under 21 U.S.C. 842 and 843.

[13] See section 1815(b), discussed *infra*. A corresponding deletion of the modifier "lawfully" has been made in the conforming amendments in the definition of the term "ultimate user," utilized in the definition of "dispense." See 21 U.S.C. 802(25).

[14] General headnote 2 of the Tariff Schedules, to which the definition makes reference, includes States, the District of Columbia, and Puerto Rico within the "customs territory."

[15] The further definition of "import" as meaning any bringing in or introduction of an article into any area has been retained in 21 U.S.C. 951 and is, therefore, also applicable under this section.

John Doe transports heroin from Europe to the Virgin Islands, he is guilty of unlawful importation.[16] Richard Roe's transportation of the heroin from the Virgin Islands to Puerto Rico or Florida would also constitute an illegal importation.[17]

The terms "schedule I," and the other "schedules" are defined in section 1815(a)(6) to refer to the schedules of controlled substances established by 21 U.S.C. 812.

Paragraphs (1) and (2) continue offenses now in 21 U.S.C. 841(a). The Committee's term "traffics" may broaden the offenses as currently stated since it is all-encompassing and refers to any manner of "dispos[al]" to another person, and not merely to distribute or dispense (in addition to manufacturing) as under section 841(a). It should also be noted that implicit in the definition of "traffics" is the rejection of the "purchasing agent" doctrine. As remarked earlier, this doctrine was eliminated in the Drug Abuse Prevention and Control Act of 1970 by means of the definition of "deliver" in 21 U.S.C. 802. The inclusion of such verbs as "transfer" and "dispose" in the concept of "traffics" also accomplishes this result, since, although an agent of a purchaser may not "sell" drugs to his principal, he certainly "transfers" or "disposes" of them so as to come within this section.[18] In addition, it should be noted that the term "traffics", specifically because of its supplemental definition in this subchapter, and also because of the breadth of the included phrase "anything of value" in its general definition, as reading "anything that might be regarded by the beneficiary as a direct or indirect gain or advantage", includes a situation in which, although no consideration (in the contractual sense) is present, a transfer not as a pure gift or gratuity is made with the hope or expectation by the transferor of developing or retaining business. The Committee is aware that such practices as the dissemination of "free samples" of narcotics in the hope of developing or maintaining a clientele are not uncommon, particularly in the context of school- or teen-age recipients, and it intends that such transfers be punishable as "trafficking". Indeed, the definition of "traffic" in its supplemented form in section 1815 would even extend, as does current law, to gratuitous transfers among friends.

With respect to the offenses of possession with intent, encompassed within the meaning of "traffics," the Committee intends to perpetuate current law to the effect that possession may be either constructive or actual,[19] and that an intent to sell or otherwise dispose of the substance may be inferred from the quantity of the substance possessed, as well as from other circumstances such as its manner of packaging.[20]

The conduct in these offenses is manufacturing or trafficking in a substance (paragraph (1)) and creating or trafficking in a substance (paragraph (2)). Since no culpability level is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[21]

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[16] See the definition of "United States" in section 111 as including all "states" (a term defined to include all possessions and territories of the United States, as well as the District of Columbia, Puerto Rico, Guam, etc.), all places and waters, continental or insular, that are subject to the special territorial or maritime jurisdiction of the United States, and the airspace overlying such States, places, and waters.

[17] See *United States* v. *Matthews, supra* note 8, reaching an identical result under prior law.

[18] See *United States* v. *Pierce,* 498 F.2d 712 (D.C. Cir. 1974), and cases cited therein.

[19] E.g., *United States* v. *Maspero,* 496 F.2d 1354, 1359 (5th Cir. 1974); *United States* v. *Philips,* 496 F.2d 1395, 1397 (5th Cir. 1974); *United States* v. *James,* 494 F.2d 1007, 1031 (D.C. Cir.), cert. denied, *sub nom. Jackson* v. *United States,* 419 U.S. 1020 (1974).

[20] E.g., *United States* v. *Welebir,* 498 F.2d 346, 350-351 (4th Cir. 1974), and cases cited therein; *United States* v. *Sigal,* 500 F.2d 1118, 1123 (10th Cir.), cert. denied, 419 U.S. 954 (1974).

The element that the substance was an "opiate" in paragraph (1) or a "counterfeit substance containing an opiate" in paragraph (2) is an existing circumstance. As no culpability standard is prescribed in this section, the applicable state of mind that must be established is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstance existed, and the risk was such that its disregard constituted a gross deviation from the degree of care that a reasonable person would have exercised in the circumstances.[22]

The combination of requiring at least "knowing" conduct and "recklessness" as to the nature of the substance, reduces, but only slightly, the scienter required by present law. Although 21 U.S.C. 841 (like the other offenses carried forward in this and the next section) speaks in terms of "knowingly or intentionally," the courts have interpreted "knowingly" to include conscious avoidance or studied ignorance, and have sustained jury instructions that knowledge may be inferred where the defendant "deliberately closed his eyes to what he had every reason to believe was the fact." [23] Both cases cited affirmed convictions for importing and possessing cocaine with intent to sell, where the evidence showed that the defendant received or was promised substantial money to carry through customs a suitcase or package, notwithstanding the defendant's contention that he did not actually know what was in the suitcase or package and that, while he realized he was doing something wrong, the substance could have been smuggled goods other than narcotics.

Under the Committee's formulation, something less than conscious avoidance will suffice for criminal liability, but the actor must have disregarded a substantial risk, of which he was aware, that the substance trafficked in was an opiate.

This is a fair standard, since, in the situation in the *Joly* and *Olivares-Vega* cases just referred to, a reasonable and law-abiding person would check or inquire into the contents of the package before agreeing to perform the requested task of carrying it through customs. A failure to do so would constitute a gross deviation from the degree of care that a reasonable and law-abiding person would exercise, and, in the Committee's view, affords ample basis for the imposition of criminal sanctions.

Paragraph (3) brings forward the offenses (insofar as they cover opiates) in 21 U.S.C. 952(a), 953(a), and 955. The latter offense has been somewhat expanded in that it currently reaches only possession aboard a vessel, aircraft, or "vehicle of a carrier," whereas this section covers possession aboard any "vehicle." The term "vehicle" is defined in section 111 to mean a motor vehicle, vessel, railroad vehicle, or aircraft. Thus, at least in its coverage of private motor vehicles, this section expands current law under 21 U.S.C. 955.

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[21] See sections 303(b)(1) and 302(b)(1).

[22] See sections 303(b)(2) and 302(c)(1).

[23] See *United States* v. *Joly*, 493 F.2d 672, 674 (2d Cir. 1974); *United States* v. *Olivares-Vega*, 495 F.2d 827, 830 (2d Cir. 1974).

The conduct in this offense is importing, exporting, or possessing a substance. As no culpability level is set forth in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[24]

The elements that the substance was an "opiate" and that, as to the possession branch, it was "aboard a vehicle arriving in or departing from the United States," etc., are existing circumstances. Since no culpability standard is specifically prescribed, the applicable state of mind to be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[25]

Paragraph (4) brings forward offenses in 21 U.S.C. 959. Insofar as the term "traffics" is broader than the concept of "distribute" in present law, this section expands the offense to cover all manner of dealings in opiates for import into the United States.

The conduct is manufacturing or trafficking in a substance. Since no culpability level is designated, the applicable state of mind is, as under the foregoing paragraphs, at least "knowing." The nature of the substance is an existing circumstance as to which the minimum state of mind that must be shown is "reckless." The element "for import into the United States" states the particular purpose for which it must be proved that the conduct was performed.

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists over an offense herein. Therefore, Federal jurisdiction over an offense in this section exists throughout the United States, as governed by the provisions of section 201(b)(2). It should be noted that extraterritorial jurisdiction may be asserted over the offense in paragraph (4), by virtue of section 204(d). This continues current law under 21 U.S.C. 959.[26] The generally broad scope of jurisdiction is consistent with the congressional findings and declarations in the Drug Abuse and Control Act of 1970.[27] Regulation of intrastate transactions under these and similar findings in predecessor statutes has been uniformly sustained against constitutional challenge.[28]

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[24] See sections 303(b)(1) and 302(b)(1).

[25] See sections 303(b)(2) and 302(c)(1).

[26] *United States* v. *King*, 552 F.2d 833, 850–852 (9th Cir. 1976).

[27] See 21 U.S.C. 801, which provides:

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people;

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people;

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce.

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

5. *Grading*

Subsection (b) simplifies and revamps the complex penalty scheme in the Drug Abuse and Control Act of 1970.

The most serious status (i.e., Class B felony—up to twenty-five years in prison) is reserved for cases in which (1) the opiate weighs one hundred grams or more, (2) the offense consists of distributing the opiate to a person who is less than eighteen years old and is at least three years younger than the defendant, or (3) the offense is committed after the defendant has been convicted of a felony under Federal, State, or foreign law relating to an opiate, or while he was on release pending trial for an offense under this section.

The first branch of this provision reflects the Committee's view that persons whose offense involves one hundred grams of an opiate are likely to be major traffickers [29] deserving of severe punishment.[30]

The second branch generally brings forward the heightened penalty under 21 U.S.C. 845 when the offense involves distributing a controlled substance to a minor. However, whereas that section applies whenever the distribution is to a person under twenty-one years of age by a person over eighteen, this section treats as victim-minors only persons under eighteen, and reaches only individuals at least three years older than the victim, where the situation is likely to involve corruption of the minor rather than a trafficking transaction by a peer.

The third branch of this provision applies to previous felony convictions in violation of State or foreign law, as well as Federal law. This expands current law under 21 U.S.C. 841(b) and 962, the double-the-penalty provisions of which are triggered only by a previous, final conviction under a law of the United States regulating narcotic drugs, marihuana, or depressant or stimulant drugs. The Committee considers that opiate trafficking violations are so deleterious to the well-being of the American people that offenders who have been previously found guilty of trafficking in such drugs under State and foreign, as well as Federal laws (or who commit such offense while on release awaiting trial for an offense under this section), merit harsh penalties. The Committee intends that a "conviction" be usable for augmentation of sentence purposes even though it is on appeal or the subject of a certiorari request.[31]

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(6) Federal control of intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

[28] E.g., *United States* v. *Lopez*, 459 F.2d 949, 951-952 (5th Cir.), cert. denied, 409 U.S. 878 (1972), and cases cited therein; *United States* v. *Lamear*, 417 F.2d 626 (8th Cir. 1969), cert. denied, *sub nom. McEntire* v. *United States*, 397 U.S. 967 (1970), and cases cited therein; cf. *Perez* v. *United States*, 402 U.S. 146 (1971).

[29] One hundred grams of a substance containing as little as 3 percent opiate—about the lowest practical "street" dilution—has a retail value of about $250,000 according to estimates supplied to the Committee by the Drug Enforcement Administration.

[30] The New York City Bar Association's Special Committee supported heavier penalties for "wholesale distribution or sale or possession of large quantities" of dangerous drugs. See Hearings, p. 3554.

[31] See *State of Arizona* v. *Court of Appeals Division I*, 441 P.2d 544, 547 (Ariz. 1968); cf. *United States* v. *Franicevich*, 471 F.2d 427 (5th Cir. 1973).

In any other case, the offense is graded as a Class C felony (up to twelve years in prison). This generally continues the existing penalty range applicable to opiate offenses when no aggravating factor is present.

Subsection (b) also provides that, notwithstanding the provisions of part III of this title, the court may not sentence the defendant to probation but shall sentence him to a term of imprisonment of not less than two years without designating eligibility for early release during the first two years of the term, with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than seventeen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense; the defendant was under unusual and substantial duress, although not such duress as to constitute a defense; or the defendant was an accomplice whose participation in the offense was relatively minor. This provision is new. It reflects the Committee's belief that the seriousness of the opiate offenses described herein ordinarily warrants a mandatory minimum prison sentence. A sentence imposed under this provision has the effect under sections 2301(c), 2302(a), and 3824(a) of requiring imprisonment for at least two years minus any time credited for satisfactory behavior under section 3824(b). However, the inflexibility of the mandatory minimum term is ameliorated by the enumeration of specific mitigating factors which, if found by the court to exist, negate the necessity to impose the mandatory minimum sentence.

SECTION 1812. TRAFFICKING IN DRUGS

1. In General and Present Federal Law

This section complements the previous offense and deals with trafficking in controlled substances other than opiates. It brings forward 21 U.S.C. 841, 952(a), 953(a), 955, and 959 to the extent those statutes cover non-opiate substances.

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) manufactures or traffics in a controlled substance other than an opiate, (2) creates or traffics in a counterfeit substance other than a counterfeit substance containing an opiate, (3) imports or exports a controlled substance other than opiate, or possesses a controlled substance other than an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States, or (4) manufactures or traffics in a controlled substance, other than an opiate, and other than a substance listed in schedules III, IV or V, for import into the United States.

The analysis of the elements and culpability attending these offenses is identical to that under section 1811(a) (1) through (4) and the discussion there should be adverted to here. The final offense is limited to schedule I or II substances to accord with the limited purview of the offense in 21 U.S.C. 959.

3. Jurisdiction

The scope of Federal jurisdiction under this section is the same as under section 1811 and the discussion there is equally applicable here.

4. Grading

In this section the Committee has continued the general sentencing scheme in current law which distinguishes between schedule I or II narcotic drugs and other substances, and contains special provisions for marihuana.[32]

Under paragraph (b)(1), the most serious penalties under this section (i.e., Class B felony—up to twenty-five years in prison) apply when the controlled substance involved in the offense is listed in schedules I or II and is a kilogram or more of a narcotic drug other than an opiate or is 500 grams or more of phencyclidine (PCP) or 5 grams or more of lysergic acid diethylamide (LSD). This grading makes appropriate distinctions between large and casual traffickers—drawing the dividing line with respect to cocaine, PCP, and LSD at approximately 100,000 times the average user dosage—and recognizes the increasing use of PCP and LSD, both particularly dangerous hallucinogenic drugs.[33]

Under paragraph (b)(2), an offense is a Class C felony (up to twelve years in prison) if the controlled substance is listed in schedules I or II and is less than a kilogram of a narcotic drug other than an opiate, less than 500 grams of PCP, less than 5 grams of LSD, or more than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil. This latter provision covers trafficking in large quantities of marihuana or proportionately equivalent quantities of more potent forms of this substance. Again, the quantity appearing in the bill was chosen because it is deemed to represent approximately 100,000 times the average user dosage.

Under paragraph (b)(5), an offense herein is graded as a Class A misdemeanor (up to one year in prison) if the controlled substance is listed in schedule V.

Subsection (b) additionally provides that each of the foregoing grading levels shall be increased, so that the offense is of the class next above that specified, if the offense consists of distributing the controlled substance to a person who is less than eighteen years old and who is at least three years younger than the defendant. This formulation has been discussed in connection with the preceding section and generally brings forward the provisions of 21 U.S.C. 845. The Committee, however, determined not to perpetuate the recidivist provisions of 21 U.S.C. 841(b) and 962 with respect to this offense. Such recidivism should be taken into account by the Sentencing Commission and the court in determining the appropriateness of a defendant's sentence. The grading levels provided are deemed adequate to punish and deter recidivists and, unlike the case with respect to opiates, the Committee does not consider that an automatic augmentation of the maximum penalty is necessary or proper with respect to the offenses in this section.

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[32] It should be noted that the Committee has amended the definition of "marihuana" in 21 U.S.C. 802 to make clear that all species of that plant are covered. This accords with the result reached by all federal courts of appeal under the existing definition, although some district courts have held to the contrary and the issue continues to generate litigation. See, e.g., *United States* v. *Walton*, 514 F.2d 201 (D.C. Cir. 1975) and cases cited therein; and see *United States* v. *Garic*, 520 F.2d 1346, 1352 (8th Cir. 1975). There is clearly no reason to except particular species of marihuana from coverage and the Committee's amendment should thus fairly put an end to the current debate regarding an apparent loophole in the law.

[33] Compare 21 U.S.C. 841(b)(5).

Similarly the Committee has omitted the general scheme in 21 U.S.C. 845, which calls for a tripling of penalties if the offender is a recidivist and the distribution is to a minor.

SECTION 1813. POSSESSING DRUGS

1. In General and Present Federal Law

This section deals with simple possession of controlied substances and is a lesser included offense of sections 1811 and 1812.[34] It is generally based upon 21 U.S.C. 844(a).

21 U.S.C. 844(a) punishes by up to one year in prison [35] whoever knowingly or intentionally possesses a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice (or except as otherwise provided by the Drug Abuse and Control Act of 1970).

The term "practitioner" is defined in 21 U.S.C. 802(20) to mean a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct, research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of his professional practice or research.[36]

2. The Offense

Subsection (a) provides that a person commits an offense if he possesses a controlled substance.

The term "controlled substance" is in section 1815(a)(1) given the same meaning as it now has under section 802(6), i.e., a drug or other substance, or immediate precursor, included in schedules I–V, but not including distilled spirits, wine, malt beverages, or tobacco.

The Committee intends that the concept of "possesses" includes both actual and constructive possession, as has been repeatedly held in current law.[37]

With respect to the controversial issue of the simple possession or gratuitous transfer of small amounts of marihuana,[38] the bill continues the policy of present law to penalize such transfer at a Class A misdemeanor level. The Committee believes that the regulation of marihuana possession in small amounts is generally a matter for the States,[39] and it is aware that the Federal Government today is not enforcing, either by arrest or prosecution, the current penal prohibition against the simple possession of marihuana; because of the lack of resources, enforcement is concentrated upon the large-scale trafficker.[40] A continuation of a Federal criminal penalty for simple possession of a small quantity of marihuana is, however, deemed appropriate and important because of its symbolic value and potential effect on State and local reform efforts and attitudes towards marihuana use.

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[34] See *Sansone* v. *United States,* 380 U.S. 343, 349–350 (1965); *United States* v. *Blake,* 484 F.2d 50, 58 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974).

[35] The penalty rises to two years in prison if the offense is a second or subsequent offense under section 844(a).

[36] The terms "distribute," "dispense," and "administer" are also defined in 21 U.S.C. 802 and have been set forth in relation to the explanation of section 1811.

[37] E.g., *United States* v. *Maspero, supra* note 19, at 1359; *United States* v. *Crippen,* 459 F.2d 1387 (3d Cir. 1972).

[38] Hearings before the Subcommittee to Investigate Juvenile Delinquency, Committee on the Judiciary, U.S. Senate, *Marihuana Decriminalization* and supplements I and II, 94th Congress. 1st Sess., May 14, 1975: see, summarizing the then current state of knowledge as to the effects of marihuana use, *Considerations for and against the Reduction of Federal Penalties for Possession of Small Amounts of Marihuana for Personal Use,* A Report of the House Select Committee on Narcotics Abuse and Control, 95th Cong., 1st Sess., pp. 6–14 (1977).

The conduct in this section is possessing a substance. Since no culpability level is specifically prescribed, the applicable state of mind to be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[41]

The element that what was possessed was a "controlled substance" is an existing circumstance. As no culpability standard is specifically designated, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[42]

The relationship between this degree of culpability and the *scienter* required by the courts under the "knowingly or intentionally" standard in present law has been fully explained in relation to section 1811 and that discussion should be consulted here.

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the controlled substance was obtained directly from or pursuant to a valid prescription or order issued by, a practitioner acting in the course of his professional practice. This continues the exception in 21 U.S.C. 844(a).[43] The matter is denominated as a "defense," thus meaning that the government will not have to negative the issue unless it is sufficiently raised by the evidence, whereupon the government will bear the burden of disproving the defense beyond a reasonable doubt.[44] This is in accord with current law, since 21 U.S.C. 885(a)(1) provides, *inter alia*, that it shall not be necessary for the United States to negative any exemption set forth in this subchapter (i.e., 21 U.S.C. 801-886) in any pleading or trial and that the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

It should be noted that the concept of "acting in the course of his professional practice" would not include activities such as a physician's selling controlled substances to a dealer or addict, or distributing or dispensing controlled substances to addicts merely to cater to or satisfy an appetite or craving for such drugs.[45]

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[39] About one-fifth of the States presently have laws decriminalizing the possession of a small amount of marihuana for personal use. These States account for nearly 32 percent of the nation's population. Such legislation is being considered in more than thirty other States. *Id.* at 1.

[40] *Id.* at 15-16.

[41] See sections 303(b)(1) and 302(b)(1).

[42] See sections 303(b)(2) and 302(c)(1).

[43] See also *Linder* v. *United States*, 268 U.S. 5, 16-22 (1925), and *Boyd* v. *United States*, 271 U.S. 104 (1926), both similarly construing a predecessor enactment.

[44] See *United States* v. *Hooker*, 541 F.2d 300, 305 (1st Cir. 1976): proposed Rule 25.1 of the Federal Rules of Criminal Procedure, contained in the subject bill.

Following existing law, the Committee does not intend that addiction be a defense to a charge of possession of a controlled substance.[46]

4. Jurisdiction

This section contains no subsection setting forth the extent to which Federal jurisdiction exists. Therefore, by operation of section 201(b)(2), there is Federal jurisdiction over an offense herein if it is committed within the extraterritorial jurisdiction to the extent provided in section 204 and the general or special jurisdiction of the United States, as defined in sections 202 and 203. This carries forward the present plenary scope of jurisdiction under 21 U.S.C. 844(a).

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the controlled substance is one hundred grams or more of an opiate. The Committee believes that possession of this quantity of an opiate would usually be tantamount to possession with intent to traffic, and therefore would appropriately be charged under section 1811. For those cases, however, in which an intent to traffic cannot be drawn from the quantity involved together with other aspects of the case, this section will still permit the imposition of a penalty reflecting the danger inherent in the quantity itself, and therefore has made such possession itself a serious offense. Of course, if less than one hundred grams is involved, the government must prove the requisite intent under section 1811. An offense under this section is a Class A misdemeanor (up to one year in prison) if the controlled substance is less than one hundred grams of an opiate or is any other controlled substance.[47]

SECTION 1814. VIOLATING A DRUG REGULATION

1. In General and Present Federal Law

This section deals primarily with regulatory offenses committed by those registered to handle controlled substances under the Controlled Substances Act or the Controlled Substances Import and Export Act. It carries forward without substantial change the offenses described in 21 U.S.C. 842(c)(2)(A), 843(c)(1), and 961(2). 21 U.S.C. 842(a) makes it unlawful for any person—

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[45] See *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 194 (1920); *United States* v. *Collier*, 478 F.2d 268, 270-272 (5th Cir. 1973); and compare *Linder* v. *United States*, *supra* note 42.

[46] E.g., *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir.) *(en banc)*, cert. denied, 414 U.S. 980 (1973); cf. *Powell* v. *Texas*, 392 U.S. 514 (1968). For a contrary view, see Hearings, pp. 1468-1469 (testimony of A.C.L.U.).

[47] The special provisions in 21 U.S.C. 844(b), permitting the deferral of entry of a judgment of conviction for a first-time offender on a charge of unlawful possession, the placing of the offender on probation, and the ultimate expungement of the conviction if the term of probation is successfully completed, have been carried forward in section 3807 of the code. It should be noted that the Committee has approved a provision, in subsection (c), that significantly expands the expungement provisions with respect to possession of small amounts of marihuana.

(1) who is subject to the requirements of part C [48] to distribute or dispense a controlled substance in violation of section 829 of title 21, United States Code;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 825 of title 21;

(4) to remove, alter, or obliterate a symbol or label required by section 825 of title 21;

(5) to refuse or fail to make, keep, or furnish any record report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of chapter 13 of title 21;

(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

(7) to remove, break, injure, or deface a seal placed upon controlled substances, pursuant to section 824(f) or 881 of title 21 or to remove or dispose of substances so placed under seal;

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of chapter 13 of title 21, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection or;

(9) to distribute or sell piperidine in violation of regulations established under 21 U.S.C. 830(a)(2), regarding presentation of identification.

21 U.S.C. 842(b) makes it unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is (1) not expressly authorized by his registration and by a quota assigned to him pursuant to 21 U.S.C. 826, or (2) in excess of a quota assigned to him pursuant to that statute.

21 U.S.C. 842(c)(2) provides that whoever is found to have "knowingly" violated section 842 is ordinarily liable to imprisonment for up to one year and a fine of up to $25,000; however, if the violation is the second such offense under this section or if the defendant had been previously convicted of any crime under the Drug Abuse and Control Act of 1970 or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, the penalty rises to a maximum of two years in prison and a maximum fine of $50,000.

21 U.S.C. 843 makes it unlawful for any person—

(1) who is a registrant knowingly or intentionally to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of title 21, United States Code;

(2) knowingly or intentionally to use in the course of the manufacture or distribution of a controlled substance a regis-

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[48] Part C (21 U.S.C. 821-829) deals with the registration of manufacturers, distributors, and dispensers of controlled substances.

tration number which is fictitious, revoked, suspended, or issued to another person;

(3) knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) knowingly or intentionally to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under subchapter I or subchapter II of chapter 13 of title 21, or to present false or fraudulent identification where the person is receiving or purchasing piperidine and is required to present identification pursuant to 21 U.S.C. 830(a); or

(5) knowingly or intentionally to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such a drug a counterfeit substance.

The part of paragraph (4) that relates to false statements and omission of material information is not carried forward in this section, but is subsumed within the more generic offenses in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement).

21 U.S.C. 843(b) makes it unlawful for a person knowingly or intentionally to use any communication facility in committing or causing or facilitating the commission of any act constituting a felony under the Drug Abuse and Control Act of 1970. This provision is not directly brought forward under this section, but is covered by means of section 401 relating to accomplice liability and the broad scope of jurisdiction which applies to all the offenses in this subchapter.

The penalties for violating subsection (a) are contained in subsection (c). The maximum penalty is ordinarily up to four years in prison and a fine of up to $30,000; however, it doubles if the offense is the second such offense under this section, or if the offender had previously been convicted of a felony under the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, or under any other law of the United States relating to narcotic drugs, marihuana, or stimulant or depressant substances.

21 U.S.C. 954 provides that notwithstanding the importation and exportation offenses in sections 952 and 953 and the registration of importers and exporters requirement under section 957, a controlled substance in schedule I may be imported into the United States for transshipment to another country, to be transferred from one vessel, vehicle, or aircraft to another vessel, vehicle, or aircraft within the United States for immediate exportation, provided that such importation, transfer, or transshipment is (1) for scientific, medical, or other legitimate purposes in the country of destination, and (2) the prior written approval of the Attorney General has been obtained. In addition, 21 U.S.C. 954 renders it lawful to import, transfer, or transship a controlled substance in schedule II, III, or IV, provided that advance notice is given to the Attorney General in accordance with regulations.

21 U.S.C. 961(2) authorizes the imposition of a sentence of up to one year in prison for any person found to have violated section 954 knowingly or intentionally. In addition, 21 U.S.C. 962 provides for double the applicable penalty in the event the offense is a second or subsequent offense under the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, or the defendant had been previously convicted of a felonious violation of the laws of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates:

> (1) section 402(c)(2)(A) of the Controlled Substances Act (21 U.S.C. 842(c)(2)(A) (relating to the dispensing and manufacturing of controlled substances by registered manufacturers, distributors, and dispensers of controlled substances);
>
> (2) section 403(c)(1) of the Controlled Substances Act (21 U.S.C. 843(c)(1) (relating to distribution of controlled substances by registrants, the use of labeling implements to render a drug a counterfeit substance and the presentation of false identification to obtain a controlled substance); or
>
> (3) section 1011(2) of the Controlled Substances Import and Export Act (21 U.S.C. 961(2)) (relating to the importation for transhipment to another country of controlled substances).

The term "violates" is defined in section 111 to mean in fact to engage in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. Whether a mental state need be proved as to the fact that the conduct violates a statute or regulation is to be determined by reference to the underlying statute and not by reference to 303(d)(1)(A). Thus, this offense preserves intact the elements (including jurisdictional [49] and culpability elements) of the crimes in current law. The descriptions of the underlying offenses contained in parentheses are not to be construed as limiting the scope or application of the statutes referred to.[50]

3. Grading

An offense described in subsection (a)(2) is graded as a Class E felony (up to three years in prison). This approximately carries forward the penalty level in existing law (four years).

An offense under paragraphs (a)(1) or (a)(3) is graded as a Class A misdemeanor (up to one year in prison). This preserves the normal maximum penalty imposable currently.[51]

SECTION 1815. GENERAL PROVISIONS FOR SUBCHAPTER B

This section contains, *inter alia,* various definitions applicable to the offenses in this subchapter. These have been adequately explained in connection with the offenses to which they pertain, and no further discussion of them is necessary.

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[49] See section 201(b)(2).

[50] See section 112(b).

[51] The Committee has eliminated the increased recidivist penalties in current law. For explanation, see the discussion with respect to section 1812.

Subsection (b) contains a general defense to a prosecution under sections 1811, 1812, and 1813 that the actor's conduct was authorized by the provisions of the Controlled Substances Act or the Controlled Substances Import and Export Act.

This continues existing law since the statutes brought forward by sections 1811, 1812, and 1813 generally contain the clause, "except as authorized by this subchapter" or some equivalent language,[52] and, in any event, the exception for authorized conduct is implicit.

By virtue of 21 U.S.C. 885, discussed in connection with the special defense in proposed section 1813, the existing exception for authorized conduct is made a matter of defense which the government need not negative in its pleadings or disprove at trial until the defendant has sufficiently raised the issue. Hence, classifying this exception as a "defense" serves to perpetuate current law in this regard.[53]

SUBCHAPTER C.—EXPLOSIVES AND FIREARMS OFFENSES

(Sections 1821-1824)

This subchapter carries forward the basic firearms and explosives offenses in current law. Except for a few relatively minor instances, no effort has been made to add to or subtract from the scope of present Federal coverage. Certain offenses moved to title 15, or redesignated as sections of title 18 Appendix, because of their basic regulatory nature and because their revision is presently under active consideration by the Committee, have been referred to by cross-reference in this title for their penalties in accordance with the general policy that all serious criminal offenses should be contained in the proposed new Federal criminal code. The offenses in this subchapter are concerned with explosives (section 1821), firearms (section 1822), using a firearm or other weapon in the course of a crime (section 1823), and possessing or placing a firearm aboard an aircraft (section 1824).

SECTION 1821. EXPLOSIVES OFFENSES

1. In General and Present Federal Law

This section brings forward offenses in chapter 40 of title 18, specifically 18 U.S.C. 842(a) through (k) and 18 U.S.C. 844(d) and (g), and also enlarges Federal cognizance over explosives offenses in airports. Because 18 U.S.C. 842 is primarily regulatory in nature, its provisions have been transferred to title 15 and the offenses here restated in terms of whoever "violates" those provisions. This section also provides that it is an offense to violate 46 U.S.C. 170(14), 49 U.S.C. 1472(h)(2), or 49 U.S.C. 1809(b), which relate to illegal transportation of hazardous materials.

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[52] E.g., 21 U.S.C. 841(a), 844(a).

[53] See proposed Rule 25.1 of the Federal Rules of Criminal Procedure contained in the subject bill. 21 U.S.C. 885 has generally been sustained against constitutional challenge. *United States* v. *Rosenberg*, 515 F.2d 190, 198-199 (9th Cir.), cert. denied, 423 U.S. 1031 (1975); *United States* v. *Benish*, 389 F. Supp. 557, 560 (W.D. Pa.), aff'd, 523 F.2d 1051 (3d Cir.), cert. denied, 424 U.S. 954 (1976). However, in *United States* v. *Black*, 512 F.2d 864 (9th Cir. 1975), the Ninth Circuit held the requirement that the defendant go forward with evidence invalid as applied to a physician charged with distributing controlled substances not in the "usual course of his professional practice."

Chapter 40 of title 18 (consisting of 18 U.S.C. 841–848) was enacted in 1970. 18 U.S.C. 842 sets forth, in subsections (a) through (k), a number of unlawful acts relating to the regulation and licensing of the business of importing, manufacturing, or dealing in explosive materials.

Subsection (a) makes it unlawful for any person (1) to engage in the business of importing, manufacturing, or dealing in explosive materials without a license issued under this chapter, or (2) knowingly to withhold information or to make any false or fictitious oral or written statement or to furnish any false or fictitious identification, intended or likely to deceive for the purpose of obtaining explosive materials, or a license, permit, exemption, or relief from disability under this chapter, and (3) other than a licensee or permittee knowingly to transport, ship, receive, etc., in interstate or foreign commerce any explosive materials [1] or to distribute explosive materials to any person (other than a licensee or permittee) who the distributor has reasonable cause to believe does not reside in the State in which the distributor resides.[2]

Subsection (b) makes it unlawful for any licensee knowingly to distribute any explosive materials to any person except (1) a licensee, (2) a permittee, or (3) a resident of the State where the distribution is made and in which the licensee is licensed to do business or a State contiguous thereto if permitted by the laws of the State of the purchaser's residence.

Subsection (c) makes it unlawful for any licensee to distribute explosive materials to any person who the licensee has reason to believe intends to transport such explosive materials into a State where the purchase, possession, or use of explosive materials is prohibited, or which does not permit its resident to transport or ship explosive materials into it or to receive explosive materials in it.

Subsection (d) makes it unlawful for any licensee knowingly to distribute explosive materials to any individual who (1) is under twenty-one years of age, (2) has been convicted in any court of a crime punishable by imprisonment exceeding one year,[3] (3) is under indictment for a crime punishable by imprisonment exceeding one year, (4) is a fugitive from justice, (5) is an unlawful user of marihuana, or any depressant or stimulant drug, or narcotic, as those terms are defined, respectively, in 26 U.S.C. 4761, 21 U.S.C.

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[1] An exception is created for a person who purchases explosive materials lawfully in a contiguous State, if the transportation, shipment, or receipt of such explosives is permitted by the law of the State in which he resides.

[2] 18 U.S.C. 841 contains definitions for chapter 40, including the terms "person," "interstate or foreign commerce," "explosive materials," "permittee," "licensee," and "distribute."

[3] The term "crime punishable by imprisonment . . . exceeding one year" is defined in section 841 to exclude (1) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses as the Secretary of the Treasury may by regulation designate, or (2) any State offense (other than one involving a firearm or explosive) classified as a misdemeanor by the laws of the State and punishable by a term of imprisonment of two years or less.

321(v), and 26 U.S.C. 4731(a), or (6) has been adjudicated a mental defective.

Subsection (e) makes it unlawful for any licensee knowingly to distribute any explosive materials to any person in any State where the purchase, possession, or use by such person of explosive materials would be in violation of any State law or published ordinance applicable at the place of distribution.

Subsection (f) makes it unlawful for any licensee or permittee willfully to manufacture, import, distribute, or receive explosive materials, without making such records as the Secretary of the Treasury may require by regulation.

Subsection (g) makes it unlawful for any licensee or permittee knowingly to make any false entry in any record which he is required to keep pursuant to this section.

Subsection (h) makes it unlawful for a person to receive, conceal, transport, ship, restore, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that they were stolen.[4]

Subsection (i) makes it unlawful for any person (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment exceeding one year,[5] (2) who is a fugitive from justice, (3) who is an unlawful user of or addicted to marihuana, or any depressant or stimulant drug, or narcotic drug, as those terms are defined, respectively, in 26 U.S.C. 4761, 21 U.S.C. 321(v), and 26 U.S.C. 4731(a), or (4) who has been adjudicated as a mental defective or committed to a mental institution, to ship or transport any explosive in interstate or foreign commerce or to receive any explosive which has been so shipped or transported.

Subsection (j) makes it unlawful for any person to store any explosive in a manner not in conformity with regulations promulgated by the Secretary of the Treasury.

Subsection (k) makes it unlawful for any person having knowledge of the theft or loss of any explosive materials from his stock to fail to report any such theft or loss within twenty-four hours of discovery to the Secretary of the Treasury and to appropriate local authorities.

18 U.S.C. 845 sets forth various exceptions to the coverage under the foregoing subsections, including any aspect of the transportation of explosive materials via railroad, water, highway, or air, which is regulated by the United States Department of Transportation,[6] the use of explosive materials in certain medicines and medical agents, the transportation, shipment, receipt or importation of explosive materials for delivery to any agency of the United States or to a State or political subdivision, small arms ammunition and components thereof, black powder in quantities not exceeding fifty

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[4] See *United States* v. *Dawson*, 467 F.2d 668 (8th Cir. 1972), cert. denied, 410 U.S. 956 (1973), sustaining this statute as a valid exercise of congressional power notwithstanding it requires no showing of an interstate nexus or effect on interstate commerce.

[5] In *United States* v. *Hoctor*, 487 F.2d 270 (9th Cir. 1973), the court held that a person who pleaded guilty in State courts to a felony, but whose conviction was subsequently "expunged" pursuant to a State statute because he satisfactorily fulfilled the conditions of his probation, was not to be considered, for purposes of 18 U.S.C. 844(i), as having been previously "convicted."

[6] See *United States* v. *Illingworth*, 489 F.2d 264 (10th Cir. 1973), holding that, under this exception, no prosecution under 18 U.S.C. 842 would lie for transporting explosives across State lines without a permit where the accused had carried dynamite on board an aircraft in view of a Federal Aviation Administration regulation proscribing the carrying of dynamite on passenger aircraft. Of course, the conduct at issue is otherwise prosecutable, i.e., under 49 U.S.C. 1472(h).

pounds, and the manufacture, under the regulation of the military departments of the United States, of explosive materials for, or their distribution to or storage or possession by, the military or naval services or other agencies of the United States, or to other establishments owned or operated on behalf of the United States.

Under 18 U.S.C. 844(a), whoever violates subsections (a) through (i) of Section 842 may be punished by up to ten years in prison; under 18 U.S.C. 844(b), whoever violates subsections (j) and (k) may be punished by up to one year in prison.

18 U.S.C. 844(d) punishes by up to ten years in prison [7] whoever transports or receives, or attempts to do so, any explosive [8] in interstate or foreign commerce, with the knowledge or intent that it will be used to injure, kill, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property.

18 U.S.C. 844(g) penalizes by up to one year in prison whoever possesses an explosive in any building in whole or in part owned, possessed, or used by or leased to the United States or any department or agency thereof, except with the written consent of the agency, department, or person responsible for the management of such building.

46 U.S.C. 170 provides that it is unlawful to transport certain explosives or hazardous materials on vessels in violation of the section or regulations promulgated by the Commandant of the Coast Guard. Under 46 U.S.C. 170 (14), as amended in 1974 by the Hazardous Materials Transportation Act, whoever knowingly violates a provision of the section or the regulations may be punished by up to five years' imprisonment.

49 U.S.C. 1472(h)(2) provides up to five years' imprisonment for a person who willfully delivers hazardous materials for air transportation in violation of a rule, regulation, or order of the Secretary of Transportation.

49 U.S.C. 1809(b), as enacted in 1974 as section 110(b) of the Hazardous Materials Transportation Act, punishes by up to five years' imprisonment a willful violation of the Act. The Act restricts transportation of hazardous materials in commerce and provides for regulations by the Secretary of Transportation.

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) transports or possesses an explosive with intent that it be used, or with knowledge that it may be used, to commit a Federal, State, or local felony, (2) violates a provision included in subsections (a) through (k) of section 1103 of the Organized Crime Control Act of 1970, as amended by section 141 of the Criminal Code Reform Act of 1981 (15 U.S.C.—) (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in explosive materials), (3) violates section 4472(14) of the Revised Statutes, as amended (46 U.S.C. 170 (14)) (relating to the regulation of carriage of explosive materials on vessels), section 902(h)(2) of the Federal Aviation Act of 1950, as amended (relating to transportation of hazardous materials in air commerce), or section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)) (relating to transportation of hazardous materials in commerce), (4) possesses an explosive in a government building, or (5) possesses an explosive in or on an airport facility or premises in fact subject to the regulatory authority of the Federal Aviation Administration.

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[7] The penalty increases if personal injury or death results from the commission of the offense.

[8] The term "explosive" is defined for section 844 in 18 U.S.C. 844(j) in somewhat different terms than for section 842.

Paragraph (1) essentially carries forward the offense defined in 18 U.S.C. 844(d). The word "possesses" has been substituted for the word "receives." In addition, the offense has been slightly altered in that the specific intent or knowledge accompanying the conduct includes the use of the explosive to commit any felony, whereas the current statute speaks of knowledge or intent that the explosive will be used "to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property." The Committee's formulation arguably expands the kinds of felonies covered. In another respect, however, it is clearly more narrow in that it specifically limits coverage to use in intended offenses that are felonies, whereas 18 U.S.C. 844(d) apparently extends to all unlawful uses, whether involving a felony, lesser offense, or perhaps even a tort. The term "unlawful" in 18 U.S.C. 844(d) has not been judicially construed.

The term "explosive" is defined in subsection (b) to include a "destructive device; gunpowder, smokeless powder or powder used for blasting materials; and a fuze, detonator, or other detonating agent." This adds to the definition of the term "explosive" in section 111, where it is generally defined to mean a chemical compound, a mechanical mixture, or any combination of materials, in such proportions, quantities, or packaging that may be exploded by operation of fire, friction, concussion, percussion, nuclear fission, or nuclear fusion, or any other means. The term "destructive device" is likewise defined in section 111 and means an explosive, an incendiary material, a poisonous or infectious material in a form that can readily be used to cause serious bodily injury, or a material that can be used to cause a nuclear incident as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014(8)); and includes a bomb, grenade, mine, rocket, missile, or similar device containing an explosive, incendiary material, or a material that can be used as a chemical, biological, or radiological weapon.

With the principal exception of poisonous or infectious materials, this definition is basically the same as that in 18 U.S.C. 844(j), which applies to 18 U.S.C. 844(d). The term "detonator" is intended to have the meaning set forth in 18 U.S.C. 841(f).

The conduct in this offense is transporting or possessing something. Since no culpability standard is specifically designated, the applicable state of mind that must be shown is at least "knowing," i.e., that the offender was aware of the nature of his actions.[9]

The element that what was transported or possessed was an explosive is an existing circumstance. Since no culpability level is designated in this section, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[10]

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[9] See sections 303(b)(1) and 302(b)(1).

The element that the explosive be transported or possessed with intent that it be used, or with knowledge that it may be used, to commit a felony states the particular state of mind with which it must be proved that the conduct was performed. It should be noted that the phrase "to commit a felony" includes the attempted commission of a felony, the consummation of a felony, and any immediate flight from the commission of a felony.[11]

Paragraph (2) brings forward the offenses in 18 U.S.C. 842(a) through (k) which, as regulatory provisions, have been moved to title 15, United States Code. The term "violates" is defined in section 111 to mean in fact to "engage in conduct which is . . . declared unlawful." Hence, the exact elements and culpability required for the offenses referred to in subsections (a) through (k) will also be required under this paragraph. The brief description of the offenses contained in a parenthesis is not to be construed as limiting the scope or application of the section to which it refers.[12]

Although retaining the foregoing offenses in 18 U.S.C. 842 virtually *in haec verba*, the Committee does not endorse or intend to bring forward the interpretation of the term "convicted" in *United States* v. *Hoctor, supra,* as not including persons who in fact were convicted in State court but whose convictions were subsequently "expunged" under State laws. Such State statutes, which are designed to restore civil liberties and remove disabilities for State purposes, should not be deemed to affect the application of the Federal statute, which was clearly intended to operate uniformly to keep explosives out of the hands of persons who in fact were previously convicted in a court of a specified level of offense. As noted by the dissenting judge in *Hoctor,* whose opinion the Committee approves, the congressional intent that a uniform *Federal* determination be made as to the eligibility of a convicted person to transport or receive any explosives or explosive material is evidenced by the presence in chapter 40 of a provision enabling a person who has been previously indicted for or convicted of a crime punishable by imprisonment in excess of one year to apply to the Secretary of the Treasury for relief from the disabilities imposed by this chapter as a result of such conviction or indictment.[13]

Paragraph (3) brings forward the offenses in 46 U.S.C. 170 (14), 49 U.S.C. 1472(h)(2), and 49 U.S.C. 1809(b), relating, respectively, to transportation of hazardous materials in vessels, aircraft, and commerce generally. Again, by the use of the term "violates," the exact elements and culpability required for the offenses referred to in those sections will also be required under this paragraph.

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[10] See sections 303(b)(2) and 302(c)(1).

[11] See the definition of "commission of an offense" and variants thereof in section 111. The term "felony" means an offense for which a term of imprisonment of more than one year is authorized by a Federal statute, or would be authorized if a circumstance giving rise to Federal jurisdiction existed.

[12] See section 112(b).

[13] See 18 U.S.C. 845(b). The Ninth Circuit has repudiated *Hoctor;* see *United States* v. *Potts,* 528 F.2d 883 (9th Cir. 1975) *(en banc)* see also *United States* v. *Mostad,* 485 F.2d 199 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974). The same reasoning applies with respect to the effect of a State or Federal pardon, other than one based on innocence. See *United States* v. *Donofrio,* 450 F.2d 1054 (5th Cir. 1971) (construing the similar provisions of 18 U.S.C. App. 1202); cf. *United States* v. *Glasgow,* 478 F.2d 850 (8th Cir.). cert. denied, 414 U.S. 845 (1973). Where, however, the conviction is wholly void from the inception (as opposed to voidable), current law—which the Committee endorses—treats the conviction as having never existed for purposes of 18 U.S.C. App. 1202, and a like result should be reached under this statute. See *United States* v. *Lufman,* 457 F.2d 165 (7th Cir. 1972); *Dameron* v. *United States,* 488 F.2d 724 (5th Cir. 1974); compare *United States* v. *Cussity,* 421 F.2d 1320 (6th Cir. 1975).

Paragraph (4) carries forward the offense in 18 U.S.C. 844(g). The term "explosive" is defined in section 111 and in subsection (b) herein and has been discussed in connection with the offense in paragraph (1). The terms "government" and "building" are also defined in section 111. The conduct in this offense is possessing an explosive. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[14]

The element that the conduct occurs in a government building is an existing circumstance. Since no culpability level is set forth in this paragraph, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[15]

Paragraph (5) creates a new offense of possessing an explosive in or on an airport facility or premises that is subject to the regulatory authority of the Federal Aviation Administration. In view of the potential seriousness of such conduct in terms of loss of life and limb and the effect on interstate and foreign commerce, and the need for the investigative resources of Federal law enforcement agencies, the Senate during consideration of S. 1437 in the Ninety-Fifth Congress accepted an amendment to extend Federal cognizance over the possession of explosives in airports. The Committee concurs and has included this offense in the reported bill.

3. Defense

Subsection (c) provides that it is a defense to a prosecution under subsection (a)(4) that the possession was in conformity with the written consent of the government agency or person responsible for the management of such building. This continues the exception in 18 U.S.C. 844(g) for consensual possession of explosives in a government building. As in the present statute, the consent must be in writing and given by the agency or person responsible for the management of the building. Subsection (c) also provides a defense to a prosecution under subsection (a)(5) that the actor's conduct was authorized by a regulation issued by the Administrator of the Federal Aviation Administration. An identical defense is provided to section 1824 (Possessing a Weapon Aboard an Aircraft) and is discussed in the report in connection with that section.

4. Jurisdiction

There is Federal jurisdiction over an offense under paragraph (1) of subsection (a) if the explosive is being transported, shipped, or received in interstate or foreign commerce. This preserves the scope of jurisdiction under 18 U.S.C. 844(d).[16]

By virtue of section 201(b)(2) Federal jurisdiction exists over an offense described in paragraphs (2) and (3) of subsection (a) to the same extent provided for by the statutes referred to in those paragraphs.

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[14] See sections 303(b)(1) and 302(b)(1).

[15] See sections 303(b)(2) and 302(c)(1).

[16] See the definitions in section 111 of "interstate commerce," "foreign commerce," and "state," and compare them with 18 U.S.C. 841(b).

There is Federal jurisdiction over an offense in paragraph (4) of subsection (a) if the building is owned by, or is under the care, custody, or control of, the United States. This corresponds closely to the jurisdiction under 18 U.S.C. 844(g), which reaches any building in whole or in part owned, possessed, used by, or leased to, the United States or any department or agency thereof. The definition of "United States" in section 111 includes any department or agency. Under the Committee's proposal, however, there will not be Federal jurisdiction under this section if an explosive is possessed in a part of a building not owned or under the care, control, etc., of the United States, although such possession might constitute an attempt (see section 1001) to commit the offense.

In addition, extraterritorial jurisdiction exists over this offense under section 204(f).

Pursuant to section 201(b)(2), there is Federal jurisdiction over an offense described in paragraph (a)(5) if the offense is committed in the general or special jurisdiction of the United States.

5. Grading

An offense under subsection (a)(1) is graded as a Class C felony (up to twelve years' imprisonment), comparably to 18 U.S.C. 844(d). A violation under subsection (a)(2) of a provision set forth in subsection (a) through (i) of section 1103 of the Organized Crime Control Act of 1970 and a violation of subsection (a)(4) or (a)(5) are graded as Class D felonies (up to six years in prison). The first represents a reduction from the ten-year maximum sentence under 18 U.S.C. 844(a) in recognition of the fact that these are regulatory offenses and that any personal injury or property damage resulting therefrom will be separately punishable under chapters 16 and 17 of the code.[17] The second represents an increase made in S. 1630 by Committee amendment to treat this offense as representing the same potential for harm to persons and property as is presented by an offense described in subsection (a)(5).

An offense under subsection (a)(2), if the violation is of a provision set forth in subsection (j) or (k) of section 1103 of the Organized Crime Control Act of 1970 is graded as a Class A misdemeanor (up to one year in prison). This carries forward the existing penalty level in 18 U.S.C. 844(b).

An offense under subsection (a)(3) is graded as a Class E felony (up to three years in prison). This represents a reduction, based upon a similar rationale, from the present five-year maximum sentence.

SECTION 1822. FIREARMS OFFENSES

1. In General and Present Federal Law

This section concerns the firearms offenses currently appearing in 18 U.S.C. 922, 923, 924(b), 18 U.S.C. App. 1202, and 26 U.S.C.

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[17] As previously indicated, the maximum imposable penalty under 18 U.S.C. 844(d) increases if personal injury or death results from the transportation or receipt of an explosive. Under the bill, as reported, the defendant in such event would be liable for additional penalties under chapter 16 (Offenses against the Person).

5861. All the title 18 provisions except section 924(b) are regulatory in nature and therefore have been redesignated as sections of title 18 Appendix [18] and the offenses here have been cross-referenced in terms of whoever "violates" them.

18 U.S.C. 922, part of chapter 44 of title 18, enacted in 1968, sets forth a series of unlawful acts too numerous to specify here.[19] The format and offenses are generally parallel to those in 18 U.S.C. 842, discussed in relation to the previous section. Among other things, section 922 makes it unlawful for any person except a licensed importer, manufacturer, or dealer to engage in the business of importing, manufacturing, or dealing in firearms. The prohibition extends to intrastate dealings in firearms and has been upheld on the basis of congressional findings accompanying the legislation of an interrelationship between the intrastate business of selling guns and interstate crime and trafficking in guns.[20] Section 922 also contains a prohibition against making any false material statement in connection with the "acquisition" of a firearm. This provision also extends to intrastate transactions.[21] The term "acquisition" has been construed broadly, to include the redemption of a pawned firearm.[22]

18 U.S.C. 923 sets forth a series of provisions covering the licensing and regulation of the business of importing, manufacturing, and dealing in firearms or ammunition.

18 U.S.C. 924(a) provides that whoever violates any provision of the chapter may be punished by up to five years' imprisonment.

18 U.S.C. 924(b) punishes by up to ten years in prison whoever, with intent to commit an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense thus punishable is to be committed therewith, ships, transports, or receives a firearm or ammunition in interstate or foreign commerce.[23]

18 U.S.C. App. 1202 punishes by up to two years in prison whoever, (1) having been convicted by a court of the United States or of a State or any political subdivision of a felony, (2) having been dishonorably discharged from the armed forces, (3) having been adjudged by a court to be mentally incompetent, (4) having renounced his United States citizenship, or (5) as an alien illegally in the United States, receives, possesses, or transports any firearm in interstate or foreign commerce or affecting such commerce. It also punishes, by a like term, whoever while being employed to his knowledge by any person in any of the above categories, in the course of his employment receives, possesses, or transports a firearm in interstate or foreign commerce or affecting such commerce. The term "felony" is defined in section 1202(c)(2) in terms similar

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[18] For discussion of an interesting proposal presented to the Committee concerning Federal licensing of gun owners rather than of guns, see Hearings, pp. 6429–6442 (recommendation of New York State Bar Association).

[19] 18 U.S.C. 921 contains definitions for chapter 44.

[20] See e.g., *United States* v. *Day*, 476 F.2d 562 (6th Cir. 1973); *United States* v. *Ruisi*, 460 F.2d 153 (2d Cir.), cert. denied, 409 U.S. 914 (1972); *Mandina* v. *United States*, 472 F.2d 1110 (9th Cir.), cert. denied, 412 U.S. 907 (1973).

[21] E.g., *Coy* v. *United States*, 460 F.2d 34 (8th Cir.), cert. denied, 409 U.S. 1010 (1972); *United States* v. *Green*, 471 F.2d 775 (7th Cir. 1972).

[22] *Huddleston* v. *United States*, 415 U.S. 814, 823 (1974)

[23] The term "crime punishable by imprisonment for a term exceeding one year" is defined in 18 U.S.C. 921(20) in language identical to that used in 18 U.S.C. 841, discussed in connection with the prior section dealing with explosives.

to those of 18 U.S.C. 921 to mean any offense punishable by imprisonment for a term exceeding one year, but not including any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the law of the State and punishable by a term of imprisonment of two years or less.[24] In *United States* v. *Bass,*[25] the Supreme Court held that 18 U.S.C. App. 1202 does require proof of a nexus between the particular firearms transaction charged and an effect on interstate or foreign commerce. However, the Court stated that such a nexus could be shown, as to the crime of "receiving" a firearm, by proof that at any time previously the firearm had traveled in interstate or foreign commerce. The Court noted that such a reading preserved a significant difference in scope between that section and 18 U.S.C. 922(g) and (h), which it overlaps.[26] Subsequently, in *Scarborough,*[27] the Court held (contrary to the intimation in *Bass*) that the possession offense carried the same broad scope as the receiving offense, and could be established by proof that the firearm in question had moved in interstate commerce even before the defendant's felony conviction.

Finally, 26 U.S.C. 5861 prohibits some thirteen unlawful acts relating to firearms, including engaging in business as a manufacturer or importer of, or dealer in, firearms without having paid the special occupational tax, or without having registered, as required by 26 U.S.C. 5801 and 5802. The penalty for violating any of the provisions of section 5861 is up to ten years in prison. The registration requirement has been sustained against a claim that it infringes the privilege against compulsory self-incrimination, in part because of the existence of a use immunity restriction (26 U.S.C. 5848) with regard to any information furnished in the course of such registration.[28]

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) transports or possesses a firearm or ammunition with intent that it be used to commit a Federal, State, or local felony, (2) violates a provision of chapter 44 of title 18 Appendix (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in firearms and ammunition), (3) violates 26 U.S.C. 5861 (relating to the registration of importers, manufacturers, and dealers in firearms and the payment of a special occupational tax), or (4) violates section 1202 of title 18 Appendix (relating to the receipt, possession, or transportation of firearms by persons prohibited from engaging in such conduct).

Paragraph (1) essentially reflects the major portion of the offense currently in 18 U.S.C. 924(b). The term "possesses" has been substituted for the term "receives." The phrase in S. 1630 as introduced

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[24] The mere fact that pursuant to a plea bargain, the judge imposes a sentence below the maximum that renders the offense a misdemeanor under State law does not alter its nature as a felony under the above definition. See *United States* v. *Glasgow, supra* note 13; but see *United States* v. *Schultheis,* 486 F.2d 1331 (4th Cir. 1973).

[25] 404 U.S. 336 (1971).

[26] *Scarborough* v. *United States,* 431 U.S. 563 (1977); see also *Barrett* v. *United States,* 423 U.S. 212 (1976).

[27] Despite the overlap and the fact that 18 U.S.C. App. 1202 carries a lower penalty than 18 U.S.C. 922(h), the Supreme Court has held that a defendant charged and convicted under the latter statute may be sentenced thereunder to a prison term in excess of that authorized by the former, *United States* v. *Batchelder,* 442 U.S. 114 (1979).

[28] See *United States* v. *Freed,* 401 U.S. 601 (1971).

"or with reasonable cause to believe it is to be used", is omitted from the bill as reported only because it is fully carried forward in the original version of the offense that is retained, as an overlapping provision, as section 904(b) of title 18 Appendix. In addition, the Committee has eliminated in this context the complex definition, used in 18 U.S.C. 924(b), of "crime punishable by imprisonment for a term exceeding one year" and has replaced it with the term "felony." "Felony" is defined in section 111 to mean an offense for which a term of imprisonment of more than one year is authorized by a Federal statute, or would be if a circumstance giving rise to Federal jurisdiction existed. This more straightforward definition avoids the problem of construing the exception under the current definition for certain offenses classified as misdemeanors under State law although punishable by imprisonment in excess of one year.

The word "firearm" is defined in subsection (b) to include a frame or receiver of a firearm as well as a firearm silencer or muffler. The term "firearm" is also generally defined in section 111 to mean a weapon that can expel, or that can readily be converted to expel, a projectile by the action of an explosive, and includes such a weapon, loaded or unloaded, commonly referred to as a gun, pistol, revolver, rifle, shotgun, machine gun, bazooka, mortar, or cannon. This is virtually identical to the definition of "firearm" in 18 U.S.C. 921 (applicable under 18 U.S.C. 924(b)) except that the category of "destructive devices" is omitted from coverage in this section.[29] The reference in the definition to weapons that can readily be converted to expel a projectile is primarily intended to encompass such items as so-called "starter guns," which are also embraced under existing law.[30]

The conduct in this offense is transporting or possessing something. Since no culpability standard is specifically set forth in this section, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[31]

The element that what was transported or possessed was a firearm or ammunition [32] is an existing circumstance. Since no culpability level is here prescribed, the applicable state of mind to be shown is, at a minimum "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstance existed.[33]

The element that the transportation or possession was done with intent that the firearm or ammunition be used to commit a felony [34] indicates the particular state of mind for which it must be shown that the conduct was performed. As noted before, the full form of the existing offense, which is carried forward as an overlapping offense in section 924(b) of title 18 Appendix, includes as an alternative state of mind "reasonable cause to believe" that a felony is to be committed with the firearm or ammunition. This branch of the offense essentially states a negligence standard in recognition of the fact that firearms are instrumentalities that can greatly facilitate the commission of crimes, and increase the danger associated with crimes; thus it is appropriate to prohibit transactions involving firearms when the actor has any reasonable cause to believe the weapon will be used to commit a felony.

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[29] Transportation in interstate of foreign commerce of a "destructive device" with intent that it be used, or with knowledge that it may be used, in the commission of a felony is punishable under section 1821 of the proposed Code, since "destructive devices" are included in the definition of "explosive."

[30] See *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463 (2d Cir.), cert. denied, 404 U.S. 983 (1971).

[31] See sections 303(b)(1) and 302(b)(1).

[32] The term "ammunition" is defined in section 111.

[33] See sections 303(b)(2) and 302(c)(1).

[34] It is noteworthy that the phrase "to commit a felony" includes the attempted commission of a felony, the consummation of a felony, and any immediate flight after the commission of a felony. See the definition of "commission of an offense" and variants thereof, in section 111.

The remaining paragraphs reflect the retention, with one change discussed below, of the other provisions of current law previously mentioned. Thus paragraphs (2) and (4) cross-reference to the offenses defined in 18 U.S.C. 921-28, which have redesignated as comparable sections of title 18 Appendix, and 18 U.S.C. App. 1202, which has been left in the new title 18 Appendix as section 1202. The term "violates" (defined in section 111) means that the precise elements and culpability now required under those statutes will be required under this section. The brief description in parentheses of the nature of the offenses referred to does not in any way limit the scope or application of those sections.[35]

The Committee has decided to redesignate the current 1968 Gun Control Act as chapter 44 of title 18 Appendix. The National Rifle Association had expressed concern that, because these primarily regulatory offenses are currently undergoing comprehensive review and revision by this Committee, the incorporation, in this bill, of changes in other than the most serious offenses in that Act might cause confusion and might, because of the Code's delayed effective date, interfere with any changes ultimately adopted in the separate revision effort. Accordingly, as noted earlier, the Committee has retained these provisions intact, including the sentencing provisions, and redesignated them as chapter 44 of title 18 Appendix. In doing so, it has even retained current 18 U.S.C. 924(b) and (c), even though those sections largely overlap the provisions of section 1822(a)(1) and 1823 of the Code. Once the amendments to the 1968 Act have been completed, the provisions of the Code can be conformed to the amended Act during the period before the effective date of the Code.

The single change alluded to above in which the Committee has consciously endeavored to modify current law relates to section 222 of the conforming amendments. That section would delete the phrase "in commerce or affecting commerce" presently found in 18 U.S.C. App. 1202.

The purpose is to overcome the decision in *United States* v. *Bass, supra,* that required the government to prove, as an element of the offense, that a convicted felon's possession, receipt, or transportation of a firearm was in commerce or affecting commerce. Under the Committee's proposal, no such element will be included in the basic definition of the offense. As noted by the Court in *Bass,* the legislative history of 18 U.S.C. App. 1202 leans in favor of such a construction.[36] Moreover, prior to the decision in *Bass,* the courts of appeals that had so construed the statute had uniformly sustained it as constitutional, in light of the findings of Congress in section 1201 that the possession, receipt, and transportation of firearms by the prohibited classes of individuals in fact constitutes a burden on interstate commerce.[37] The Committee concurs with these views and legislative findings and, believing that the broader construction of 18 U.S.C. App. 1202 was the one originally intended by the Congress, has amended the statute to make clear that in the future it will enjoy such scope.

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[35] See section 112(b).

[36] See 404 U.S. at 339-347. See also *id.* at 351-356 (Blackmun, J., dissenting). However, the Court felt that the statute was not sufficiently clear in this respect to support the wider inter-

Paragraph (3) brings into title 18 as a significant felony the current prohibitions of 26 U.S.C. 5861, discussed above.

The Committee intends that, with the exception of the *Bass* case discussed above, the judicial interpretations of the statutes referred to under paragraphs (2) through (4) herein also be deemed to apply under this section.

3. Jurisdiction

Subsection (d) provides that there is Federal jurisdiction over an offense in subsection (a)(1) if the firearm or ammunition is being transported, shipped, or received in interstate or foreign commerce. This carries forward the present jurisdictional purview of 18 U.S.C. 924(b).[38]

Pursuant to section 201(b)(2) there is Federal jurisdiction over an offense described in subsections (a)(2), (3), and (4) to the same extent provided for in the statutes referred to in those subsections.

4. Grading

An offense under subsection (a)(1) is graded as a Class C felony (up to twelve years in prison). An offense under subsection (a)(2) is subject to the penalty set forth in the relevant provision of chapter 44 of title 18 Appendix as redesignated by section 101 of S. 1630.

An offense under subsection (a)(3) or (a)(4) is graded as a Class D felony (up to six years in prison). For an offense described in subsection (a)(3), this represents a decrease from the ten-year maximum penalty under existing law, in recognition of the fact that these are regulatory offenses and that any personal injury resulting therefrom will be separately punishable under chapter 16 of the Code. For an offense described in subsection (a)(4), this represents an increase from the two-year maximum in current law that makes the penalty similar to that provided in 18 U.S.C. App. 924(a) for the similar offenses described in 18 U.S.C. App. 924(g) and (h), in recognition of the danger inherent in such persons as convicted felons transporting or possessing firearms.

SECTION 1823. USING A WEAPON IN THE COURSE OF A CRIME

1. In General and Present Federal Law

This section is similar to 18 U.S.C. 924(c), which is redesignated by section 101 of the bill, as reported, as 18 U.S.C. App. 924(c). That

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pretation argued, and, in accordance with the principle of lenity, adopted the narrower construction.

[37] See e.g., *United States* v. *Synnes*, 438 F.2d 764, 766–769 (8th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972); *Stevens* v. *United States*, 440 F. 2d 144, 149–152 (6th Cir. 1971).

[38] See the definitions of "interstate commerce," "foreign commerce," and "state" in section 111 and compare them with 18 U.S.C. 921(a)(2).

statute provides that whoever (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States or (2) carries a firearm unlawfully during the commission of any such felony shall, in addition to the punishment provided for the commission of such felony, be sentenced to a prison term of not less than one year nor more than ten years.[39] It has been held that this creates a separate offense and is not merely a provision for enhancing the penalty.[40] The term "unlawfully", which limits the operation of the statute, has been held to refer to violations of State or municipal law, in addition to Federal law.[41] The Committee has included the provision here as describing dangerous criminal conduct, while carrying forward the current law provision as part of redesignated chapter 44 of title 18 Appendix. The Committee expects to resolve this overlap as part of the ongoing revision of chapter 44 now under way in the Committee, as discussed under section 1822, *supra.*

2. The Offense

Subsection (a) provides that a person commits an offense if, during and in relation to the commission of a crime of violence, other than a misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury, he (1) displays or otherwise uses a firearm or a destructive device, (2) possesses a firearm or destructive device, or (3) displays or otherwise uses (A) a dangerous weapon other than a firearm or destructive device or (B) an imitation of a firearm or destructive device.

Although this section refers explicitly to both firearms and destructive devices, it should be emphasized that this does not represent an enlargement of present coverage since the definition of "firearm" in 18 U.S.C. 921(a)(3) specifically includes a destructive device (defined in 18 U.S.C. 921(a)(4)). The definitions of "firearm" and "destructive device" in section 111 of the subject bill are practically coextensive with those in section 921.

This section does, however, modestly differ from existing law in that it reaches the use, display, or possession of a firearm or destructive device during a "crime of violence" rather than a felony, and requires that the offense be committed "in relation to" as well as "during" such crime. This both expands and contracts the scope of the offense. Some expansion is effected because the definition of "crime of violence" in section 111 reaches certain misdemeanors as well as felonies.[42] On the other hand, some narrowing is caused by limiting the offenses with which the display, use, or possession of a firearm must be associated to crimes of violence rather than any felony, and by the requirement that the display, use, or possession be "in relation to" such underlying offense. These limitations, however, are designed to refine the offense by confining it to its proper and practical boundaries as a means of deterring and punishing the employment of a firearm in relation to an offense that, by its nature, involves physical force or a substantial risk thereof. This will not, in the Committee's judgment, produce any significant practical constraints on the scope of the offense, since experience under 18 U.S.C. 924(c) indicates that the statute is not frequently utilized in situations in which the associated offense is not a "crime of violence" as defined herein.[43] The elimination from the definition of "crime of violence" of a "misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury" is intended to exclude situations in which a person, at no risk to human safety, uses a firearm to damage a sign or other object on a Federal reservation or to shoot game unlawfully. While the person should be liable in such instances for the property damage, the Committee does not believe it is appropriate to render him liable at a felony level under this section for his use of a firearm.

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[39] In the case of a second or subsequent conviction under this subsection, the penalty rises to not less than two nor more than twenty-five years, and the court is forbidden to suspend the sentence, place the defendant on probation, or provide that the sentence run concurrently with that for the underlying felony.

[40] See *United States* v. *Sudduth,* 457 F.2d 1198 (10th Cir. 1972); *United States* v. *Ramirez,* 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973).

[41] See *United States* v. *Howard,* 504 F.2d 1281 (8th Cir. 1974).

[42] "Crime of violence" is defined to mean (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In addition, paragraph (3) broadens the offense in current law to include the use or display of dangerous weapons other than a firearm or destructive device, and the use or display of an imitation of a firearm or destructive device. The inspiration for this latter addition comes from statutes such as 18 U.S.C. 2113(d), which provide an enhanced penalty for certain offenses (in that case, bank robbery) if, in committing or attempting to commit the offense, the defendant assaults any person or puts his life in jeopardy by use of a dangerous weapon or device.[44] The courts have divided in construing this statute as to whether an objective putting in jeopardy need be shown or whether it is sufficient that the offender possessed an apparent present ability to place life in danger. Those courts that have adopted the latter view have sustained the application of 18 U.S.C. 2113(d) to situations where unloaded guns or simulated bombs were displayed noting that the use of such devices—whether imitation or otherwise—has the actual effect of increasing the danger to life by tending to induce those intent upon preventing crime to resort to dangerous or deadly weapons.[45]

The Committee endorses this principle and has incorporated it into this offense in part by means of paragraph (3).[46] Thus, under paragraph (3), as well as under the other branches of this section, it will not be necessary to show that life was actually placed in jeopardy, but only that a dangerous weapon, firearm, or destructive device, or an imitation of a firearm or destructive device, was used, displayed, or possessed in the commission of a crime.[47]

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[43] But see *United States* v. *Dixon*, 558 F. 2d 919 (9th Cir.), cert. denied, 434 U.S. 1063 (1977), and *United States* v. *Bower*, 575 F. 2d 499 (5th Cir. 1978), in which the courts sustained convictions under 18 U.S.C. 924(c) where the firearm was carried during the commission of felonies involving the possession of narcotics with intent to distribute.

[44] See also 18 U.S.C. 2114 for a similar provision.

[45] See, e.g., *United States* v. *Cooper*, 462 F.2d 1343 (5th Cir.), cert. denied, 409 U.S. 1009 (1972), and cases cited therein; *United States* v. *Newkirk*, 481 F.2d 881 (4th Cir. 1973), cert. denied, 414 U.S. 1145 (1974) and cases cited therein; but see *United States* v. *Coulter*, 474 F.2d 1004 (9th Cir.), cert. denied, 414 U.S. 833 (1973). See also *Bradley* v. *United States*, 447 F.2d 264 (8th Cir. 1971), vacated, 404 U.S. 567 (1972).

[46] The principle is also embodied in part in the definition of "firearm" in section 111, which includes an unloaded weapon.

One further change from 18 U.S.C. 924(c) should be discussed. Under that statute there is a requirement, as to the prohibition against "carrying" a firearm during the commission of a felony, that the carrying be "unlawful." Thus someone who had a permit for a pistol and who carried but did not use the weapon during an assault or robbery cannot be convicted under the present law.[48] The Committee rejects this limitation on the offense and has omitted the word "unlawfully" from the possession branch of this section. In the Committee's view, the mere carrying or possession of a firearm or destructive device during the commission of a crime indefensibly increases the risk of danger to other persons and should be discouraged by penal sanctions.

As just indicated, the purpose of this section is to create a separate basis of criminal liability for the possession or employment of any firearm, destructive device, or dangerous weapon in the commission of a crime because of the potential danger posed to human life by such conduct. The relatively severe penalties imposable for such conduct will, it is hoped, deter some criminals from using or carrying weapons in the course of their crimes. Where, however, the nature of the offense itself involves using or possessing a weapon, the factor of potential danger to life has already been taken into account, and there is no reason to permit the pyramiding of offenses and punishment through application of this section. Accordingly, the Committee does not intend that this section be construed to apply where the underlying offense is one involving the use or possession of a weapon of the type here covered (for example, a person convicted of possessing a dangerous weapon aboard an aircraft under the following section would not also, by virtue of such conduct, be guilty of an offense under this section).[49]

The conduct in this offense is displaying or otherwise using something (paragraphs (1) and (3)) and possessing something (paragraph (2)). Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[50]

The element that what was displayed, used, or possessed was a firearm, destructive device, dangerous weapon other than a firearm or destructive device,[51] or imitation of a firearm or destructive device, as the case may be, is an existing circumstance. Since no culpability level is prescribed in this section, the applicable state of mind that must be shown is, at a minimum, "reckless," i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstances existed.[52]

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[47] The phrase "commission of a crime" includes the attempted commission, the consummation, and any immediate flight after the commission, of a crime. See the definition of "commission of an offense" and its variants in section 111. In its proposed coverage of the escape phase of a crime, this section may expand somewhat upon current law under 18 U.S.C. 924(c).

[48] See *United States* v. *Ramirez, supra* note 40, at 813–814; *United States* v. *Akers*, 542 F.2d 770 (9th Cir.), cert. denied, 430 U.S. 908 (1976).

[49] This is in accord with the scope of 18 U.S.C. 924(c), *Simpson* v. *United States*, 435 U.S. 6 (1978). See also *United States* v. *Eagle*, 539 F.2d 1166 (8th Cir. 1976) (section 924(c) not applicable where underlying offense was assault with a dangerous weapon) but see *United States* v. *Crew*, 538 F.2d 575 (4th Cir. 1976) (section 924(c) applicable where underlying offense is aggravated bank robbery by putting life in jeopardy through use of dangerous weapon or device).

[50] See sections 303(b)(1) and 302(b)(1).

[51] The term "dangerous weapon" is defined in section 111 (apart from its inclusion of a firearm or destructive device) as a weapon, device, instrument, material, or substance, whether animate or inanimate, that as used or as intended to be used is capable of producing death or serious bodily injury. The term "serious bodily injury" is also defined in section 111.

The common element that the conduct occur "during and in relation to the commission of a crime of violence" (with the exception of a misdemeanor of the type described) is also an existing circumstance as to which, by the operation of the same principle, the required culpability is at least "reckless."

3. Jurisdiction

Subsection (c) provides that there is Federal jurisdiction over an offense in this section if it occurs during the commission of any other offense described in this title over which Federal jurisdiction exists. This limits the extent to which the prohibition has been expanded by virtue of the section's application to misdemeanors, since only those misdemeanors defined in this title will furnish a prosecutable basis for this offense.

4. Grading

An effort has been made in this section to grade the offense according to the degree of potential danger created by the offender's conduct. Thus, an offense under subsection (a)(1), involving the actual display or use of a firearm or dangerous device, is graded as a Class D felony (up to six years in prison). An offense under subsections (a)(2) and (a)(3) is graded as a Class E felony (up to three years in prison).

Subsection (b) also provides that notwithstanding the provisions of part III of this title, if the offense is under paragraph (a)(1) or (a)(2) the court may not sentence the defendant to probation but shall sentence him to a term of imprisonment of not less than two years for a subsection (a)(1) offense or one year for a subsection (a)(2) offense, with the sentence to run consecutively to any other term of imprisonment imposed upon the defendent, unless the court finds that, at the time of the offense, the defendant was less than seventeen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; the defendant was an accomplice whose participation in the crime of violence was relatively minor; or the defendant establishes by a preponderance of the evidence that he committed the crime of violence based upon a good faith belief that he was acting to protect a person or property from conduct constituting a felony, although not under circumstances as would constitute a defense to prosecution. These grading provisions, which are similar to those found in section 1811 (Trafficking in an Opiate), are derived from 18 U.S.C. 924(c), which requires the imposition of a one-to-ten-year prison sentence and in the case of a second or subsequent conviction, removes the options of probation and concurrent sentence (but not parole eligibility), while mandating the imposition of a two-to-twenty-five-year prison term. In lieu of these provisions, the Committee has included a more precise mandatory minimum scheme whereby a true mandatory minimum sentence must be imposed, even for a first offense, unless the court finds that one or more specific mitigating factors are present. Although opposed in general to the concept of mandatory minimum prison sentences, the Committee believes that, in this instance, the provision serves a significant deterrent purpose and should be retained.

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[52] Sections 303(b)(2) and 302(c)(1).

SECTION 1824. POSSESSING A WEAPON ABOARD AN AIRCRAFT

1. In General and Present Federal Law

This section prohibits the possession or placing of a concealed dangerous weapon aboard an aircraft. Its principal purpose is to prevent aircraft hijacking.[53]

This section carries forward, in somewhat modified form, the proscription in 49 U.S.C. 1472(*l*). With certain exceptions, that statute, as amended in 1974, punishes by up to one year in prison whoever, "while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight, or any person who has on or about his person, or who has placed, attempted to place, or attempted to have aboard such aircraft any bomb or similar explosive or incendiary device." [54] The penalty rises to five years in prison if the offense is committed "willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life."

The carrying of a concealed, unloaded gun aboard (or while attempting to board) an aircraft has been held to violate the predecessor to this statute based on the finding that such weapons are "dangerous weapons." [55] However, in *United States* v. *Dishman,*[56] the court, one judge dissenting, held that a starter pistol, capable of firing blanks but not of expelling a projectile, was not a "dangerous weapon" under this statute since, absent evidence of its actual or intended unlawful use, it was not such a weapon as was inherently capable of producing death or great bodily harm.[57]

Another significant case dealing with the meaning of "dangerous weapon" under 49 U.S.C. 1472(*l*) is *United States* v. *Margraf.* [58] In that case, a majority of the Third Circuit sustained the conviction of a man who attempted to board a commercial aircraft carrying a concealed pocketknife with a blade exceeding three inches in length. The court found that, under the circumstances,[59] the knife was a "dangerous weapon" within the scope of the statute. In response to the defendant's petition for a writ of certiorari, the government noted in its brief that on February 8, 1973 (after the defendant's conduct in this case), the F.A.A. had circulated guidelines to assist those responsible for screening passengers boarding aircraft. In describing what property in possession of a passenger should be considered as a weapon or dangerous object, the guidelines, *inter alia,* listed "Knives—All sabres, swords, hunting knives, and such other knives considered illegal by local law." The government, after pointing out that the defendant's knife could lawfully be possessed and carried by him both in Pennsylvania, where he sought to board the aircraft, and in California, his destination, indicated that it had formulated a policy under which the guidelines of the F.A.A. would ordinarily be adhered to in determining which cases to prosecute under this statute. Accordingly, the government requested the Supreme Court to vacate the judgment of the court of appeals and to remand the case so as to permit the charges against the defendant to be dismissed. The government stated its position as follows: [60]

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[53] See *United States* v. *Ware,* 315 F. Supp. 1333 (W.D. Okla. 1970).

[54] The terms "air transportation" and "intrastate air transportation" are defined in 49 U.S.C. 1301(10) and (23).

[55] See *United States* v. *Cook,* 446 F.2d 50 (9th Cir. 1971); *United States* v. *Ware, supra* note 53.

[56] 486 F.2d 727 (9th Cir. 1973).

[57] But see *United States* v. *Brown,* 508 F.2d 427 (8th Cir. 1974), holding a tear gas gun to be a dangerous weapon notwithstanding the gun's inability to expel a solid projectile.

[58] 483 F.2d (3d Cir. 1973) (*en banc*).

[59] Among other things, the defendant had responded in the negative to a security officer's question whether he was carrying a knife, weapon, or other large metallic object.

> It is true that the FAA's guidelines are not binding upon those addressed and leave room for the exercise of trained judgment in regulating the kinds of objects that passengers may carry on board aircraft. They do, however, represent an informed judgment by the expert federal agency charged with primary responsibility for assuring the safety of air commerce that only large knives or those considered illegal under state law should be considered weapons for this regulatory purpose. The Department of Justice has therefore concluded that prosecutions under section 1472(*l*) should not be undertaken with respect to objects not proscribed under the guidelines, at least in the absence of unusual, aggravating circumstances, or where local law may be unduly lax in regulating the carriage of knives or other objects. (We do not, of course, concede that the decision of the court of appeals was wrong as a matter of law, or that the statute in question could never be applied to a knife such as petitioner's.) . . . Since the present case presents no aggravating circumstances and involves no unduly lax local laws, petitioner should not be subject to prosecution.

The Supreme Court granted the government's request and remanded the case to the lower court for reconsideration in light of the government's position.[61]

2. The Offense

Subsection (a) provides that a person commits an offense if he possesses or secretes aboard an aircraft: (1) a dangerous weapon, other than a destructive device, that in fact is concealed and that is, or that would be accessible to such person in flight; or (2) a destructive device that in fact is concealed. This formulation does not substantially depart from the current statute, but, because of the general structure of the proposed Code, the offense is defined in a more concise manner. Thus, there is no need to include a specific exception for law enforcement officers since such persons are protected by the defense of public authority carried forward in section

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[60] Memorandum for the United States, No. 73-202, O.T. 1973, p. 5.

[61] 414 U.S. 1106 (1973). And see, on remand, 493 F. 2d 1206. Compare, however, *United States* v. *Brown, supra* note 57.

501. Similarly, whereas 49 U.S.C. 1472(e) expressly covers attempts and complicity offenses (i.e., "attempted to have placed aboard such aircraft"), such conduct is embraced in the Code under the general attempt (section 1001) and complicity (section 401) provisions and need not be separately set forth.

The term "dangerous weapon" is defined in section 111 to mean a weapon, device, instrument, material, or substance, whether animate or inanimate, that as used or as intended to be used is capable of producing death or serious bodily injury,[62] or a firearm or destructive device. The term "firearm" is defined in section 111 to mean a weapon that can expel, or that can readily be converted to expel, a projectile by the action of an explosive, and includes such a weapon, loaded or unloaded, commonly referred to as a gun, pistol, revolver, rifle, shotgun, machine gun, etc. The term "destructive device" is likewise defined in section 111 and means, *inter alia,* an explosive,[63] an incendiary material, or poisonous or infectious material in a form that can readily be used to cause serious bodily injury.

These definitions, in combination, essentially carry forward existing interpretations of 49 U.S.C. 1472(*l*). For example, unloaded guns are expressly within the definition of "firearm" and thus are covered irrespective of any proof that "as used or as intended to be used" they are capable of producing death or serious bodily injury. The same is true of starter guns which, as noted in connection with the preceding section, are intended to come within the concept of a weapon that can "readily be converted to expel" a projectile.[64]

With respect to dangerous weapons that are not firearms or destructive devices, such as knives, the Committee's formulation is intended to clarify current law. Such weapons will be considered as "dangerous" within the purview of this section only if as used or as intended to be used they are capable of inflicting serious bodily injury or death. Hence, if a person boards an aircraft carrying a concealed pocketknife or razor, he will not be guilty under this section unless it can be proved that he intended to use the item (or did use it) in a manner capable of causing serious bodily harm or worse. Such intent will often be able to be shown by the manner in which the weapon is concealed, or by statements or other actions of the defendant.[65] However there is no intention under this section to impose penal sanctions for the possession of any concealed object which merely has the capacity to be used in the furtherance of a crime aboard an aircraft. Such a prohibition would be far too broad and would extend, *inter alia,* to a toy pistol, knitting needle, letter opener, and the like, that are normally possessed for wholly innocent reasons.

The Committee thus basically endorses the court of appeals decision in *Margraf, supra,* although it has made the definition of "dangerous weapon" somewhat more rigorous by an explicit requirement of proof of an intended harmful use of the weapon[66] where the weapon is neither a firearm nor a destructive device. Although enforcement of this section will, of course, be in the discretion of the executive branch, the Committee wishes it to be known that it disagrees with the prosecutive policy announced in the *Margraf* case and would prefer that no such policy be applied under this section. In particular, that aspect of the policy that ordinarily hinges the determination whether to prosecute upon whether a person's possession of a concealed knife is unlawful under local law seems unreasonable. The issue under 49 U.S.C. 1472(*l*), as well as under this section, is not whether a person's possession of a concealed weapon[67] is otherwise legal but whether it is dangerous when considered within the framework of the particular dangers sought to be guarded against by those provisions—i.e., the potential of the weapon for use in aircraft hijacking or in committing another offense aboard an aircraft. Thus, in the Committee's view, if there is to be any formal policy limiting the class of prosecutable situations under this section, such a policy should be applied in terms of a uniform Federal standard and not by reference to State law.

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[62] The term "serious bodily injury" is also defined in section 111.

[63] The term "explosive" is also defined in section 111.

[64] The Committee therefore intends to overcome the decision in *United States* v. *Dishman, supra* note 56.

[65] Where the weapon is a "firearm," the Committee views the potential misuse of the weapon and the danger to the aircraft and its occupants to be so great as not to require a showing of intended harmful use in order to obtain a conviction hereunder.

The conduct in this offense is, in paragraph (1), possessing or secreting a weapon aboard an aircraft, and in paragraph (2), possessing or secreting a device. Since no culpability standard is specifically prescribed, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[68]

The elements that the weapon was a "dangerous weapon" and that the device was a "destructive device" are existing circumstances. Since no culpability level is prescribed in this section, the applicable state of mind that must be established is, at a minimum, "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[69] This is in part consistent with the interpretation of 49 U.S.C. 1472(*l*) in *Margraf, supra,* where the majority read that statute as not requiring a specific intent to carry a concealed dangerous weapon; however, the majority intimated that the proper test under the current law was whether the defendant "should have been aware that it could be used as a deadly weapon and that others could have classified it as a deadly weapon".[70] This test, which comes close to imposing criminal liability under a mere negligence standard, has been strengthened by the Committee to require proof that the defendant was at least "reckless" with respect to the fact that the weapon he possessed was of the prohibited type, i.e., his disregard of the substantial risk constituted a gross deviation from the standard of care a reasonable man would have exercised. The fact that the dangerous weapon or destructive device was concealed is also an existing circumstance. However, since it is preceded by the phrase "in fact", no proof of a mental state is required as to this element.[71] This appears to be consistent with current case law [72] and is in any event appropriate to further the purpose of the statute to deter crime and promote safety in air commerce.[73] It is the fact of concealment of an accessible dangerous weapon on an aircraft that poses the greatest risk. A person aboard an aircraft who is aware that he is in possession of a weapon as to the dangerousness of which he is reckless, is properly subject to the prohibition of this section if, in addition, the weapon is in fact concealed, irrespective of whether he was aware of, or reckless as to, its concealment.

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[66] As noted earlier, the facts on *Margruf* would have supported such a finding, by virtue of the inference to be drawn from the defendant's denial of his possession of a knife.

[67] In *United States* v. *Brown, supra* note 57, a majority of the Court held that concealment of a weapon had not been sufficiently proved by a stipulation that the weapon was in the defendant's carry-on flight bag, underneath various items of personal belongings, which was tendered for routine inspection. The Committee disagrees with this holding.

[68] See sections 303(b)(1) and 302(b)(1); *United States* v. *Lee,* 539 F.2d 60 (6th Cir. 1976).

[69] See sections 303(b)(2) and 302(c)(1).

[70] *Supra* note 58 at 712.

3. Defense

Subsection (b) provides that it is a defense to a prosecution under this section that the actor's conduct was authorized by a regulation issued by the Administrator of the Federal Aviation Administration. This carries forward the existing exception of 49 U.S.C. 1472(*l*) for such persons, some of whom might not be deemed to come within the definition of a public servant to whom the general defense of public authority is available.

4. Jurisdiction

There is Federal jurisdiction over an offense described in this section if it is committed on an aircraft in, or intended for operation in air transportation or intrastate air transportation as defined in 49 U.S.C. 1301. This carries forward present law.

5. Grading

An offense under subsection (a)(2) is graded as a Class D felony (up to six years' imprisonment) and an offense under subsection (a)(1) is graded as a Class E felony (up to three years in prison). This represents an increase in the maximum penalty as compared to current law but one which the Committee strongly believes is justified because of the inherent danger to life created by the illegal possession of a dangerous weapon aboard an aircraft.

SUBCHAPTER D.—RIOT OFFENSES

(Sections 1831-1834)

The offenses covered in this subchapter are inciting or leading a riot, arming a rioter, and engaging in a riot. On the whole, they represent a restatement of existing law on riot offenses. However, some important changes have been made. The scope of Federal jurisdiction over riot offenses has been narrowed in some areas and broadened in others, and the definition of "riot" has been narrowed.

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[71] See section 303(a)(1).

[72] *United States* v. *Flum*, 518 F.2d 39, 41-45 (8th Cir.) (*en banc*), cert. denied, 423 U.S. 1018 (1975).

[73] *Ibid.*

At common law a riot existed when three or more persons acted together with a common intent to accomplish some purpose by force or violence.[1] As a breach of the peace, riot was punishable notwithstanding any lawful objective of the rioters; thus riot offenses have been committed by police and other civil officers armed with legal process whose actions far exceeded the bounds of duty.[2] The determination of whether particular breaches of the peace constituted riot assumed added importance as legislation came to be enacted, in derogation of the common law, to make municipalities civilly liable for damages by riot.[3]

Statutory definitions of riot in this country have, for the most part, adopted the common law concept with slight variations. One of the more noticeable of these concerns the minimum number of participants required to constitute a riot. Two persons have been enough to engage in a riot in certain states.[4] In contrast, present Federal law has considerably confined the scope of riot offenses, as explained below, and this subchapter proposes to restrict them even further.

SECTION 1831. LEADING A RIOT

1. In General and Present Federal Law

This section makes punishable the inciting of a riot and the participation in a riot in any of certain specified leadership capacities. The section is designed to carry forward aspects of 18 U.S.C. 1792 and 2101. In addition it owes part of its derivation to the current riot statute for the District of Columbia, 22 D.C. Code 1122.

Insofar as pertinent here, 18 U.S.C. 1792 provides that it is a felony for a person to instigate, connive, willfully attempt to cause, assist, or conspire to cause any mutiny or riot at a Federal penal or correctional institution. The penalty is imprisonment for up to ten years.

18 U.S.C. 2101(a), enacted in 1968, provides that whoever travels in interstate commerce or uses any facility of such commerce (such as the mails, telegraph, telephone, radio, or television) with intent to incite a riot, or to organize, promote, encourage, participate in, or carry on a riot, or to commit an act of violence to further a riot, and who performs an overt act for any such purpose, shall be subject to a maximum penalty of five years' imprisonment. Notably, under this section, the definition of a riot is quite broad, reaching a public disturbance involving an act or acts of violence by a person who is part of an assemblage of three or more persons, or a threat or threats of the commission of an act or acts of violence by a person who is part of an assemblage of three or more persons having the ability of immediate execution of the threat, where, in either case, the act or threat results or would result in damage or injury to another person or to property of another.[5] There is, moreover, no requirement in 18 U.S.C. 2101 that a riot actually occur.

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[1] See Annotation. *What Constitutes Riot Within Criminal Law*, 49 A.L.R. 1135 (1927)

[2] See 77 C.J.S. Riot § 3: 46 Am. Jur., *Riots and Unlawful Assembly*, § 13.

[3] See Annotation, *Liability of Municipalities for Mob or Riot*, 52 A.L.R. 563 (1928).

[4] *Ibid.;* Working Papers, p. 988.

[5] See 18 U.S.C. 2102(a).

Notwithstanding its relative breadth, the statute has been sustained against claims that it is overbroad and vague and that it infringes First Amendment freedoms of travel and expression.[6]

22 D.C. Code 1122 provides that whoever willfully engages in or urges or incites others to engage in a riot in the District of Columbia is guilty of an offense. If, as a result of the riot, a person suffers serious bodily harm, or there is property damage exceeding $5,000, a person who urged and incited others to take part therein is punishable by up to ten years in prison; otherwise, the offense is a misdemeanor. The section defines a riot as a "public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to persons or property." This definition was upheld against constitutional challenge in *United States* v. *Matthews.*[7]

Riot offenses committed in Federal enclaves are presumably punishable through the Assimilative Crimes Act, utilizing the diverse laws of the States, although no reported case involving a prosecution for riot under 18 U.S.C. 13 apparently exists.

2. The Offense

A. Elements

There are two distinct crimes defined in subsection (a). The first of these is causing a riot by incitement or, during a riot, inciting participation in the riot. The term "incite" is defined in section 111 to mean urging "other persons to engage in imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct". This is consistent with case authority involving First Amendment concerns. As is the situation under 18 U.S.C. 2101(b) currently, the definition would clearly not embrace "the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts." The word "incitement" thus connotes exhortatory conduct, consisting of words, signals or any other means of communication, which is designed for the purpose of imminently urging or exciting others to riot. Inciting a riot may involve an explicit call to violence or an assertion of the rightness, fitness, or necessity of acting violently.[8] In contrast, inciting a riot does not include an explicit call to take part in a demonstration, strike activity, or similar conduct, even though that activity might turn violent.

The offenses of causing a riot by incitement or inciting participation in an ongoing riot under this section require the actual occurrence of a riot. This offense is derived from the recommendation of the National Commission.[9] It represents a considerable narrowing of the offense in 18 U.S.C. 2101 and is in accordance with the judicial interpretation placed upon the District of Columbia riot statute, *supra.*[10] Riot incitement activity that is merely inchoate in nature is specifically excluded from the operation of the general attempt, conspiracy, and solicitation provisions of the proposed Code, except that a conspiracy to commit an offense under this paragraph is punishable if the crime was in fact completed.[11]

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[6] See *United States* v. *Dellinger,* 472 F.2d 340, 354-364 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973).

[7] 419 F.2d 1177 (D.C. Cir. 1969).

[8] See *United States* v. *Dellinger, supra* note 6 at 362-363, sustaining the definition in 18 U.S.C. 2102(b); cf., *Heard* v. *Rizzo,* 281 F. Supp. 720, 745 (E.D. Pa.), aff'd *per curiam,* 392 U.S. 646 (1968).

[9] Final Report § 1801(1).

The term "riot" is defined in section 1834, for purposes of this subchapter, as a public disturbance involving ten or more persons as participants that involves violent and tumultuous conduct and that causes, or creates a grave danger of imminently causing, bodily injury to a person or damage to property. This is also a considerable narrowing of the purview of the offense under current law. The definition is derived from and similar to that given to the term "riot" in 22 D.C. Code 1122, quoted *supra,* but is less expansive than under that statute, as no provision is here included making the "threat" of violent conduct sufficient to constitute the offense.[12] It also would require a larger group of people, ten rather than five, and require that they be participants rather than merely members of the group. Finally, the definition was narrowed to require actual causing of damage to property or bodily injury to persons or a grave danger of imminently causing such damage or injury. The Committee concluded that these modifications tending to minimize the First Amendment implications of the provision could be made without jeopardizing prosecution of appropriate cases.

The disturbance inherent in a riot must be a "public" disturbance. There are no private or covert riots. The disturbance must occur in a public place so that it may attract public notice, because a riot is distinctly punishable as having the potential to cause public terror or alarm. However, the general public need not be involved. A riot may take place in a Federal prison under the potential gaze of only a special or limited public.

The concept of "participants" would require that the persons have been acting in concert or with common purpose in order for this section to apply; but the defendant need not have known the identity or numbers involved (so long as ten or more are shown to have participated).[13]

According to the Code definition, a riot also requires "violent and tumultuous conduct." For ten persons to engineer a robbery by means of force and violence is not a riot. The distinguishing factor in a riot is the agitation of the rioters. Physical acts are committed violently and tumultuously when they are furious, extreme, sudden, vehement, passionate, or otherwise characterized by intense movement or feeling, so as to appear out of control or to threaten indiscriminate injury. In short, the offense "involves frightening group behavior." [14] Such conduct usually causes some personal injuries or property damage, and "riot" is defined in terms of the necessity of such results, or the creation of a grave danger of causing such results. The court in *United States* v. *Matthews, supra,* specifically held that participation in the looting phase of a riot may constitute "violent and tumultuous conduct," noting that even the looter who does not smash store windows or break in the door "promotes new violence. [His conduct] attracts people to the scene who have no business there." [15] The Committee endorses this holding and intends that it apply also to this section.

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[10] See *United States* v. *Jeffries,* 45 F.R.D. 110 (D.D.C. 1968); see also *United States* v. *Dellinger, supra* note 6, at 361 n. 30.

[11] Section 1004(b)(2).

[12] See Final Report. Comment, p. 242.

[13] See *United States* v. *Jeffries, supra* note 10, at 118–119; see also *id.* at 121.

[14] *Id.* at 118.

The second offense created under this subsection is leading a riot or giving commands, directions, or instructions with intent to further the riot. The provision is drawn from the recommendations of the National Commission.[16]

The Committee is aware that apprehension has been expressed in some quarters that riot laws may be worded or applied so broadly as to inhibit the exercise of the freedoms of speech and peaceful assembly.[17] This section, however, has been carefully fashioned with these constitutional considerations in mind. It does not reach mere hot-headed speech, however outrageous, nor does it cover the declaration of abstract or academic propositions of the need for violence.[18] The Committee thus believes that the section will readily withstand constitutional scrutiny and is of appropriate breadth to protect Federal interests.

B. Culpability

The conduct in paragraph (1) is contained in the words "by incitement" and "incites participation." As no culpability standard is specifically designated, the applicable state of mind that must be proved is "knowing," i.e., that the offender was conscious of the nature of his action.[19] In effect this means that the offender must be aware that he is inciting, or inciting participation in "riotous conduct." Thus, a union leader, for example, who exhorted a group of employees to picket an employer's premises would not be guilty under this section even if property damage or a riot happened to ensue. Consistent with the general rule that knowledge of the law is not relevant, the actor need not know that such conduct as he is inciting is a "riot" as defined in section 1834. The element in this offense that a "riot" is incited is a result of conduct. As no culpability level is specifically provided, the state of mind that must be shown is "reckless," i.e., that the offender was aware of, but disregarded, the substantial risk that his incitement activity would produce a riot, and the risk must be such that its disregard constituted a gross deviation from the standard of care that a reasonable person would have exercised in the circumstances.[20] Thus a person who, knowing that an assemblage was present, incited its members to a public disturbance involving violent conduct would be guilty under this paragraph notwithstanding that he did not know for certain that the assemblage consisted of ten or more persons or that a "grave danger" of injury to persons or property was created. The Committee considered but rejected (as did the National Commission) a requirement that the incitement be "intentional," i.e., with a purpose to cause a riot. Although the proof in the usual case will likely establish such intent, it seems patent that when an individual is aware that he is exhorting others to violence and that violence of the level of a riot will probably ensue, he is operating outside the area of protected speech.

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[15] *Supra* note 7, at 1183–1184.

[16] See Final Report, § 1801(1)(b).

[17] See Working Papers, p. 1020; *Report of the National Advisory Committee on Civil Disorders*, pp. 289–290 (G.P.O. ed. 1968).

[18] Compare *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[19] See sections 303(b)(1) and 302(b)(1).

[20] See sections 303(b)(3) and 302(c)(2). Recklessness is also the applicable state of mind required with respect to the existing circumstance element "during a riot".

In paragraph (2) the culpability is similar except that the conduct must be engaged in "with intent to further a riot". Thus, the offender need only be reckless as to the attendant circumstances that a riot is happening and that the activity he is leading, or giving commands, etc., in furtherance of, is in fact a riot meeting the definition in section 1834. He must, however, not only know, i.e., be aware, that he is leading or giving commands, etc., but intend to thereby further a public disturbance or violent demonstration.

3. Jurisdiction

Subsection (c) provides that there is Federal jurisdiction over an offense in this section in three circumstances. The first arises when the offense is committed in the special jurisdiction of the United States. The special jurisdiction is defined in section 203 to include the special territorial, special maritime, and special aircraft jurisdictions. In essence, it covers Federal enclaves, vessels on the high seas, and certain aircraft while in flight. No comparable jurisdictional base exists under current law. Rather, as previously indicated, a riot in a Federal enclave is presently punishable under the Assimilative Crimes Act, 18 U.S.C. 13, by borrowing the riot laws of the State or locality in which the enclave is situated. The purpose of including this jurisdictional base is to make it unnecessary for the Federal government to assimilate the disparate and often antiquated riot laws of the States and to supply a uniform Federal definition and grading for the offense.[21]

It should be noted that, since the District of Columbia is not within the special territorial jurisdiction,[22] the mere existence of a riot in the District will not constitute an offense under this section, unless one of the other jurisdictional bases applies.

The second base for jurisdiction occurs if the riot involves persons in a Federal facility used for official detention. The latter term is defined in section 111 and is discussed in connection with section 1313 (Escape) in this report. This jurisdictional base is designed essentially to carry forward the present scope of 18 U.S.C. 1792.

The third base for Federal jurisdiction exists when a person moves across a State or United States boundary, in the execution or consummation of the offense. These provisions limit the current jurisdictional purview of 18 U.S.C. 2101 to eliminate Federal jurisdiction of riot offenses based on use of the mail or a facility of interstate or foreign commerce and to provide jurisdiction if the person moves across a State or United States boundary in the execution or consummation of the offense but not if such boundary was crossed during the planning, promotion, or concealment of the offense.

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[21] See Working Papers, pp. 987-988.

[22] See *Johnson* v. *United States*, 225 U.S. 405, 415 (1912).

The Committee determined to delete an additional jurisdictional base, included in S. 1 in the 94th Congress, when the riot obstructs a Federal governmental function. This base does not exist in present law. It was included, however, in the recommendation of the National Commission as part of the definition of "riot." The Committee sees no need for an extension of Federal riot coverage. If a riot in the District of Columbia is directly against a government agency (e.g., the Bureau of Indian Affairs) and obstructs the operations of that agency, the conduct may be prosecuted under the District of Columbia Code. Similarly, if a riot is intended to hinder Federal law enforcement agents from arresting or transporting a suspect (e.g., moving a particularly unpopular defendant out of a local jail and past an angry mob), Federal jurisdiction will likely exist, albeit only at a misdemeanor level, under section 1302 (Obstructing a Government Function by Physical Interference).

4. Grading

An offense under this section is graded as a Class D felony (up to six years' imprisonment) if the riot involves persons in a facility used for official detention; otherwise, the offense is a Class E felony (up to three years in prison). These penalties are less severe than those under 18 U.S.C. 1792 (ten years)[23] and 2101 (five years). However, a person guilty under this section may also be punishable for personal injury or property offenses committed during the riot.

SECTION 1832. PROVIDING ARMS FOR A RIOT

1. In General

This section creates the one offense in this subchapter that does not require the occurrence of a riot as an element. The section makes punishable the supplying or teaching the preparation or use of a firearm, destructive device, or dangerous weapon with intent to promote a riot. It is designed basically to carry forward the offenses in 18 U.S.C. 231(a)(1) and (2). This section is not violated by the recipient of the firearm or the instruction. That person may, however, be guilty of offenses elsewhere described in the Code, e.g., section 1822 (Firearms Violations) and 1823 (Using or Possessing a Weapon in the Course of a Crime).

2. Present Federal Law

18 U.S.C. 231(a)(1) provides that whoever teaches or demonstrates the use, application, or making of any firearm, explosive, or incendiary device, or technique capable of causing injury or death to persons, knowing, having reason to know, or intending that the same will be unlawfully employed to further a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the conduct or performance of any Federally protected function shall be subject to a maximum penalty of five years' imprisonment.

18 U.S.C. 231(a)(2) provides that whoever transports or manufactures for transportation in interstate or foreign commerce any firearm, explosive, or incendiary device, knowing, having reason to know, or intending the same to be used unlawfully to further a

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[23] Strangely, 18 U.S.C. 1792 contains no provision permitting imposition of a fine. The code permits a fine up to $250,000. See section 2201.

civil disorder shall be subject to a maximum penalty of five years' imprisonment.

The term "civil disorder" as used in these provisions is defined in 18 U.S.C. 232(1) to mean "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual."

These statutes have been upheld against various constitutional challenges, including the contention that they permit prosecution for the dissemination of ideas without a showing of clear and present danger.[24] The culpability standard in these provisions—i.e., "knowing, or having reason to know"—has also been sustained as not indefinite and as requiring those prosecuted "to have acted with intent or knowledge" that the information disseminated would be used in the furtherance of a civil disorder.[25]

3. The Offense

Section 1832 makes it an offense for a person, "with intent to promote a riot," to supply or teach the preparation or use of a firearm, a destructive device, or another dangerous weapon.

The term "riot" as used herein is defined in section 1834. This definition has been explained in connection with section 1831 and need not be discussed here. Notably, however, by making the section 1834 definition applicable, the Committee has eliminated the disparity in current law between the definition of "riot" in 18 U.S.C. 2102(a) and the definition of "civil disorder" in 18 U.S.C. 232(1). Although quite similar, the two definitions differ in that a "civil disorder" apparently requires acts of violence and by more than one person, whereas a "riot" requires merely a single act of violence. Since the statutes, and their present counterparts in this Code, seek to prevent like occurrences, the Committee perceived no reason for different treatment, and particularly no reason to require an intent that multiple acts of violence be performed.[26]

It is also significant to note that this section can be violated (as can 18 U.S.C. 231) by teaching the preparation or use of a firearm, destructive device, or dangerous weapon, even if the weapon is not present, e.g., by the use of instructive drawings or diagrams.

The terms "firearm," "destructive device," and "dangerous weapon" are defined in section 111 and further explained in this report in connection with subchapter C of this chapter.

This section contains a general purposive element of "intent to promote a riot." The concept of intent connotes a conscious purpose to further a riot.[27] Thus, this section carries a more stringent culpability standard than exists under 18 U.S.C. 231.

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[24] See *United States* v. *Featherston*, 461 F.2d 1119 (5th Cir.), cert. denied, 409 U.S. 991 (1972), *National Mobilization Comm. to End War in Viet Nam* v. *Foran*, 411 F.2d 934 (7th Cir. 1969); *United States* v. *Hoffman*, 334 F. Supp. 504 (D.D.C. 1971); see also *United States* v. *Mechanic*, 454 F.2d 849 (8th Cir. 1971), cert. denied, 406 U.S. 929 (1972), upholding 18 U.S.C. 231(3) punishing whoever commits an act to obstruct, impede, or interfere with a fireman or law enforcement officer lawfully engaged in the performance of his official duties incident to and during a civil disorder which affects interstate or foreign commerce. This offense is encompassed within the obstructing of a government function offenses in the proposed Code (sections 1301, 1302).

[25] *United States* v. *Featherston*, *supra* note 24 at 1122.

[26] See Working Papers, p. 1002.

[27] See section 302(a). See also *United States* v. *Villano*, 529 F.2d 1046, 1055 (10th Cir.), cert. denied, 426 U.S. 953 (1976).

The conduct in this section is supplying or teaching the preparation or use of some kind of weapon or device. As no culpability level is specifically designated, the applicable state of mind that must be proved is "knowing," i.e., that the offender was aware that he was supplying or teaching the preparation or use of a weapon or device.[28] The element that the item supplied, for example, was a firearm, destructive device, or dangerous weapon is an existing circumstance. As no culpability standard is stated, the applicable state of mind is "reckless," i.e., that the offender was aware of but disregarded the substantial risk that the circumstances existed.[29] Hence, a person who, intending to promote a riot, supplied another with a Molotov cocktail would be guilty of an offense under this section even if he did not know to a certainty that the object was a destructive device as defined in this Code but disregarded a substantial risk as to its dangerous character.

4. Jurisdiction

Under subsection (c), jurisdiction for this offense is the same as under section 1831, discussed above, with the exception that jurisdiction also attaches if the firearm, destructive device, or other dangerous weapon is moved across a State or United States boundary in the commission of the offense. This narrows the current jurisdictional scope of 18 U.S.C. 231. That statute applies, *inter alia*, whenever the civil disorder "in any way or degree" might obstruct, delay, or adversely affect commerce, the movement of any article in commerce, or the performance of any federally protected function. The general affecting commerce jurisdiction is here dropped since this would needlessly federalize virtually every such offense.[30] On the other hand, Federal jurisdiction will exist where either a person or weapon involved in the offense moves in commerce, or where a facility of commerce is used in connection with various phases of the offense specified in section 1831(c). It is worthy of note that the final jurisdictional branch under 18 U.S.C. 231 relating to the obstruction of any Federally protected function (defined broadly in 18 U.S.C. 232 to mean any function, operation, or action carried out under the laws of the United States by any department, agency, instrumentality, or officer or employee of the United States) is here deleted in order further to harmonize the scope of this section with section 1831. If the ultimate design of the riot intended to be promoted is to obstruct or impair a government function, the conduct proscribed by this section may be reachable, at a misdemeanor level, as an attempted violation of section 1302 (Obstructing a Government Function by Physical Interference).

5. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) where the offense involves supplying a firearm or destructive device; otherwise (i.e., where the offense involves teaching, or the supplying of a dangerous weapon) the offense is a Class E felony (up to three years in prison). These distinctions are felt to represent a more rational grading structure than the uniform five-year penalty provided in 18 U.S.C. 231.

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[28] See sections 303(b)(1) and 302(b)(1).
[29] See sections 303(b)(2) and 302(c)(1).
[30] See Final Report, Comment, p. 243.

SECTION 1833. ENGAGING IN A RIOT

1. In General and Present Federal Law

This section punishes engaging in a riot. Participating in a riot in a Federal penal or correctional institution is currently punishable under 18 U.S.C. 1792 (which reaches, among others, anyone who "assists" a riot);[31] as previously noted, engaging in a riot in a Federal enclave is presumably covered by the Assimilative Crimes Act. There is, however, no general Federal statute prohibiting taking part in a riot. This section will furnish such a provision, thus making it unnecessary in the future to rely upon the disparate riot and disorderly conduct statutes of the States.[32]

Through its utilization of the definition of "riot" in section 1834, section 1833 is quite similar to the existing riot statute applicable in the District of Columbia, 22 D.C. Code 1122, which, however, uses the culpability term "willfully."[33] The courts have interpreted "willfully" as apparently not requiring a conscious purpose to engage in the riot, but merely as knowingly participating therein.[34]

2. The Offense

The conduct in this offense is "engaging in" some kind of public disturbance or violent demonstration. The culpability standard designated is intentional, i.e., the offender has a conscious objective or desire to engage in a public disturbance or demonstration. Thus, merely being swept up in a riot does not constitute an offense under this section. Moreover, a peaceful protester in a large group is not guilty of an offense hereunder simply because a part of the group riots; there is no vicarious liability for this crime. The element that the activity engaged in in fact constitutes a "riot" as defined in section 1834 is an existing circumstance. Therefore, since no culpability level is specifically prescribed, the applicable mental state is "reckless," i.e., the offender must be shown to have been aware of, but to have disregarded, the substantial risk that the disturbance or demonstration was a riot.[35] As under section 1831, it is necessary to show that a riot actually occurred for conviction under this section.[36]

3. Jurisdiction

Federal jurisdiction over an offense under this section exists if the offense is committed in the special jurisdiction of the United

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[31] See *United States* v. *Farries*, 459 F.2d 1057, 1063-1064 (3d Cir.), cert. denied, 409 U.S. 888 (1972).

[32] See Working Papers, pp. 987-988, 992-993.

[33] This statute and the elements of the definition of "riot" are discussed in connection with section 1831.

[34] See *United States* v. *Matthews, supra* note 7, at 1184 and n. 11; *United States* v. *Jeffries, supra* note 10 at 119.

[35] It could happen, e.g., in darkness that a person engages in a riot aware only, without being clear on the matter, that he seems to be allied with a large number of persons and that the tumult and violence seem to be posing grave risks of injury to persons or property.

[36] It is not, however, necessary to show how or by whom the riot was instigated. Compare *United States* v. *Rodgers*, 419 F.2d 1315 (10th Cir. 1969), the result in which the Committee intends to overcome. See also *United States* v. *Farries, supra* note 31.

States, or in a Federal facility used for official detention.[37] As indicated above, the purpose of the first jurisdictional base is primarily to furnish an appropriate definition and grading for riot offenses in Federal enclaves. The second branch carries forward the jurisdictional scope of 18 U.S.C. 1792. As with section 1831, a jurisdictional base for cases in which a Federal government function is obstructed was deemed unnecessary in light of (1) the existence of a separate riot offense applicable in the District of Columbia and (2) the availability in most such situations of a prosecution under section 1302 (Obstructing a Government Function by Physical Interference).

4. *Grading*

If the riot takes place in a facility used for official detention, the offense is graded as a Class E felony (up to three years in prison); otherwise, it is graded as a Class B misdemeanor (up to six months in prison). This is in general accord with the grading of the offense under the District of Columbia Code and the recommendation of the National Commission.[38] The higher grading level for riots in an official detention facility preserves the felony status of this offense under 18 U.S.C. 1792, and was specifically recommended by the Department of Justice.[39]

SECTION 1834. DEFINITIONS FOR SUBCHAPTER D

This section contains the definition of "riot" applicable to the offenses in this subchapter. This definition has been discussed in connection with section 1831 herein.

SUBCHAPTER E.—GAMBLING, OBSCENITY, AND PROSTITUTION OFFENSES

(Sections 1841-1844)

This subchapter contains offenses that are not particularly related by subject matter but that have been treated in a similar manner by the Committee—i.e., gambling (section 1841), obscenity (section 1842), prostitution (section 1843), and sexual exploitation of a minor (section 1844). In the first and third instances, the Committee has somewhat curtailed the scope of the offenses as compared to existing law in order to confine them to the sphere of legitimate Federal interest. Gambling and prostitution that is not carried on as a business appear more appropriately to be the subject of State regulation. The scope of the obscenity offense has been maintained, but it has been recast to conform more closely to the latest pronouncements of the Supreme Court and includes, for the first time, a definition of obscene material. Except when dealing with minors under sections 1842 through 1844, and except for the obscenity offense, a common theme applicable to these sections is that they are, in whole or in part, linked to a violation of the applicable State law, the Committee viewing the Federal role in these areas as primarily one of assisting the States in the enforcement of their laws and policies.

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[37] The term "official detention" is defined in section 111 and is discussed in detail in connection with section 1313 (Escape) in this report.

[38] See Final Report, § 1803.

[39] Hearings, p. 8887 (testimony of Norman Carlson, Director, Bureau of Prisons).

SECTION 1841. ENGAGING IN A GAMBLING BUSINESS

1. In General

Gambling was not an offense at common law, unless so conducted as to constitute a nuisance.[1] However, most States now outlaw some forms of gambling.[2]

The Federal interest in prohibitions against gambling stems in the main not from enforcing the moral considerations relied on by State legislatures, but rather from the by now well-documented fact that illegal gambling proceeds are the principal source of revenue for persons engaged in organized crime.[3]

Section 1841 is, therefore, directed at the management of gambling businesses of sufficient size as are likely to be under the domination of the organized criminal element and to have an impact on interstate commerce.[4] Because of the fact that gambling enterprises normally operate across State lines, local law enforcement has not been able effectively to cope with the problem. The assistance of the Federal Government is also required because of the corruptive influence of persons involved in large-scale gambling businesses.

2. Present Federal Law

Current Federal criminal laws with respect to gambling are scattered through the United States Code. Although the most commonly invoked provisions are contained in title 18, additional statutes are included in title 15 and title 26.

18 U.S.C. 1082 makes it a crime punishable by up to two years in prison, to "set up, operate, or own or hold any interest in" a gambling ship or gambling establishment on such a ship,[5] or to conduct any gambling game or device, or to entice, induce, solicit, or permit any person to bet or play at a gambling establishment on such a ship, "if such gambling ship is on the high seas, or is an American vessel," or otherwise is within the jurisdiction of the United States and not within the jurisdiction of any State. This statute also pro-

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[1] See 3 Wharton. *Criminal Law Procedure*, p. 4 (1957 ed., Supp. 1974); 38 C.J.S. *Gaming*, § 80 (1943).

[2] 3 Wharton, *supra* note 1 at 6.

[3] See Working Papers, pp. 1172–1173.

[4] See 3 Wharton, *supra* note 1 at 4 (1957 ed., Supp. 1974); see also, e.g., *United States* v. *Meese*, 479 F.2d 41 (8th Cir. 1973); *United States* v. *Hunter*, 478 F.2d 1019 (7th Cir.), cert. denied, 414 U.S. 857 (1973); *United States* v. *Iannelli*, 477 F.2d 999 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975); *United States* v. *Thaggard*, 477 F.2d 626 (5th Cir), cert. denied, 414 U.S. 1064 (1973); *United States* v. *DiMario*, 473 F.2d 1046 (6th Cir.), cert. denied, 412 U.S. 907 (1973).

[5] The terms "gambling ship" and "gambling establishment" are defined in 18 U.S.C. 1081.

vides for forfeiture of the vessel if the owner uses or knowingly permits the use of the vessel in violation of this section.[6]

Prosecutions under this statute have been rare. However, the section was sustained against constitutional challenge in *United States* v. *Black.*[7]

18 U.S.C. 1084 makes it a two-year felony for anyone "engaged in the business of betting or wagering" knowingly to use a wire communication facility, *inter alia,* "for the transmission in interstate or foreign commerce of bets or wagers" or "information assisting in the placing of bets or wagers." The statute exempts information for use in news reporting or sports events, or for the transmission of information assisting in the placing of bets or wagers on a sporting event from a State where betting on such sports event is legal to a State where it is also legal.

This statute has been sustained against claims that it is a usurpation of State powers and that it violates First Amendment rights of speech.[8] However, although relatively frequently utilized, its effectiveness in curbing gambling activities has been undercut by ambiguities which judicial construction has not resolved. For example, the Federal courts are divided as to whether the section reaches a person who *receives* a bet or wager or information assisting in the placing of the same. Some courts have held that the term "transmission" restricts the class of offenders to those who send rather than receive the bet or information (unless, of course, they can be said to have caused the transmission by the other party, so as to be guilty under 18 U.S.C. 2(b)).[9] Other courts have held that the clear purpose of the statute was to reach both the sender and receiver of such bets or information, and that this result is evident through the statute's employment of the broad phrase "*uses* a wire communication facility." [10]

Another ambiguity results from the statutory language "bets or wagers," although one court has held that the use of the plural form was merely an oversight, and that the statute should be construed to reach a single use of interstate facilities.[11]

18 U.S.C. 1301–1306 contain the current Federal proscriptions against lotteries. 18 U.S.C. 1301 makes it an offense punishable by up to two years' imprisonment to import or transport in interstate commerce any lottery ticket, paper, share, or interest in a lottery, or to receive the same knowing that it was so transported or imported. A lottery is defined as any scheme offering prizes dependent in part or in whole upon lot or chance.[12] This statute has been sustained as constitutional.[13] It has also been held not to reach records containing figures representing the results of a lottery.[14]

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[6] 18 U.S.C. 1083 imposes civil penalties on the use of a vessel to transport persons between a point within the United States and a gambling ship which is not within the jurisdiction of any State.

[7] 291 F. Supp. 262 (S.D.N.Y. 1968).

[8] See e.g., *Truchinski* v. *United States,* 393 F.2d 627 (8th Cir.), cert. denied, 393 U.S. 831 (1968).

[9] See, e.g., *United States* v. *Stonehouse,* 452 F.2d 455 (7th Cir. 1971).

[10] 18 U.S.C. 1084(a) (emphasis added). *See United States* v. *Tomeo,* 459 F.2d 445 (10th Cir.), cert. denied, 409 U.S. 914 (1972); *United States* v. *Sellers,* 483 F.2d 37, 44–45 (5th Cir. 1973), cert. denied, 417 U.S. 908 (1974).

[11] *Sagansky* v. *United States,* 358 F.2d 195 (1st Cir.), cert. denied, 385 U.S. 816 (1966).

[12] For an analysis of the cases on this subject, see Note, 57 Geo. L.J. 573, 574–580 (1969).

[13] See *Lottery Case,* 188 U.S. 321 (1903).

[14] See *France* v. *United States,* 164 U.S. 676 (1897).

18 U.S.C. 1302 prescribes the same penalty as section 1301 for whoever mails any lottery ticket or other paper used in lotteries as covered in section 1301, or any check, bill, money, money order, etc. for the purchase of a lottery ticket or other paper used in lotteries, or any publication containing an advertisement of any lottery, or any article described in 18 U.S.C. 1953. The validity of this section has been upheld, but the statute has been strictly interpreted as not reaching the mailing of information and paraphernalia as to how a lottery might be set up, but only the mailing of information relating to an ongoing lottery.[15]

18 U.S.C. 1303 makes it a crime punishable by up to one year in prison for a postal employee knowingly to assist in the mailing of a lottery ticket or related papers, lottery advertisements, or a list of the prizes awarded in a lottery.

18 U.S.C. 1304 prescribes the same prison term as section 1303 for whoever knowingly broadcasts or permits the broadcast of information concerning a lottery. This statute has been upheld against First Amendment challenge,[16] but has been construed to prohibit only the broadcasting of advertisements and information directly promoting an existing lottery, not the broadcasting of news concerning lotteries.[17]

18 U.S.C. 1305 exempts fishing contests not held for profit from the prohibitions of the foregoing sections.

18 U.S.C. 1306 makes it a crime punishable by up to one year in prison for a Federally insured bank to sell lottery tickets.

18 U.S.C. 1307 exempts from 18 U.S.C. 1301 through 1304 an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law where the advertisement, etc., is (1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or (2) broadcast by a radio or television station licensed to a location in that State or adjacent State which conducts such a lottery. Section 1307 also exempts from 18 U.S.C. 1301 through 1303 the transportation or mailing to addresses within a State of tickets and other material concerning a lottery conducted by that State acting under authority of State law. The term "lottery" is defined, *inter alia,* to exclude the placing or accepting of bets or wagers on sporting events or contests.[18]

18 U.S.C. 1952, the so-called Travel Act, prohibits whoever travels, or uses a facility, in interstate or foreign commerce with intent to (1) distribute the proceeds of any "unlawful activity," (2) commit any crime of violence to further any "unlawful activity," or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, etc., of any "unlawful activity," and who thereafter performs or attempts to perform any of the acts specified in the foregoing subparagraphs. The maximum penalty is imprisonment for up to five years. The term "unlawful activity" is de-

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[15] *United States* v. *Halseth,* 342 U.S. 277 (1952).

[16] See *American Broadcasting Co.* v. *United States,* 110 F. Supp. 374, 389 (S.D.N.Y. 1953), aff'd, 347 U.S. 284 (1954).

[17] *New York State Broadcasters Ass'n* v. *United States,* 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); compare also *New Jersey State Lottery Commission* v. *United States,* 491 F. 2d 219 (3d Cir. 1974) *(en banc),* vacated and remanded for consideration of mootness, 420 U.S. 371 (1975).

[18] See P.L. 93-583, January 2, 1975; P.L. 94-525, October 17, 1976.

fined to mean any business enterprise involving, *inter alia,* "gambling . . . in violation of the laws of the State in which they are committed or of the United States." [19]

This statute has withstood a number of constitutional attacks predicated on claims of vagueness, encroachment upon powers reserved to the States, equal protection, and abridgement of the right to travel.[20] It has proved of significant assistance in fulfilling the Federal government's role in combatting large scale illegal gambling. However, because of its somewhat clumsy draftsmanship, 18 U.S.C. 1952 has generated a host of issues requiring court interpretation, including the nature of the intent required. The courts have generally held that the statute necessitates a showing of travel with an intent to facilitate an activity which the accused knew to be unlawful under State but not Federal law.[21] Another question that has arisen is whose interstate travel constitutes a violation of the statute. In *Rewis* v. *United States,*[22] the Court held that the mere fact that customers of a gambling establishment travel interstate does not render them guilty; moreover the Court held that persons who conduct an illegal gambling operation do not violate the statute simply because they are aware of or can foresee that some of their customers will travel interstate to patronize it. However, the Court cited with approval a line of lower court cases indicating that the statute is violated when the agents or employees of the gambling establishment themselves cross State lines in furtherance of illegal activity, and indicated that the same result might obtain where those who conduct an illegal gambling enterprise actively encouraged interstate travel by customers.[23]

18 U.S.C. 1953 punishes, to the same extent as section 1952, whoever except a common carrier in the usual course of its business sends or carries in interstate or foreign commerce any wagering paraphernalia, device, or writing used or to be used in bookmaking, wagering pools with respect to a sporting event, or in a numbers, policy, bolita, or similar game. An exception is made, *inter alia,* for the transportation of betting materials to be used in the placing of bets on a sporting event into a State where such betting is legal, for the carriage or transportation in interstate commerce of any newspaper or similar publication, and for equipment, tickets, or materials used or designed for use within a State in a lottery being conducted by that State acting under authority of State law.[24] In *United States* v. *Fabrizio,*[25] the Supreme Court held that this statute is not solely aimed at gambling activities by organized crime and that it reaches gambling paraphernalia relating to a sweepstakes which was lawful in the State where conducted, where the paraphernalia was transported *out* of that State. The Court also broadly construed the terms defining the types of gambling para-

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[19] Other illegal businesses covered include liquor, narcotics, and prostitution.

[20] See Working Papers, p. 1179, n. 29, and cases cited therein.

[21] See *United States* v. *Miller,* 379 F.2d 483, 486 (7th Cir.), cert. denied. 389 U.S. 930 1967); *United States* v. *Polizzi,* 500 F.2d 856, 876–877 (9th Cir.), cert. denied, 419 U.S. 1120 (1974).

[22] 401 U.S. 808 (1971).

[23] *Id.* at 813–814.

[24] 18 U.S.C. 1952 has no such exception for newspapers. In *Erlenbaugh* v. *United States,* 409 U.S. 239 (1972), the Supreme Court held that this omission was deliberate and that section 1952 reached persons who caused the interstate delivery of newspapers containing racing information in order to promote or facilitate an illegal gambling enterprise.

[25] 385 U.S. 263 (1966).

phernalia whose transportation is forbidden to include an "acknowledgment" (in effect a receipt), even though the acknowledgment is not essential for the collection of a prize.

18 U.S.C. 1955 is directed solely at large scale illegal gambling businesses. It punishes by up to five years in prison whoever "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." The phrase "illegal gambling business" is defined to mean a gambling business which (1) is a violation of the law of a State or political subdivision in which it is conducted, (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and (3) has been or remains substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.[26] The section also includes a forfeiture provision for "any property," including money, used in violation of the section, and a provision defining probable cause for obtaining warrants.

This statute, which is based on a Congressional finding that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof," [27] has been repeatedly upheld as constitutional notwithstanding the lack of a need to show an effect on interstate commerce in any particular case.[28] In addition, the courts have uniformly held that, in determining whether five or more persons conduct, etc., the illegal gambling business, all those who participate in the operation of the business, regardless of how minor their roles, may be counted (e.g., runners, dealers, employees, etc.) and that Congress intended to exclude only customers of the business.[29]

The Supreme Court has also held that a conspiracy to violate this section states a separate offense that does not merge with the offense hereunder.[30]

18 U.S.C. 1511 is a companion provision to 18 U.S.C. 1955. Section 1511 punishes by up to five years in prison any conspiracy to obstruct the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if (1) one or more of the conspirators does any act to effect the object of the conspiracy, (2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision, and (3) one or more of the conspirators conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

The statute contains an identical definition of illegal gambling business as appears in section 1955, and an identical provision excluding games of chance conducted by charitable organizations. This enactment is clearly aimed in part at those who corruptly use their official position within a State or local government in connection with large scale illicit gambling activities. The statute has been upheld as within the constitutional powers of Congress.[31]

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[26] The section excludes games of chance conducted by charitable organizations.

[27] See section 801 of P.L. 91-452, 84 Stat. 936 (1970).

[28] See, e.g. *United States* v. *Farris*, 624 F.2d 890 (9th Cir. 1980); *United States* v. *Meese, supra* note 4; *United States* v. *Ceraso*, 467 F.2d 653 (3d Cir. 1972); *United States* v. *Hunter, supra* note 4; *United States* v. *Thaggard, supra* note 4; *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), vacated and remanded on other grounds, 417 U.S. 903 (1974).

[29] See, e.g., *United States* v. *Becker, supra* note 28; *United States* v. *Riehl*, 460 F.2d 454 (3d Cir. 1972); *United States* v. *Hunter, supra* note 4; *United States* v. *Palmer*, 465 F.2d 697 (6th Cir.), cert. denied, 409 U.S. 874 (1972).

[30] See *Iannelli* v. *United States*, 420 U.S. 770 (1975).

Chapter 24 of title 15 also contains some rarely used provisions dealing with the manufacture, repair, labeling, and transportation of various types of gambling devices.

15 U.S.C. 1172 prohibits the interstate transportation of slot machines and other gambling devices, except where the transportation is into a State which has specifically enacted a law exempting itself from the prohibitions of this chapter, or in which the device is legal, or into a licensed gambling establishment where betting is legal under State laws.

15 U.S.C. 1173 requires manufacturers and others who deal with gambling devices to register with the Attorney General.[32] The section is currently written to limit its coverage to those whose business affects interstate or foreign commerce, in view of an earlier Supreme Court decision construing more ambiguous language in the statute as not expressing a clear purpose of Congress to reach intrastate activities involving gambling devices.[33]

15 U.S.C. 1174 requires the labeling and marking of shipments of gambling devices, apparently to facilitate the detection of unlawful shipments.

15 U.S.C. 1175 prohibits the manufacture, possession, use, etc., of gambling devices in the District of Columbia and the maritime and territorial jurisdiction of the United States.

15 U.S.C. 1176 prescribes a maximum prison term of two years for violation of any of the provisions in chapter 24.

15 U.S.C. 1177 provides for confiscation of gambling devices manufactured, possessed, or used in violation of the provisions of chapter 24.[34]

15 U.S.C. 1178 exempts racetrack parimutuel betting machines and certain other types of devices from the effect of chapter 24.

Title 26, United States Code, at one time provided Federal law enforcement officials with certain effective weapons to combat gambling, based upon an invocation of the taxing power. The Supreme Court, however, declared that these statutes could not be enforced in the face of a valid claim of the Fifth Amendment privilege against compulsory self-incrimination, since the class of persons against whom they were aimed—persons in the business of wagering—were a criminally suspect class as to whom compliance with the laws might well provide a link in the chain of evidence incriminating them as to another offense.[35] Subsequently, Congress amended the law to provide that no information maintained or furnished to the government pursuant to the wagering and occupational tax statutes may be used against the taxpayer in any criminal proceeding except a proceeding to enforce a tax under title 26.[36] This amendment has the effect of resuscitating the criminal application of these statutes,[37] which are summarized in the note below.[38]

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[31] See *United States* v. *Thaggard, supra* note 4; *United States* v. *Riehl, supra* note 29.

[32] It may be that the criminal penalties attaching to a violation of this section are unenforceable as violative of a registrant's privilege against compulsory self-incrimination. Such a determination would in large part depend on a court's assessment of whether persons who manufacture or deal in gambling devices, constitute a criminally suspect class. See *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968).

[33] *United States* v. *Five Gambling Devices,* 346 U.S. 441 (1953).

[34] See *United States* v. *Various Gambling Devices,* 478 F.2d 1194 (5th Cir. 1973), intimating that notwithstanding the *Marchetti* and *Grosso* cases, *supra* note 32, the forfeiture provision may well be valid as applied to a violation of chapter 24 involving failure to register.

[35] See *Marchetti* v. *United States, supra* note 32; *Grosso* v. *United States, supra* note 32.

3. The Offense

A. Elements

Subsection (a) defines four separate offenses involving gambling, consolidating numerous provisions in existing law.

Paragraph (1) provides that a person commits an offense if he "owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business." The term "gambling business" is defined in subsection (b) as a "business involving gambling of any kind that, in fact: (A) has five or more persons engaged in the business; and (B) has been in substantially continuous operation for a period of thirty days or more, or has taken in $2,000 or more in any single day."

This provision is quite similar to that found in 18 U.S.C. 1955. The Committee intends that the previously cited current case law be followed as to what kinds of person associated with the gambling business may be counted in determining whether the business consists of "five or more" individuals. The Committee also intends that the criminal conspiracy section (1002) be deemed applicable to this offense and endorses the reasoning of those cases which have interpreted 18 U.S.C. 1955 as not barring a prosecution both for conspiracy to violate that section and the substantive offense. For example, if two persons agreed to establish a business involving gambling and thereafter performed an overt act to effect the agreement, they would be guilty of conspiracy to violate this section.

The Committee eliminated the exception for gambling activities conducted on behalf of charitable organizations, presently contained in 18 U.S.C. 1955, since it believes there is no reason for the exception other than in places where such gambling is legal under local law.[39]

The Committee has substituted the phrase "takes in $2,000 or more" for the more ambiguous "has a gross revenue of $2,000" in

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[36] 26 U.S.C. 4424.

[37] See H. Conf. Rept. No. 93-1401, 93d Cong., 2d Sess. (1974).

[38] 26 U.S.C. 4401 imposes a two per cent excise tax on all wages.

26 U.S.C. 4402 exempts from taxation parimutuel betting, certain coin-operated devices, and State-conducted lotteries, wagering, pools, and sweepstakes.

26 U.S.C. 4403 requires all persons liable for the wagering tax to keep daily records of the pertinent data and to post the revenue stamps conspicuously in their place of business.

26 U.S.C. 4404 establishes the territorial extent of applicability of the tax provision.

26 U.S.C. 4411 imposes a special occupational tax on anyone engaged in the business of accepting or receiving wagers.

26 U.S.C. 4412 requires each person subject to the occupational tax to register with the Internal Revenue Service.

26 U.S.C. 4421 defines the terms "wager" and "lottery" for purposes of the gambling tax provisions.

26 U.S.C. 4422 precludes any exemption from prosecution by State or Federal authorities for engaging in gambling on which the tax is paid.

26 U.S.C. 4423 requires that the account books of anyone liable for a tax under that chapter be perpetually available for inspection.

[39] See discussion of subsection (c) *infra;* see also Final Report, § 1831.

18 U.S.C. 1955 in order to lay to rest any contention that proof of $2,000 in profits, rather than gross receipts, is required.[40]

Paragraph (2) provides that a person commits an offense if he receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling.[41]

Lay-off wagers are a form of reinsurance in which a bet is placed by one gambler with another to safeguard himself from loss through compensatory arrangements.[42] Although lay-off activities can be reached under paragraph (1), this offense is designed to apply to any lay-off man, regardless of proof as to the number of persons in his operation, the continuity of his enterprise, or the volume of business he does. This will obviate difficulties of proof with respect to lay-off men virtually all of whom, as a practical matter, will be conducting large scale operations.

The term "gambling" is not defined. However, the Committee intends that it be broadly construed to include, *inter alia,* pool-selling, bookmaking, maintaining slot machines or roulette wheels, operating card, dice, bingo, keno, or similar games; and conducting lotteries, policy, bolita, numbers, or similar games or selling chances in such games.

Paragraph (3) makes it an offense to carry or send "(A) a gambling device; (B) gambling information; or (C) gambling proceeds; to any place within a state from any place outside the state."

The term "gambling device" is defined in subsection (b) to mean any device covered by 15 U.S.C. 1171 and not excluded by 15 U.S.C. 1178 (2) or (3);[43] or any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, bingo or keno games, lotteries, policy, bolita, numbers, or similar games, or any equipment for carrying on card or dice games other than cards or dice used in such games.

The term "gambling information" is defined in subsection (b) to mean "information consisting of, or assisting in, the placing of a bet or wager, or the purchase of a ticket in a lottery or similar game of chance." This is similar to the definition in 18 U.S.C. 1084, but expands and clarifies the term specifically to include lotteries.

This offense incorporates the proscriptions of 15 U.S.C. 1172, barring the interstate transportation of gambling devices; 18 U.S.C. 1084, prohibiting the interstate transportation of gambling information; 18 U.S.C. 1301 and 1302, restricting the importation, interstate transportation, or mailing of lottery tickets; 18 U.S.C. 1952, proscribing the interstate distribution of gambling proceeds; and 18 U.S.C. 1953, outlawing the interstate transportation of wagering paraphernalia. It should be noted that the proscription applies only when the gambling device, proceeds, or information is sent "to any place within a state". Thus, contrary to present law but consistent with recent proposed legislation,[44] the offense does not apply to the sending of gambling materials to a foreign country.

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[40] See, *United States* v. *Sacco,* 491 F.2d 995, 1001 (9th Cir. 1974); *United States* v. *Ceraso,* 467 F.2d 653 (3d Cir. 1972). 18 U.S.C. 1511, the companion provision to 18 U.S.C. 1955, has not been carried forward in this section. Its purview is deemed sufficiently covered by the general conspiracy and bribery provisions of the proposed Code.

[41] The National Commission by contrast made the fact of receiving lay-off wagers or providing reinsurance a circumstance that increased the grading of the offense of engaging in an illegal gambling business. See Final Report, § 1831(3)(c).

[42] See R. King, *Gambling and Organized Crime,* p. 232 (1969).

[43] The devices excluded are machines designed primarily for use at a racetrack in connection with parimutuel betting, machines not designed primarily for gambling and which when operated do not deliver, as a result of the application of an element of chance, any money or property or entitlement to the same (e.g., a pinball machine or coin-operated bowling alley), and certain devices designed and manufactured primarily for use at carnivals or county or State fairs.

Paragraph (4) provides that a person commits an offense if he otherwise establishes, promotes, manages, or carries on an enterprise involving gambling.

This broadest of the provisions in this section is substantially similar to the offense currently found in 18 U.S.C. 1952. The term "enterprise" is defined in section 111 to include any business or other undertaking by an individual, a government, or an "organization" or "group" (terms also defined in section 111). The concept of "enterprise" has been discussed in greater detail in connection with section 1802 (Racketeering) and that discussion should be consulted here.

B. Culpability

The conduct in paragraph (1) is owning, controlling, managing, etc., a gambling business. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware that he was engaging in such a business.[45]

It should be noted, however, that the term "gambling business" is defined in subsection (b) to mean a business involving gambling that, "in fact," (A) has five or more persons engaged in the business, and (B) has been in substantially continuous operation for thirty days or more, or has taken in $2,000 or more on any single day. By the operation of section 303(d)(3), those elements of the definition that are preceded by the words "in fact" require no proof of any mental state. Thus, the offender must merely be shown to have been aware of the fact that the business involved "gambling." This is in accordance with current law since the courts under 18 U.S.C. 1955 have not required proof of *scienter* as to the size or volume of business of the illegal activity.

The analysis of culpability in the remaining paragraphs is similar. Thus, in paragraph (2) the conduct is receiving lay-off wagers or otherwise providing reinsurance in relation to persons engaged in gambling and the applicable mental state is at least knowing.

In paragraph (3), the conduct is carrying or sending a gambling device, gambling information, or gambling proceeds, and the applicable minimum mental state that must be shown is "knowing".[46] The element that the device, information, or proceeds were sent to a State from outside that State is an existing circumstance as to which the state of mind that must be established is at least "reckless". In paragraph (4), the conduct is otherwise establishes, promotes,[47] manages, etc., an enterprise involving gambling. The applicable mental state is knowing.

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[44] See S. 947, 96th Cong., 1st Sess., passed by the Senate on September 26, 1979, 125 Cong. Rec., pp. S 13447-8 (Sept. 26, 1979 (daily ed.)).

[45] See sections 303(b)(2) and 302(e)(1).

[46] No proof of a mental state is required with regard to the fact that a gambling device is defined by reference to statutes in title 15. See section 303(d)(1)(C).

[47] See *United States* v. *Villano*, 529 F.2d 1046, 1055-1056 (10th Cir.), cert. denied, 426 U.S. 953 (1976).

4. Defenses

Subsection (c) sets forth a variety of defenses applicable to the offenses described in this section.

Paragraph (1) provides that it is a defense to a prosecution under subsections (a)(1), (a)(2), or (a)(4) that the kind of gambling, the gambling business or enterprise, the manner in which the business or enterprise was operated, and the defendant's participation therein, were legal in all States and localities in which it was carried on, including any such place from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any such place in which the wager was received or to which it was transmitted.[48]

Under current law, the fact that the gambling activity was not lawful in all States affected is an element of the offense. The Committee determined that the legality of the gambling activity should instead be made a matter of defense. First, the illegality of the gambling business or enterprise under State law will be clear in the overwhelming majority of cases. Hence, there is no point in making proof of illegality a requirement in all cases. Second, in those infrequent situations involving some novel form of gambling the status of which is unclear under State law, it is more equitable to require the defendant to produce some evidence of the legality of his conduct, bearing in mind that he has, at the very least, recklessly embarked on a continuous and large scale operation the legality of which is open to question. Upon the introduction of sufficient evidence to raise the issue, the prosecution will then bear the burden of proving beyond a reasonable doubt that the defense was not established.

The remaining defenses principally codify existing law. Thus, paragraph (2) provides several defenses to a prosecution under subsection (a)(3).

The first of these is that the gambling device was carried or sent into or was en route to, "solely a state and locality in which the use of such a device was legal." This is similar to the defense in 15 U.S.C. 1172.[49]

The second is that the defendant was a common or public contract carrier, or an employee thereof, and was carrying the gambling device in the usual course of his business. This is drawn from 18 U.S.C. 1953.

The third defense is that the defendant was a player or bettor and the gambling device he was carrying or sending was solely a ticket or other embodiment of his claim. This is consistent with the practice under 18 U.S.C. 1301 and 1302, which has not been to punish the bettor or player himself for transporting his own ticket. The National Commission suggested a similar provision.[50]

The fourth defense is that the transmission of the gambling information was made solely in connection with news reporting. This carries forward the specific exemption in 18 U.S.C. 1084 and the case law exemption created to 18 U.S.C. 1304.

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[48] The fact that the gambling business may have been only partly unlawful is not sufficient to establish the defense, nor is it relevant that the State law punishing the conduct is a misdemeanor and not a felony. *United States* v. *Polizzi,* 500 F.2d 856, 872-874 (9th Cir.), cert. denied, 419 U.S. 1120 (1974). The determination of the applicable State law is, of course, a matter for the court. *Id.* at 890.

[49] See also 18 U.S.C. 1953 exempting equipment and tickets for use in a State-conducted lottery.

[50] See Final Report, § 1832(d) and Comment, p. 263.

The fifth defense is that the transmission of the gambling information was solely from a State and locality in which such gambling was legal into a State and locality in which such gambling was legal. This is also derived from 18 U.S.C. 1084.[51]

The sixth defense is that the gambling proceeds were obtained as a result of the defendant's lawful participation in gambling which was legal in all States and localities in which it was carried on, including any State and locality from which the defendant placed a wager or otherwise participated in gambling activity, and any such place in which his wager was received or to which it was transmitted. This is currently the law under 18 U.S.C. 1952.

5. *Establishing Probable Cause*

Subsection (d) contains a provision virtually identical to that in 18 U.S.C. 1955. It provides that if five or more persons are engaged in a gambling business, and such business operates for two or more successive days, then, solely for the purpose of obtaining warrants for arrests, interceptions of communications, and other searches and seizures, probable cause that the business has taken in $2,000 or more in any single day "shall be deemed to be established." The corresponding provision in 18 U.S.C. 1955 has been upheld as constitutional on the ground that Congress could rationally conclude from statistics indicating revenues received by gambling businesses that a gambling operation having five or more participants and doing business for two successive days would reap at least $2,000 in a single day. Significantly, this presumption applies only with respect to the requirements of proof for warrants and does not apply at trial. Moreover, the words "shall be deemed to be established" (which appear also in 18 U.S.C. 1955) do not create an irrebuttable presumption, but only an inference to be drawn absent contrary indication.[52] The Committee intends the phrase "other searches and seizures" to include the use of call registers pursuant to the provisions of subchapter B of chapter 31.

6. *Jurisdiction*

Subsection (f) provides that there is Federal jurisdiction over an offense under paragraphs (a)(1) or (a)(2) if it is committed within the general or special jurisdiction of the United States. The general and special jurisdiction, as defined in sections 202 and 203, include the full extent of United States jurisdiction except for extraterritorial jurisdiction. This broad scope of jurisdiction—applicable to the offenses of engaging in a gambling business and providing reinsurance for gambling—is based upon existing law and implements the congressional finding in section 801 of the Organized Crime Control Act of 1970 that large-scale gambling has an effect upon interstate commerce and the facilities thereof.[53] Thus, this section reaches gambling ships, provided they fall into the definition of "gambling business" in paragraph (a)(1).

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[51] This defense incorporates the provisions of 18 U.S.C. 1307 dealing with information relating to State-conducted lotteries.

[52] See *United States* v. *Palmer, supra* note 29; *United States* v. *DiMario, supra* note 4; *United States* v. *Politi,* 334 F. Supp. 1318, 1323 (S.D.N.Y. 1971).

[53] That finding has been uniformly sustained as resting on a rational foundation. See *United States* v. *Becker, supra* note 28; *United States* v. *Riehl, supra* note 29; *United States* v. *Hunter, supra* note 4; *United States* v. *Meese, supra* note 28.

There is jurisdiction over an offense described in paragraphs (a)(3) or (a)(4) if the United States mail or a facility in interstate or foreign commerce, or movement of any person across a State or United States boundary, occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense. This is basically consistent with the jurisdictional purview of 18 U.S.C. 1952.[54]

This subsection does not carry forward the prohibition on the sale of lottery tickets by Federally insured banks. Similarly, small scale gambling activities conducted wholly within Federal enclaves are not covered. However, such activities may be punished under section 1861 (Violating State or Local Law in an Enclave) if carried out in violation of the law of the State in which the enclave is situated. In such a case, although the Federal government has no direct interest in punishing the activity, it would do so because of the policy of not permitting enclaves to become havens for the violation of State laws.

7. Grading

An offense under paragraphs (a)(1) or (a)(2) is graded as a Class D felony (up to six years in prison). An offense under paragraphs (a)(3) or (a)(4) is graded as a Class E felony (up to three years in prison). These distinctions and grading levels generally accord with existing laws.

SECTION 1842. DISSEMINATING OBSCENE MATERIAL

1. In General

This section reflects the view that obscene material is or may be harmful under certain circumstances and that the Federal Government should continue to play a role in suppressing its distribution. In addition, the section reflects the Supreme Court's recent agreement upon an obscenity test that includes, *inter alia*, an ability to determine the obscenity of materials on the basis of State or local community standards. Thus, unlike present statutes, a definition of obscenity is provided based upon views expressed in recent Supreme Court decisions. Likewise, this section simplifies existing statutes and eliminates various anachronistic features.[55]

2. Present Federal Law

A. Statutes

The principal Federal statutes punishing obscenity are contained in chapter 71 of title 18, United States Code (18 U.S.C. 1461-1465).[56] These sections proscribe the mailing of obscene material and related matter (section 1461); the importation or transportation by common carrier of obscene matter (section 1462); the mailing of indecent matter on wrappers or envelopes (section 1463); the broadcasting of obscene, indecent, or profane language by radio (section 1464); and the transportation in interstate or foreign commerce of obscene matter for the purpose of sale or distribution (section 1465). The basic penalty for all these offenses is up to five years in prison, except for the broadcasting offense which carries only a two-year maximum term.

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[54] See *United States* v. *LeFaivre*, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).

[55] Compare Final Report, § 1851 which was, however, drafted prior to the most recent series of Supreme Court decisions which this section reflects.

[56] See also 18 U.S.C. 552, punishing, *inter alia*, officers and employees of the United States who aid and abet the importation, advertising, and trafficking in obscene articles; 19 U.S.C. 1305, providing for forfeiture of imported articles that are obscene or immoral. Cf. 27 U.S.C. 205(f)(4); 39 U.S.C. 3006; and 47 U.S.C. 223, punishing obscene, lewd, lascivious, filthy, or indecent telephone calls.

The above enactments have all been sustained as constitutional.

B. Substantive Case Law

In *Paris Adult Theatre I* v. *Slaton,*[57] the Supreme Court held that States have a valid interest in regulating obscenity notwithstanding that conclusive proof as to its ill effects may be lacking. Based upon such studies and evidence as do exist, legislatures can reasonably conclude that a nexus is present between exposure to obscene material and antisocial behavior. Quite apart from its crime-producing effects, moreover, the Court noted that, "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." [58]

There is one area in which the harmful impact of obscenity is more clearly documented—i.e., dissemination to juveniles. Because of this, the Court has sustained legislation prohibiting the dissemination of publications depicting nudity to minors under seventeen years of age, notwithstanding that the publications would not be deemed obscene if sold or distributed to adults.[59]

Recognizing the sanctity of the home, the Supreme Court has held in *Stanley* v. *Georgia,*[60] that a person may not constitutionally be punished for the mere possession of obscene matter therein. However, following the decision in *Stanley,* the Court made it clear that that case could not be understood as resting on a broad constitutional right to receive obscene material even for one's personal use, and accordingly upheld the application of Federal laws proscribing, e.g., the importation and transportation of such material notwithstanding allegations that the matter was intended for purely private use.[61]

A major breakthrough in the Court's long history of obscenity litigation was reached in *Miller* v. *California,*[62] in which a majority concurred in the following statement as to the guidelines to be used in determining whether particular material is obscene: [63]

> (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as

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[57] 413 U.S. 49 (1973).

[58] *Id.* at 63.

[59] *Ginsberg* v. *New York,* 390 U.S. 629 (1968), cited with approval in *Miller* v. *California,* 413 U.S. 15, 36n. 17 (1973).

[60] 394 U.S. 557 (1969).

[61] *United States* v. *Reidel,* 402 U.S. 351 (1971); *United States* v. *Orito,* 413 U.S. 139 (1973); *United States* v. *12 200-Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973).

[62] *Supra* note 59.

[63] *Id.* at 21.

> a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value (citations omitted).

The Court noted that this would allow punishment only for the sale or exposure of materials that depict or describe "hard core" sexual conduct,[64] and gave the following illustrations of what a State statute could define for the regulation under part (b) of the standard announced in *Miller:* [65]

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[66]

With respect to the standard to be employed in assessing whether material appeals to the prurient interest and is "patently offensive," the Court in *Miller* further held that juries may constitutionally be instructed to make such determinations based upon the standard that prevails in the State or local community, and need not utilize a national standard.[67]

Although States are free to adopt either a national or a local community standard, the Supreme Court has construed 18 U.S.C. 1461 as requiring that "local rather than national standards should be applied".[68] Under section 1461, moreover, the determination of what the local standard is, is a Federal question. A State statute dealing with the matter (e.g., decriminalizing dissemination of obscene materials to adults) does not bind the Federal courts.[69]

The Court in *Miller* and its companion cases was dealing with material directed to the average person. However, where obscene material is aimed at a deviant sexual group, the Court has made it clear that the community standard to be used in gauging prurient interest is that of the deviant group (e.g. homosexuals or paedophiles).[70] Likewise it is settled that in determining whether borderline materials are obscene because of an appeal to prurient interest, the method of advertising them may be considered, and if there is "pandering," the conduct may be punished.[71]

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[64] In *Kaplan* v. *California,* 413 U.S. 115 (1973), the Court held that a book containing no pictures could nonetheless qualify as "obscene" under the *Miller* test.

[65] *Supra* note 59, at 25. The Court in *United States* v. *Orito, supra* note 57, at 145 made it clear that the standards outlined in *Miller* apply also to the Federal government. See also *Hamling* v. *United States,* 418 U.S. 87 (1974).

[66] In *Ward* v. *Illinois,* 430 U.S. 983 (1977), the Court noted that the illustrations in *Miller* were merely examples and not meant to be exhaustive. The Court in *Ward* upheld a conviction under an Illinois obscenity law for having sold "sado-masochistic" material.

[67] In *Jenkins* v. *Georgia,* 418 U.S. 153 (1974), the Court resolved some uncertainty that had arisen from this aspect of its *Miller* opinion, holding that *Miller* approved but did not mandate a direction to decide the above issues on State or local standards; the Court upheld an instruction that the jury should apply "community standards," without specifying the community.

[68] *Smith* v. *United States,* 431 U.S. 291 (1977).

[69] *Ibid.*

[70] See *Mishkin* v. *New York,* 383 U.S. 502, 508-509 (1966), cited with approval in *Miller* v. *California, supra* note 59 and *Hamling* v. *United States, supra* note 65.

Scienter is a constitutional prerequisite to any statute regulating the dissemination of obscene matter.[72] However, the Supreme Court has held that it is not necessary to require proof that the offender knew that the material was obscene (a legal conclusion), but only that he had knowledge of the contents of the materials and knew their character and nature.[73] The Court determined that this degree of *scienter* applied under 18 U.S.C. 1461.[74]

Prior to 1971, 18 U.S.C. 1461 and 1462 punished trafficking, *inter alia,* in any writing or advertisement representing that any article may be used for "preventing conception or producing abortion." A 1971 amendment eliminated the words "preventing conception." [75] The restriction as to writings concerning abortion survives in the statutes but would appear to be of dubious validity.[76] It is not carried forward in the present section.

It should be noted that the Department of Justice since 1966 has applied a policy of not prosecuting under 18 U.S.C. 1461 in situations involving the mailing or receipt of private obscene correspondence, unless "aggravated" circumstances are present.[77]

C. Procedural Issues

Proof as to the obscene nature of materials may normally be established by introducing the materials themselves into evidence; it is not constitutionally necessary to employ expert witnesses, except perhaps in the unusual case where contested materials are directed at such a bizarre deviant group that the trier of fact would be plainly inadequate to judge whether the material appeals to a prurient interest.[78] The Committee intends that this rule be carried forward under the proposed obscenity provision.

Under existing Federal law,[79] venue exists in any district in which obscene material has been mailed, passed, or received.[80] This doctrine is continued in section 3311 of the Code.

18 U.S.C. 1465 contains a provision that the transportation of two or more copies of any obscene article, or a combined total of five or more obscene articles shall create a rebuttable presumption that

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[71] See *Ginzburg* v. *United States,* 383 U.S. 463 (1966), cited approvingly in *Miller* v. *California* and *Hamling* v. *United States, supra;* see also *United States* v. *Pellegrino,* 467 F.2d 41 (9th Cir. 1972).

[72] See *Smith* v. *California,* 361 U.S. 147 (1959).

[73] See *Hamling* v. *United States, supra* note 65 at 119-124.

[74] *Id.* See also *United States* v. *Smith,* 467 F.2d 1126, 1129-1130 (7th Cir. 1972), construing 18 U.S.C. 1464.

[75] P.L. No. 91-662, 84 Stat. 1973 (1971).

[76] See e.g., *Associated Students for the Univ. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11 (C.D. Cal. 1973) (three-judge court). The definition of obscene matter announced in *Miller* v. *California, supra* note 59, does not contain any reference to writings involving abortion, and the Supreme Court in *Hamling* v. *United States, supra* note 65, has construed 18 U.S.C. 1461 as embodying the *Miller* standards.

[77] See *Redmond* v. *United States,* 384 U.S. 264 (1966), dismissing at the government's suggestion the conviction of a husband and wife who had sent and received obscene photographs of one another through the mail. Subsequent cases have distinguished *Redmond* and have established that the policy is not enforceable by the courts. See, e.g., *Spillman* v. *United States,* 413 F.2d 527 (9th Cir.), cert. denied, 396 U.S. 930 (1969); see generally *United States* v. *Hutul,* 416 F.2d 607, 626-627 (7th Cir. 1969), cert. denied, 396 U.S. 1012 (1970).

[78] See *Paris Adult Theatre I* v. *Slaton, supra* note 57, at 56; *Kaplan* v. *California, supra* note 64.

[79] 18 U.S.C. 3227.

[80] See *Reed Enterprises* v. *Clark,* 278 F. Supp. 372 (D.D.C. 1967) (three-judge court), aff'd, 390 U.S. 457 (1968).

such articles were intended for sale or distribution. The presumption has been sustained, but only as applied to cases involving large numbers of obscene articles.[81] Its validity as applied to a case involving only the minimum numbers of obscene articles would seem doubtful under such decisions as *Barnes* v. *United States,*[82] and the Committee has accordingly not sought to reenact it. Of course, proof as to the quantity of obscene articles possessed by a person is relevant in its own right to the issue whether such possession is with intent to distribute them for profit.[83]

3. The Offense

Subsection (a) provides that a person commits an offense if he (1) disseminates obscene material (A) to a minor, or (B) to any person in a manner affording no immediately effective opportunity to avoid exposure to such material; (2) commercially disseminates obscene material to any person; or (3) otherwise dissemminates obscene material to any person.

The term "obscene material" is defined in subsection (b)(5) to mean material that:

> (A) sets forth in a patently offensive way:
>
> > (i) an explicit depiction, or a detailed description, of an actual or simulated act of sexual intercourse, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal; of oral-anal contact; of masturbation; of excretory functions; or of flagellation, torture, or other violence indicating a sado-masochistic sexual relationship; or
> >
> > (ii) a lewd exhibition, or close-up representation, of a human genital organ;
>
> (B) taken as a whole, (i) would be found by an average person, applying contemporary community standards, to appeal to prurient interests; or (ii) appeals to prurient interest of a sexually deviant class of persons, if such material is designed for dissemination to such class of persons; and
>
> (C) taken as a whole, lacks serious artistic, scientific, literary, or political value.

This definition forms the core of the section and is believed to be well within the framework of the *Miller* v. *California* standards in that (1) it specifically defines the sexual conduct which is the subject matter of the materials to be proscribed; (2) it views the work as a whole with regard to its appeal to prurient interests; and (3) it excepts those works which, when viewed as a whole, fulfill an artistic, scientific, political, or literary purpose. The language closely follows that set forth in the *Miller* v. *California* opinion, and covers only materials clearly outside the protection of the First Amendment.[84]

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[81] E.g., *United States* v. *Manarite,* 448 F.2d 583, 594 (2d Cir.) cert. denied, 404 U.S. 947 (1971); *United States* v. *Knight,* 395 F.2d 971 (2d Cir. 1968), cert. denied, 395 U.S. 930 (1969).

[82] 412 U.S. 837 (1973).

[83] Cf. *United States* v. *Childs,* 463 F.2d 390 (4th Cir.), cert. denied, 409 U.S. 966 (1972).

[84] The definition closely tracks the language used in *Miller* v. *California.* Subparagraph (B)(ii), dealing with dissemination to a sexually deviant class, is intended to reflect the holding of *Mishkin* v. *New York, supra* note 70, that in such a case prurient interest is to be judged by reference to the standards of the average person in such class.

With respect to the community to which resort should be made in determining whether particular matter is obscene, the bill, consistent with current law, defines "community" to mean the Federal district in which the material is disseminated.

Paragraph (1)(A) bars dissemination [85] of obscene material to a minor. This reflects the special interest in protecting young and presumably more susceptible persons to the deleterious influences of obscene matter.[86] The term "minor" is defined in subsection (b) to mean an unmarried person less than eighteen years old. The particular age selected as a cutoff, while inevitably somewhat arbitrary, is predicated on the age fixed by Congress for defining a juvenile in 18 U.S.C. 5031, carried forward in this bill in section 3605.[87]

Paragraph (1)(B) prohibits dissemination of obscene material to any person in a manner that does not allow immediately effective opportunity to avoid exposure to such material. The provision is designed to protect the sensitivities of the average individual against an "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." [88] Examples of how this branch of the statute could be violated are a billboard display or broadcast of obscene matter, affording no opportunity to the passerby or person just tuning in the station to avoid exposure thereto, or a mailing containing no warning (or a misleading description) as to the contents of the article.

Paragraph (2) punishes commercial distribution of obscene material. The phrase "commercially disseminate" is defined in subsection (b)(1) to mean "to disseminate for profit or to disseminate other than for profit by means of mass communication." The definition would reach aspects of advertising as well as sale, even if no *quid pro quo* was directly sought from the recipient of an obscene advertisement, since one who produces obscene advertising brochures clearly intends any dissemination to yield profit. Thus, for example, blanket mail solicitations containing obscene matter would be covered under this branch of the statute.[89]

The conduct in this offense is, in paragraph (1), disseminating material, and, in paragraph (2), commercially disseminating material. Since no culpability level is specifically prescribed, the applicable state of mind that must be shown is at least "knowing," i.e., that the defendant was aware of the nature of his actions.[90]

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[85] The term "disseminate" is broadly defined in subsection (b)(2) to mean (A) to "transfer, distribute, dispense, lend, display, exhibit, send, or broadcast, whether for profit or otherwise;" or (B) to "produce, advertise, transport, or possess with intent to engage in any conduct set forth in subparagraph (A)."

[86] See *Ginsberg* v. *New York, supra* note 59: *Paris Adult Theatre I* v. *Slaton, supra* note 57, at 57–58 n. 7; *United States* v. *Orito, supra* note 61 at 143. See also section 1643 (Sexual Abuse of a Minor).

[87] The Committee has refined the definition by excluding persons under eighteen who are married, on the ground that the marital relationship implies a greater degree of maturity and lessens the likelihood of adverse impact on behavior due to exposure to obscenity.

[88] *Redrup* v. *New York*, 386 U.S. 767, 769 (1967). See also *Paris Adult Theatre I* v. *Slaton, supra* note 57, at 57–58, noting the interest in enforcing safeguards against exposure to juveniles "and the passerby." Cf. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

[89] Such mailings would also present a jury question under the dissemination to minors provision, since, as will be discussed *infra*, one need only be shown to have been "reckless" as to the possibility of a minor receiving the materials. The anti-assaultive or pandering provision might also be infringed if the envelopes contained no clear markings as to the nature of the contents.

[90] See sections 303(b)(1) and 302(b)(1).

The element that the material is "obscene material" is an existing circumstance. As no culpability standard is set forth in this section, the applicable state of mind that must be proved is, at a minimum, "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[91] The Committee believes that this standard in effect incorporates the constitutional *scienter* requirement established in *Hamling* v. *United States, supra,* that a person must know the contents of the materials and their character and nature.[92] For, without an awareness of the nature of the materials, it cannot be said that a person has consciously disregarded the risk that they may be obscene.

The remaining elements, e.g., that the dissemination was to a minor, are also existing circumstances. The requisite culpability is at least "reckless."

Paragraph (3) punishes "otherwise" disseminating obscene material. It is contemplated that this branch of the statute will be used only in those rare situations in which a non-commercial dissemination, that does not also come within subsection (a)(1), warrants prosecution by the Federal Government. The analysis of the requisite elements and mental states that must be shown tracks that in the preceding paragraph.

4. Affirmative Defenses

Subsection (c) provides that it is an affirmative defense to a prosecution under this section that dissemination of the material was intentionally restricted to (1) a person associated with an institution of higher learning, either as a member of the faculty or as an enrolled student, teaching or pursuing a bona fide course of study, or conducting or engaging in a bona fide research program, to which such material is pertinent, (2) a person whose receipt of such material was authorized in writing by a licensed or certified psychiatrist, psychologist, or medical practitioner for use in a bona fide psychiatric, psychological, or medical treatment to which such material is pertinent.

These defenses are essentially self-explanatory. They are as indicated only meant to apply to bona fide situations and not where a sham course is offered or where a person connives with a doctor or psychologist to obtain written permission to see such material for purposes unrelated to professional treatment or legitimate research. The designation of the defenses as "affirmative" means that the defendant will bear the burden of proving the elements of the defense by a preponderance of the evidence.[93]

5. Jurisdiction

There is Federal jurisdiction over an offense in this section in three circumstances. The first is if the offense is committed within the special jurisdiction of the United States. This is new. The special jurisdiction is defined in section 203 and includes the special maritime, special territorial, and special aircraft jurisdictions. In essence, the places covered are the high seas and various vessels thereon, Federal enclaves, and certain aircraft while in flight. The extension of Federal cognizance in these areas is clearly warranted and also has the effect of eliminating the current need to rely on diverse State laws via the mechanism of the Assimilative Crimes Act, 18 U.S.C. 13, or its counterpart in the subject bill, section 1861 (Violating State or Local Law in an Enclave).

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[91] See sections 303(b)(2) and 302(c)(1).

[92] *Supra* note 65. See also *United States* v. *Sulaiman,* 490 F.2d 78 (5th Cir.), cert. denied, 419 U.S. 911 (1974). The Committee intends that a person may acquire an awareness of the risk that materials are obscene not only through viewing them but also by being told of their general nature and content.

[93] See the definition of "affirmative defense" in section 111.

The second and third circumstances are if the United States mail or a facility in interstate or foreign commerce is used in the commission of the offense,[94] and if the material is moved across a State or United States boundary in the commission of the offense. These jurisdictional bases essentially carry forward the present purview of 18 U.S.C. 1461-1465.[95]

6. Grading

An offense under this section is graded as a Class D felony (up to six years in prison) if the offense involves the commercial dissemination of material in the circumstances set forth in subsection (a)(1) or of material that sets forth sexually explicit conduct by a minor, and a Class E felony (up to three years in prison) in any other case. The term "sexually explicit conduct" is defined in subsection (b) in a manner that closely tracks the definition of the same term in 18 U.S.C. 2252(c), part of Public Law 95-225, Protection of Children Against Sexual Exploitation Act of 1977. The higher grading is designed to reflect the offenses set forth in 18 U.S.C. 2252, which punish the transportation in interstate or foreign commerce or the mails, or the receipt, sale, or distribution of any obscene visual or print medium that has been so transported or mailed, for the purpose of sale or distribution for sale, if the producing of such visual or print medium involves the use of a minor (an unmarried person less than eighteen years old) engaging in sexually explicit conduct and the medium depicts such conduct. "Minor" is defined in the current law as a person under sixteen years of age. The definition of "minor" in this section thus represents a modest change which the Committee deems appropriate in the interests of uniformity.

SECTION 1843. ENGAGING IN A PROSTITUTION BUSINESS

1. In General

Prostitution was not a common law offense but today is generally prohibited by statutes directed at women who perform sexual acts for hire.[96]

Current Federal statutes in the prostitution field are generally aimed at penalizing the use of interstate commerce to facilitate prostitution. Their thrust, however, is jurisdictional rather than substantive and by relying on the use of interstate commerce to define the offense, the statutes are defective both in reaching behavior which there is no real Federal interest in punishing (e.g., transporting a woman in interstate commerce for an "immoral" purpose), while failing to reach some activities of organized crime (e.g., controlling an interstate network of call girl services or a chain of houses of prostitution).[97]

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[94] The term "commission of the offense" is defined in section 111.

[95] The term "facility in interstate . . . commerce" is intended to include, as in other contexts, the interstate use of a telephone and an interstate broadcast over the radio (including a citizens band radio) or television. See *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir. 1976); *United States* v. *Villano*, 529 F.2d 1046, 1052-1053, n.6 (10th Cir.), cert. denied, 426 U.S. 953 (1076). 18 U.S.C. 1464 proscribes also the uttering by radio of "indecent" or "profane" language, and has been construed to reach intrastate communications over facilities that also operate in interstate commerce (e.g., citizens band radios). *Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966). This broader coverage has been preserved by transferring this statute to title 18 Appendix, United States Code. The term "indecent" in 18 U.S.C. 1464 was recently construed as synonymous with "obscene." See *United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977).

[96] See 2 Wharton, *supra* note 1, § 758 (1967 ed. Supp. 1974).

Section 1843, by contrast, focuses on the operation of a prostitution business, directing penalties primarily at the persons responsible for its operation. The section continues, however, to encompass those who engage in prostitution other than as managers. The section removes the sexual bias sometimes found in State laws and uses terminology throughout that makes clear that the offense is not limited to members of a single sex.

2. Present Federal Law

The principal Federal statutes are the White Slave Traffic Act (18 U.S.C. 2421 et seq.), and the Travel Act (18 U.S.C. 1952), discussed in connection with section 1841, *supra.*

18 U.S.C. 2421 makes it an offense punishable by up to five years in prison to knowingly transport in interstate or foreign commerce (or in the District of Columbia) any woman or girl "for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to engage in any other immoral practice." [98]

It has been held that an expectation of pecuniary gain is not an element of this offense (thus extending its reach to situations when a man takes his paramour across a State line in tryst),[99] nor need the interstate transportation be by common carrier.[100] A persistent problem has been in determining whether the interstate transportation was for one of the prohibited purposes. The courts have held that merely taking a prostitute on an innocent vacation does not violate this section; rather it must be shown that a "dominant" (but not the sole) purpose of the travel was for prostitution, debauchery, or other immorality.[101] The focus of the statute on interstate transportation has also created other difficulties in terms of defining numbers of offenses. Thus it has been held that the simultaneous transportation of two women in interstate commerce constitutes only a single offense,[102] but a round trip may constitute two distinct interstate journeys.[103]

The term "immoral purpose" has been held to be limited by the principle of *ejusdem generis* to the same class of conduct as prostitution or debauchery but within that class has been given a broad interpretation so as to reach, for example, the transportation across State lines of plural wives by members of the Mormon faith believing in polygamy.[104]

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[97] See Working Papers, pp. 1191-1192.

[98] The section also proscribes the knowing purchase of any ticket to be used by a girl or woman for one of the purposes described above.

[99] See *Caminetti* v. *United States*, 242 U.S. 470 (1917); Working Papers, p. 1198.

[100] *Wilson* v. *United States*, 232 U.S. 563 (1914).

[101] See *Mortensen* v. *United States*, 322 U.S. 369 (1944); see also *United States* v. *Lomas*, 440 F.2d 335 (7th Cir.), cert. denied, 404 U.S. 842 (1971); *United States* v. *Tyler*, 424 F.2d 510 (10th Cir.), cert. denied, 400 U.S. 839 (1970).

[102] See *Bell* v. *United States* 349 U.S. 81 (1955).

[103] See *Nelms* v. *United States*, 291 F.2d 390 (4th Cir. 1961).

The offense is complete upon the crossing of State boundaries irrespective of whether any prostitution or debauchery later occurs or whether the purpose of the transporter to do so is abandoned.[105]

The offense under 18 U.S.C. 2421 may be committed by the transportation of one's wife for prostitution purposes; if it is, the Supreme Court has determined that the wife may testify against her husband at his trial notwithstanding the spousal privilege, since she is the "victim" of the offense even if she was not coerced.[106]

18 U.S.C. 2422, a companion statute, penalizes whoever knowingly persuades, induces, entices, or coerces any woman or girl to travel in interstate or foreign commerce (or in the District of Columbia) for the purpose of prostitution, debauchery, or other immoral purpose, or who with the intent that such woman or girl shall engage in prostitution, debauchery, etc., knowingly causes her to be carried as a passenger in interstate or foreign commerce (or in the District of Columbia) by any common carrier. The penalty is the same as that prescribed under section 2421.

18 U.S.C. 2423, as recently amended by Public Law 95-225, the Protection of Children Against Sexual Exploitation Act of 1977, provides a penalty of up to ten years' imprisonment for whoever transports, finances the transportation of, or otherwise causes or facilitates the movement of, any minor in interstate or foreign commerce or within the District of Columbia or any territory or possession of the United States, with intent that such minor (1) engage in prostitution, or (2) engage in prohibited sexual conduct, if the person so transporting, financing, etc., knows or has reason to know that the prohibited sexual conduct will be commercially exploited by any person. The term "minor" is defined to mean a person under eighteen years of age; the term "prohibited sexual conduct" is defined in a manner substantively identical to the term "sexually explicit conduct" contained in 18 U.S.C. 2253 and discussed both in connection with the previous and the following sections. "Commercial exploitation" is defined to mean having as a goal monetary or other material gain. No reported cases as yet exist under this statute.

18 U.S.C. 1952, the Travel Act, is a more accurate expression of the Federal interest in prostitution activities. It punishes by up to five years in prison whoever travels in interstate or foreign commerce or uses any facility thereof, with intent to (1) distribute the proceeds of any unlawful activity, (2) commit any crime of violence to further any unlawful activity, or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, etc., of any unlawful activity, and who thereafter performs or attempts to perform any of the acts set forth in subparagraphs (1), (2), and (3). The term "unlawful activity" is defined to mean, *inter alia*, any

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[104] See *Cleveland* v. *United States*, 329 U.S. 14 (1946). But cf. *United States* v. *Prater*, 518 F.2d 817 (7th Cir. 1975) (strip-tease act not an "other immoral act").

[105] *Wilson* v. *United States, supra* note 100.

[106] See *Wyatt* v. *United States*, 362 U.S. 525 (1960). Compare *Hawkins* v. *United States*, 358 U.S. 74 (1958); and see generally, *Trammel* v. *United States*, 445 U.S. 40 (1980) (modifying the privilege so that it may be invoked only by the witness-spouse, not the defendant-spouse). But see 8 U.S.C. 1328, abolishing the privilege generally for the crime of importing aliens for prostituton purposes.

business enterprise involving prostitution in violation of the laws of the State in which they are committed or the laws of the United States.

The general discussion of the elements under this statute in connection with section 1841 (Engaging in a Gambling Business) is applicable here. It is significant that, although confined to "enterprises"—and thus somewhat tailored to large scale businesses of the type commonly associated with organized crime in which the Federal Government has a substantial interest—this section is defective in that it relies on State law for the determination of prostitution offenses. Since prostitution was not a common law offense, the prohibitions vary widely among the States. For example, some States proscribe prostitution itself while others punish only the promotion or facilitation of prostitution activities; in many States the customers of prostitutes are deemed to be criminals whereas in others they are not. Thus reliance on State law injects an undesirable measure of diversity in the conduct proscribed and tends to weaken the effort to differentiate between acts supportive of an organized prostitution business and individual ventures into professional prostitution.[107]

In addition to the foregoing principal statutes, existing Federal law also reaches prostitution in Federal enclaves via the provisions of the Assimilative Crimes Act, 18 U.S.C. 13, which incorporates the penalty and definition of the offense from the law of the State where the enclave is situated. Such "assimilation" is subject to much of the same criticism as above with regard to the lack of uniformity thereby created in the Federal Government's role in proscribing prostitution.

Finally, Federal law explicitly prohibits acts of prostitution in one area of special Federal interest. 18 U.S.C. 1384 provides that whoever, within such reasonable distance of any military or naval camp, fort, post, yard, base, cantonment, training, or mobilization place as the appropriate Secretary of one of the armed forces shall designate and publish, "engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for purposes of lewdness, assignation or prostitution into any vehicle, conveyance, place, structure, or building or leases or rents or contracts to rent or lease any vehicle, etc., knowing or with good reason to know that it is intended to be used for any of purposes herein prohibited" is guilty of a misdemeanor punishable by up to one year in prison. No reported cases under this statute apparently exist, although it has been stated that repression of prostitution has proved beneficial to the maintenance and supervision of military bases.[108]

3. The Offense

Subsection (a) provides that a person commits an offense if he (1) "owns, controls, manages, supervises, directs, finances, procures patrons for, or recruits participants in, a prostitution business; or (2) otherwise engages in prostitution." "Prostitution business" is defined in subsection (b) as a business in which a person engages in prostitution; and prostitution is defined as engaging in sexually explicit conduct, as defined in section 1844(b)(3), as consideration for anything of pecuniary [109] value or for commercial exploitation.

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[107] See Working Papers, pp. 1192-1193.

[108] See *id.* at 1195 n. 9.

The terms "owns, controls, manages, supervises, directs, [and] finances" parallel those in section 1841 (Engaging in a Gambling Business), which in turn are derived from 18 U.S.C. 1955. Unlike in the gambling statute, however, where only businesses of a certain size or volume are covered, the section follows existing law in reaching a prostitution business of any size, including that of a self-employed prostitute.[110] The remaining terms in paragraph (1)—"procures patrons for, or recruits participants in"—are designed to reach other activities substantially facilitating the operation of the business.[111]

The unlawful sexual acts referred to in section 1844(b)(3) include homosexual as well as heterosexual activity by members of either sex. These elements are discussed in more detail in connection with section 1844.

The National Commission included a special provision [112] designed to preserve the existing case law exception permitting testimony by a victim-spouse to be received against her or his marital partner in a prostitution prosecution. The Committee intends that the case law be preserved but notes that this result has been effectively achieved by enactment of Rule 501 of the Federal Rules of Evidence. Accordingly, there is no need for such a separate evidentiary provision in this Code.

The conduct in this section is owning, controlling, etc., or otherwise engaging in a prostitution business. Since no culpability standard is specifically designated, the applicable state of mind that must be proved is at least "knowing," i.e., that the offender was aware of the nature of his actions.[113]

4. Defense

Subsection (c) provides that it is a defense to a prosecution under this section that the prostitution business and any prostitution involved were lawful under the laws of all States or localities in which the offense occurred.

The fact that the prostitution business violates State law is presently an element of the offense under 18 U.S.C. 1952, although not under the White Slave Traffic Act.[114] The Committee believes that a State law violation is a sensible limitation on the scope of the offense, both here and in the two preceding sections, as a reflection of the extent of legitimate Federal interest, but that a more equitable as well as practical allocation of the burden of going forward with the evidence is to make legality of the enterprise a defense. This will enable proof of illegality to be foregone in those cases (the overwhelming majority) where illegality of the business is clear and will require the defense to come forward with some evidence to raise the issue of legality in those instances where the defendant contends that the State or local law is not clear or permits the activity.[115] Thereafter the prosecution will have the burden of disproving the defense beyond a reasonable doubt.[116] The reason for making a defense available predicated upon the lawfulness of the activity under State law is to implement the Committee's judgment that there is no Federal interest of sufficient magnitude to warrant penal sanctions in regard to prostitution businesses which are not unlawful locally.

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[109] The term "anything of pecuniary value" is defined in section 111 to include any direct or indirect gain or advantage in the form of money or its equivalent, or any other property or service valued in excess of $100.

[110] See 18 U.S.C. 1952.

[111] The concept of procuring patrons is intended to reach the activities, e.g., of a pimp or "madam" who obtains customers for the prostitutes he or she controls, but not to cover the on-the-street solicitations of a customer by a prostitute.

[112] See Final Report, § 1848.

[113] See sections 303(b)(1), 302(b)(1).

[114] See *United States* v. *Pelder*, 578 F.2d 701, 710–712 (8th Cir. 1978), sustaining convictions involving the transportation of women to Nevada for purposes of prostitution notwithstanding the legality of prostitution in that State.

5. *Jurisdiction*

Subsection (e) provides that there is Federal jurisdiction over an offense under this section in three circumstances. The first is if the offense is committed within the special jurisdiction of the United States. The special jurisdiction is defined in section 203 and includes, in essence, Federal enclaves, various vessels on the high seas, and certain aircraft while in flight. Extending the jurisdictional scope of this section to such places will enable the present coverage of the Assimilative Crimes Act, incorporating the diverse provisions of State and local laws, as well as 18 U.S.C. 1384, to be replaced by the uniform definitional and grading provisions of this section.[117]

The second circumstance is if the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

The third circumstance is if movement of any person across a State or United States boundary occurs in the course of the planning, promotion, management, execution, consummation, or concealment of the offense, or in the course of the distribution of the proceeds of the offense. The second and third bases perpetuate the existing jurisdictional purview of 18 U.S.C. 1952 and the White Slave Traffic Act with the exception that movement of "any person" (e.g., the owner of the business) and not just that of the prostitute is deemed sufficient for Federal jurisdiction to attach. The Committee perceives no reason why the only relevant travel should be that of the prostitute.

6. *Grading*

An offense under subsection (a)(1) is generally graded as a Class E felony, carrying a three-year maximum prison sentence. Maintaining the distinction drawn in 18 U.S.C. 2423, however, the offense is raised to a Class D felony, carrying a six-year maximum sentence, if the business involves the prostitution, or the recruitment for prostitution, of a person under eighteen years old. An offense under subsection (a)(2) is graded as a Class A misdemeanor (up to one year in prison) reflecting the Committee's view that the individual prostitute's offense is less serious than that of a person managing, owning, or financing a prostitution business.

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[115] In order for the defense to apply, no part of the activity could be subject to State or local sanctions. See *United States* v. *Polizzo, supra* note 48. The determination of State law is for the court.

[116] See the discussion of the defenses in section 1841.

[117] Some coverage in 18 U.S.C. 1384—i.e., the prohibition against setting up a house of prostitution "near" a military base—will be lost. This is not, however, deemed to be significant. In addition, prostitution within the District of Columbia will not be reached since the District is not part of the special jurisdiction. The Committee deems it appropriate to leave such offenses to local prosecution under the District of Columbia Code.

SECTION 1844. SEXUALLY EXPLOITING A MINOR

1. In General and Present Federal Law

This section is intended to carry forward, with some changes, 18 U.S.C. 2251, part of the Protection of Children Against Sexual Exploitation Act of 1977.[118]

18 U.S.C. 2251 makes it unlawful for a person to employ, use, persuade, induce, entice, or coerce a minor to engage in, or, if the person is a parent, legal guardian, or custodian of a minor, to permit the minor to engage in or to assist another to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, if such person knows or has reason to know that the medium will be transported in interstate or foreign commerce or mailed, or if such medium has actually been so transported or mailed. A first offense is subject to a maximum prison term of ten years; a subsequent offense is punishable by two to fifteen years' imprisonment. The term "sexually explicit conduct" is defined in 18 U.S.C. 2253 to mean actual or simulated (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, (2) bestiality, (3) masturbation, (4) sado-masochistic abuse for the purpose of sexual stimulation, or (5) lewd exhibition of the genitals or pubic area of any person. "Minor" is defined to mean a person under the age of sixteen. "Producing" is defined to mean producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit. "Visual or print medium" is defined to mean any film, photograph, negative, slide, book, magazine, or other visual or print medium. No reported cases involving prosecution under this statute as yet exist.

2. The Offense

Subsection (a) provides that a person commits an offense if he (1) employs, uses, persuades, induces, entices, or coerces a minor, or (2) being a parent, legal guardian, or other person having custody or control of a minor, permits such minor to engage in, or assist any other person to engage in, sexually explicit conduct with the intent to produce any visual or printed medium depicting such conduct.

The term "sexually explicit conduct" is defined in subsection (b) to mean an actual or simulated act of sexual intercourse, including genital-genital, anal-genital, or oral-genital, whether between human beings or between a human being and an animal; of oral-anal contact; of masturbation; or flagellation, torture, or violence indicating a sado-masochistic sexual relationship; or of a lewd exhibition of a human genital organ. This definition closely tracks the definition of the same term in 18 U.S.C. 2253.[119] The term "produce" is defined in subsection (b) to mean produce, direct, manufacture, issue, publish, or advertise, for pecuniary profit. This restates the definition in 18 U.S.C. 2253. The term "minor" is defined in subsection (b) to mean a person less than eighteen years old, thus expanding in this respect the scope of 18 U.S.C. 2251 and harmonizing the definition of "minor" in this section with that in sections 1842 and 1843. The term "visual or printed medium" is not, unlike the current statute, defined. The Committee intends that it bear its current meaning under 18 U.S.C. 2253.

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[118] Other parts of that Act are brought forward in sections 1842 and 1843.

[119] The Code's definition expands upon current law by including acts of sexual intercourse between a human being and an animal. In place of the rather vague terms "bestiality" and "sado-masochistic abuse" it substitutes the somewhat more specific phrase "flagellation, torture, or other violence indicating a sado-masochistic sexual relationship". It deletes coverage of acts

The conduct in this offense is employing, using, persuading, enticing, coercing, or permitting a person to engage in, or to assist another to engage in, sexually explicit conduct. Since no state of mind is specifically set forth in this section, the requisite minimum mental state that must be proved is "knowing", i.e., that the offender was aware of the nature of his or her actions.[120] The facts that the victim was a "minor" as defined, and, as to the offense in subsection (a)(2), that the offense was committed by a parent, legal guardian, or a person having custody or control of a minor, are existing circumstances. As no culpability level is specifically prescribed, the applicable mental state that must be established is at least "reckless", i.e., that the offender disregarded the substantial risk that the circumstance existed.[121] The element that the offense was committed "with intent to produce any visual or printed medium depicting" sexually explicit conduct sets forth the particular purpose for which it must be shown that the offender performed the conduct.

3. Jurisdiction

There is Federal jurisdiction over an offense in this section if the offense is committed within the special jurisdiction of the United States or if the material is moved across a state or United States boundary or is placed in the United States mail. This modifies somewhat the jurisdictional extent of the offense as compared with 18 U.S.C. 2251. The special jurisdiction is defined in section 203 and essentially includes Federal enclaves, the high seas, and certain vessels and aircraft. Application of the offense to these areas enlarges upon the scope of 18 U.S.C. 2251 and achieves two purposes. First, in areas of exclusive Federal jurisdiction, it ensures that the prohibited conduct can be punished. Second, in areas of concurrent Federal and state jurisdiction, such as Federal enclaves, it creates a uniform Federal offense. This avoids the necessity of relying, through the assimilative crime provisions (section 1861), on state or local laws which may vary from enclave to enclave, and preserves the felony status of the offense. On the other hand, the jurisdictional aspect involving the movement of the material or its mailing is narrowed to some degree as contrasted with 18 U.S.C. 2251, which reaches situations not only where the material is in fact moved in interstate or foreign commerce or mails, but where the offender knows or has reason to know that such acts will occur. The Committee deems it inappropriate to assert Federal jurisdiction predi-

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involving the exhibition of the pubic area, since such acts are adequately encompassed by the language concerning exhibition of a genital organ.

[120] See sections 302(b)(1) and 303(b)(1).

[121] See sections 302(b)(1) and 303(b)(2).

cated upon a person's belief or reason to believe that a jurisdictional event will occur, if in fact the event never takes place, unless events have been set in motion that meet the jurisdictional criteria for attempt or conspiracy. For example, a person would be guilty of a Federal attempt to commit this offense if the government could show that the United States mail would be used in the course of conduct involving the crime, even though the conduct is interrupted prior to the event.

4. *Grading*

An offense under this section is graded as a Class C felony (up to twelve years in prison). This slightly increases the applicable penalties under 18 U.S.C. 2251 but eliminates, consistent with the Code's general sentencing philosophy, the pseudo-mandatory minimum sentence in present law for a second offender.

SUBCHAPTER F.—PUBLIC HEALTH OFFENSES

(Sections 1851-1853)

This subchapter brings into the criminal Code a number of public health offenses currently defined and punished in titles 21, 23, and 42, United States Code. Only those offenses deemed worthy of retention as felonies have been selected for incorporation into this title. Other less serious offenses relating to public health will be retained in their respective titles as misdemeanors. This subchapter does not significantly alter the substantive definition of the crimes here incorporated. Rather, the principal technique adopted by the Committee is to refer to particular sections outside title 18 and provide that whoever "violates" them is guilty of an offense. This preserves the content of the current offenses,[1] while enabling the penalty to be prescribed in this subchapter.

SECTION 1851. FRAUD IN A HEALTH RELATED INDUSTRY

1. *In General and Present Federal Law*

This section deals with offenses involving the marking, labeling, and packaging of certain foodstuffs and adulteration or misbranding of a food, drug, device, or cosmetic, with intent to defraud.

21 U.S.C. 458 sets forth a number of prohibited acts relating to the improper slaughter of poultry, sale of adulterated, misbranded, or uninspected poultry, improper use of trade secrets, and improper use of any official device, mark, or certificate.

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[1] Specifying the content of such offenses is seen as preferable to a general regulatory offense statute, which was seriously criticized in the Hearings. See, e.g., Hearings, pp. 1646-1647, 1789-1790, 3509-3512, 6658-6661.

21 U.S.C. 459 prohibits establishments from processing poultry or poultry products except in compliance with the requirements of chapter 10 of title 21.

21 U.S.C. 460 proscribes a variety of acts involving identification of certain poultry parts or products not intended for human consumption; the section also mandates record-keeping by persons engaged in the business of slaughtering, transporting, storing, buying, selling, processing, or packaging poultry. It also requires that anyone engaged in certain businesses associated with poultry or poultry products register with the Secretary of Agriculture; and the section regulates transactions involving transportation or importation of dying, disabled, or diseased poultry to prevent its use as human food.

21 U.S.C. 463 prohibits violation of any regulations prescribed by the Secretary of Agriculture setting forth conditions under which poultry products capable of use as human food shall be stored or otherwise handled by any person engaged in the business of buying, selling, importing, storing, or transporting them.

21 U.S.C. 466 prohibits the importation of slaughtered poultry unless they are healthful and not adulterated and unless they comply with the regulations promulgated by the Secretary of Agriculture to assure that such poultry meets the standards required of domestic poultry for human consumption.

21 U.S.C. 461(a) provides that any person who violates any of the foregoing sections shall be subject to imprisonment for not more than one year.[2] It further provides, *inter alia,* that "if such violation involves intent to defraud," the offender shall be liable to imprisonment for up to three years. Carriers are excluded from liability (except under 21 U.S.C. 460) unless they have knowledge or are in possession of facts from which a reasonable person would believe that poultry or poultry products were not inspected or marked in accordance with this chapter or were otherwise ineligible for transportation.

21 U.S.C. 610 prohibits the slaughter of cattle, sheep, swine, goats, horses, mules or other equines at any establishment preparing any carcasses or food products for commerce, except in compliance with chapter 12 of title 21. The section also prohibits the sale, transportation, or receipt in commerce of any such articles which are capable of use as human food and are adulterated or misbranded, or any such articles that were not inspected as required; and it also bars the doing of any act which is intended to cause, or which causes, such articles to be misbranded.

21 U.S.C. 611 proscribes, *inter alia,* the misuse or destruction of any official mark or certificate or the making of any false statement in any shipper's certificate or the knowing misrepresentation that any article covered in this chapter has been inspected.

21 U.S.C. 620 prohibits the importation of carcasses or meat or food products of cattle, sheep, swine, goats, horses, mules, or other equines which are capable of use as human food unless they comply with the standards applicable to domestic products of the same kind.

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[2] This offense will be retained in title 21.

21 U.S.C. 642 prohibits the violation of regulations promulgated by the Secretary of Agriculture setting forth conditions under which carcasses or meat or food products of cattle, sheep, etc., capable of use as human food, may be stored or otherwise handled by any person engaged in the business of buying, selling, importing, storing, or transporting such articles.

21 U.S.C. 641 requires identification of certain parts of cattle, sheep, etc. not intended for use as human food and proscribes the purchase, sale, transportation, or receipt of such items unless they are identified as prescribed by regulations.

21 U.S.C. 642 mandates record-keeping by persons engaged in the business of slaughtering, buying, selling, importing, preparing, or packaging cattle, sheep, etc., as well as by persons engaged in the buying, selling, importing, or transporting of any dead, dying, disabled, or diseased animals of the type specified above.

21 U.S.C. 643 requires registration with the Secretary of Agriculture of anyone engaged in various businesses associated with the parts or products of cattle, sheep, etc.

21 U.S.C. 644 regulates transactions involving the transportation or importation of dying, disabled, or diseased cattle, sheep, etc.

21 U.S.C. 676 provides that any person who violates any of the foregoing provisions shall be subject to imprisonment for not more than one year.[3] It further provides, *inter alia*, that "if such violation involves intent to defraud," the offender shall be liable to imprisonment for up to three years. An exception is created for persons who receive for transportation any animal or article under this chapter "in good faith" unless they refuse, upon request of the Secretary, or his representative, to disclose the name and address of the person from whom it was received.

21 U.S.C. 1037 sets forth a number of prohibited acts dealing with restricted eggs, egg processing, egg inspection, adulterated or misbranded eggs, identification of eggs and egg products not intended for human consumption, keeping of records by persons engaged in the business of transporting or handling eggs, importation of eggs, improper use of any official mark, label, or certificate, or improper use of any trade secret by a Federal or State employee. In general, the prohibited acts parallel those in 21 U.S.C. 458 and 460, relating to poultry and poultry products.

21 U.S.C. 1041 provides that any person who commits any offense prohibited by section 1037 shall be subject to imprisonment for not more than one year.[4] It further provides, *inter alia*, that "if such violation involves intent to defraud," the offender shall be liable to imprisonment for up to three years. Carriers and warehousemen are excepted (other than for record-keeping) for acts connected with their receipt, carriage, holding, or delivery of eggs or egg products in the usual course of business, unless they know or are in possession of facts that would cause a reasonable person to believe that such items were not eligible for transportation under, or were otherwise in violation of, this chapter, or unless they refuse to furnish, on request of the Secretary or his representative, the name and address of the person from whom such eggs or egg products were received.

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[3] This offense will be retained in title 21.
[4] This offense will be retained in title 21.

21 U.S.C. 331 sets forth more than a score of prohibited acts relating to food, drugs, and cosmetics. Included are the adulteration or misbranding of any food, drug, or cosmetic in interstate commerce, the manufacture, introduction or receipt in commerce of any such substance, the misuse of any mark, label, or other identification device authorized or required by regulations, trafficking in or making counterfeit drugs, misuse of trade secrets, the doing of any act with intent to cause, or which causes, any food, drug, device or cosmetic to become adulterated or misbranded, and the failure of any person who owns or operates any establishment engaged in the manufacture, preparation, propagation, compounding, or processing of a drug to register with the Secretary of Health, Education, and Welfare.

21 U.S.C. 333(a) provides that any person who violates section 331 shall be subject to imprisonment for not more than one year.[5] 21 U.S.C. 333(b) further provides, *inter alia*, that if any person commits such a violation "with the intent to defraud or mislead," he shall be liable to imprisonment for up to three years.[6] Subsection (c) contains a number of exclusions from criminal liability in cases of good faith, etc., patterned upon the provisions of 21 U.S.C. 461(a), 676, and 1041.

2. The Offense

Subsection (a) provides that a person commits an offense if, "with intent to defraud," he violates: (1) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act, as amended (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the marking, labeling, and packaging of poultry and poultry products); (2) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act, as amended (21 U.S.C. 610, 611, 620, 624, 641, 642, 643, or 644) (relating to the marking, labeling, and packaging of meat and meat products); (3) section 8 of the Egg Products Inspection Act, as amended (21 U.S.C. 1037) (relating to the marking, labeling, packaging of eggs and egg products); or (4) section 301 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 331) (relating to the adulteration of a food, drug, device, or cosmetic).

The term "violates" is defined in section 111 to mean in fact engaging in conduct which is proscribed, prohibited, declared unlawful or made subject to a penalty. Use of the term "violates" has the effect under the Code of preserving the current content (including both substantive and jurisdictional elements) of the sections of title 21 referred to. Whether a mental state need be proved as to the fact that the conduct violates a statute or regulation is to be determined by reference to the underlying statute and not by section 303(d)(1)(A).

The phrase "with intent to defraud" states the particular purpose for which it must be established that the forbidden conduct was performed. This carries forward that aspect of 21 U.S.C. 461(a),

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[5] This offense will be retained in title 21.

[6] The three-year punishment is also made available in the case of a second or subsequent violation, even if no intent to defraud is present.

676, 1041, and 333(b), discussed *supra*, that punishes the violation of the sections referred to in this offense at a felony level.[7]

The brief descriptions of the sections here incorporated, contained in parentheses, are not to be construed as limiting the scope or application of the sections to which they refer.[8]

3. Grading

An offense under this section is graded as a Class E felony (up to three years in prison).

SECTION 1852. DISTRIBUTING ADULTERATED FOOD

1. In General and Present Law

This section deals with offenses that involve, generally, the marking, labeling, packaging, adulteration, or misbranding of poultry, meat, eggs, or products thereof. The statutes covered are the same as those encompassed in paragraphs (a)(1) through (a)(3) of section 1851 and the detailed descriptions of the offenses there should be consulted here.

The penalty provisions applicable to the sections referred to in this offense are 21 U.S.C. 461(a), 676, and 1041(a). Those sections provide, among other things, that violations are punishable as three-year felonies if the violation is done "with intent to defraud," or if the violation involves the "distribution" of an adulterated article. It is this latter aspect that is carried forward by section 1852.

21 U.S.C. 461(a) provides, for example, that any person who violates 21 U.S.C. 458, 459, 460, 463, or 466 shall be subject to imprisonment for not more than three years if such violation involves, *inter alia*, "any distribution or attempted distribution of an article that is adulterated (except as defined in section 453(g)(8) of this title)."

21 U.S.C. 676 provides that any person who violates, among other sections, 21 U.S.C. 610–611, 619–620, 624, or 641–644 shall be subject to imprisonment for not more than three years if such violation involves, *inter alia*, the "distribution or attempted distribution of an article that is adulterated (except as defined in section 601(m) of this title)."

Finally, 21 U.S.C. 1041(a) provides that any person who violates 21 U.S.C. 1037 is punishable by not more than three years if the violation involves, *inter alia*, the "distribution or attempted distribution of any article that is known to be adulterated (except as defined in section 1033(a)(8) of this title)."

2. The Offense

Subsection (a) provides that a person commits an offense if "in the distribution of an adulterated article" he violates: (A) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act, as amended (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the distribution of adulterated poultry and poultry products); (B) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act, as amended (21 U.S.C. 610, 611, 619, 620, 624, 641, 642, 643, or 644) (relating to the distribution of adulterated meat and meat products); or (C) section 8 of the Egg Products Inspection Act, as amended (21 U.S.C. 1037) (relating to the distribution of adulterated eggs and egg products).

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[7] 21 U.S.C. 333(b) also refers to an intent to "mislead." This term has been eliminated as synonymous with the word "defraud" and therefore redundant.

[8] See section 112(b).

The term "violates" is defined in section 111 to mean in fact engaging in conduct which is proscribed, prohibited, declared unlawful, or made subject to a penalty. By the use of this device, the essential elements (including jurisdictional elements) contained in the statutes referred to are kept intact. Whether a state of mind need be proved as to the fact that the defendant's conduct violated one of the enumerated statutes is to be determined by reference to the underlying statute and not by section 303(d)(1)(A).

The phrase "in the distribution of an adulterated article" is an existing circumstance. Since no culpability level is specifically designated, the applicable state of mind that must be shown is at least "reckless," i.e., that the defendant was aware of but disregarded the substantial risk that the circumstance existed.[9] This carries forward, with some modification, the aspect of 21 U.S.C. 461(a), 676, and 1041(a), discussed *supra,* that punishes the violation of the sections referred to in this offense at a felony level. The requirement of recklessness as to the fact that the offense involves distribution of an adulterated article represents a compromise between the provisions of 21 U.S.C. 461(a) and 676, on the one hand, which apparently require no culpability, and those in 21 U.S.C. 1041(a), on the other hand, which specify a culpability level of "knowing." The Committee perceives no sound reason for any distinction in this regard as between the above offenses and, accordingly, has unified the mental state required. The concept of "recklessness" rather than "knowing" has been adopted since the Committee considers that, in relation to regulatory offenses of the kind here at issue involving the distribution of adulterated articles, conscious disregard of a substantial risk that the article is adulterated furnishes a more than adequate basis for the imposition of felony sanctions.[10]

Subsection (b) provides that the term "adulterated" in paragraph (1) is to be given the meaning set forth in 21 U.S.C. 453(g), except for paragraph 8 thereof; in paragraph (2), the meaning set forth in 21 U.S.C. 601(m), except for paragraph 8 thereof; and in paragraph (3), the meaning set forth in 21 U.S.C. 1033(a), except for paragraph 8 thereof. This carries forward the precise contours of current law under 21 U.S.C. 461(a), 676, and 1041(a), described above.[11]

The brief descriptions of the sections referred to, contained in parentheses, are not to be construed as limiting the scope or application of those sections.[12]

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[9] See sections 303(b)(2) and 302(c)(1).

[10] Cf. *United States* v. *Balint,* 258 U.S. 250 (1922); *United States* v. *International Min'ls Corp.,* 402 U.S. 558 (1971).

[11] The "paragraph 8" exceptions in each of the listed statutes are identical and relate to types of adulteration that do not pose an immediate health hazard, e.g., where a valuable constituent has been in whole or in part abstracted from the article, or any substance has been substituted in whole or in part for the article, or any substance has been added or mixed or packed with the article so as to increase its bulk or weight or make it appear better or of greater value than it is.

[12] See section 112(b).

3. Grading

An offense under this section is graded as a Class E felony (up to three years in prison). As under the foregoing section, this is designed to preserve the penalty level in existing law.

SECTION 1853. ENVIRONMENTAL POLLUTION

1. In General and Present Federal Law

This section brings into the Code those environmental offenses outside title 18 that are considered the most serious violations affecting the environment and public health. For the most part, these offenses carry felony penalties either for the first or second offense. This section carries forward offenses under the Federal Water Pollution Control Act, the Clean Air Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Solid Waste Disposal Act, the Outer Continental Shelf Lands Act, the Marine Protection, Research, and Sanctuaries Act of 1972, the Noise Control Act of 1972, and the pollution part of the Rivers and Harbors Act of 1899.

The Federal Water Pollution Control Act, as added by the Act of October 18, 1972, stated a national goal of the elimination of discharge of pollutants into navigable waters by 1985 and an interim goal by 1983 of a water quality which provides for recreation, and for protection and propagation of fish, shellfish and wildlife. Pursuant to these stated goals, 33 U.S.C. 1319(c)(1) makes it an offense willfully or negligently to violate section 1311, 1312, 1316, 1317, or 1318, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 or 1344, of title 33, United States Code. The penalty under these sections for a first offense is up to one year in prison and a fine of not less than $2,500 nor more than $25,000 per day of violation. For a second or subsequent offense, the maximum penalties increases to two years' imprisonment and a per day fine of $50,000 respectively.

The sections of the Act referred to prohibit, *inter alia,* the discharge of any pollutant except in compliance with specified sections of title 33, United States Code, and the violation of any established standard of performance (which is defined as a standard for control of discharge of pollutants). Additionally, these sections mandate the Administrator of the Environmental Protection Agency to establish timetables for effluent limitations, designed to require decreasing levels of pollutant discharges, to establish lists of sources and toxic pollutants for which standards of performance will apply, and to require owners and operators of sources to maintain records and submit reports to implement the objectives of the chapters. The sections authorize the States to develop permit programs, procedures, and laws for enforcement purposes.

Congress enacted the Clean Air Act (42 U.S.C. 7401 *et seq.*) to protect and enhance the quality of the Nation's air resources; to initiate and accelerate a national research and development program to achieve prevention and control of air pollution; to provide technical and financial assistance to State and local governments; and to encourage and assist the development and operation of regional air pollution control programs.

42 U.S.C. 7413(c)(1)(A) makes it unlawful for any person knowingly to violate any requirement of an applicable plan for implementation and enforcement of emission standards for hazardous air pollution during any period of Federally assumed enforcement or more than thirty days after being notified by the Administrator that he is violating such requirement. Section 7413(c)(1)(B) makes it illegal for any person to knowingly violate or fail or refuse to comply with an order issued by the Administrator relating to an implementation plan. Section 7413(c)(1)(C) punishes violations of other sections prohibiting the operation of a new source in violation of an applicable standard of performance, the construction or modification of a source that will emit an air pollution to which a standard of performance applies, or the emission from any statutory source of an air pollutant to which a standard will apply, and the failure to comply with any regulation plan or schedule relating to temporary suspension of emission limitations. Section 7413(c)(1)(D) concerns violations of requirements relating to noncompliance penalties and to ozone. The penalty for a first offense is a prison term of up to one year and a fine of up to $25,000 per day of violation. The maximum penalty increases for a second or subsequent offense to two years' imprisonment and a fine of $50,000 per day.

The Toxic Substance Control Act was enacted to regulate those chemical substances and mixtures which present an unreasonable risk of injury to health or the environment and to permit appropriate action to be taken with respect to chemical substances and mixtures which are imminent hazards to the public. Under 15 U.S.C. 2615(b) a criminal penalty is created punishable by up to one year in prison and a $25,000 fine for each day of violation for a person who knowingly or willfully violates 15 U.S.C. 2614. That section, in turn, makes it unlawful, *inter alia,* to fail to comply with rules and regulations issued concerning the testing, manufacturing, and disposal processing of chemical substances and mixtures, the prohibitions on manufacture and use of certain hazardous chemical substances and mixtures, and the use for commercial purposes of chemical substances or mixtures with knowledge of their manufacture in violation of the rules and regulations. It also penalizes the failure to maintain required records and to submit required reports and notices, and the failure to permit required entries and inspections.

Part of the Federal Insecticide, Rodenticide, and Fungicide Act prohibits, *inter alia,* the sale, distribution, holding for sale, or receipt of any pesticide that is not registered with the Administrator of the Environmental Protection Agency. Its basic aim is to regulate and control the use of poisonous substances sold for agricultural and related purposes. The statute sets out a detailed registration and certification scheme providing for rules and regulations on all facets of the manufacture and distribution of pesticides. Under 7 U.S.C. 1361(b)(1) a criminal penalty of a maximum of one year in prison and a $25,000 fine is established for any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates any provision of the Act.

The Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*) has as its basic objective the protection of health and the environment and the conservation of valuable material and energy resources, by dealing effectively with solid wastes. Pursuant to this goal, 42 U.S.C. 6928(d) (1) and (2) makes it an offense, *inter alia,* for any person knowingly to transport any hazardous waste listed in the subchapter to a facility without a permit under section 6925 (or section 6926 in the case of a State program), or to treat, store, or dispose of any hazardous waste listed in the subchapter without having obtained a permit therefor. The penalty for a first offense is up to one year in prison and a fine of not more than $25,000 per day of violation. For a second or subsequent violation, these penalties rise to a maximum of two years' imprisonment and a per day fine of $50,000.

43 U.S.C. 1350(c)(1) makes it an offense to "knowingly and willfully" violate any provision of the Outer Continental Shelf Lands Act, any term of a lease, license, or permit issued pursuant to the Act, or any regulation or order issued under the Act designed to protect health, safety, or the environment or conserve natural resources. The penalty is up to ten years imprisonment or a fine of not more than $100,000 or both. Each day that a violation continues under these provisions constitutes a separate offense.

The Marine Protection, Research, and Sanctuaries Act of 1972 seeks to regulate the dumping of materials into ocean waters and creates a statutory and regulatory scheme to control such dumping of any object which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. It prohibits, *inter alia,* the transport from the United States or in any United States vessel or aircraft of any material for the purpose of dumping it into the ocean without a permit. Under 33 U.S.C. 1415(b) any person who knowingly violates any provision of the Act or any regulations promulgated under it is subject to a fine of up to $50,000 and imprisonment for not more than one year.

The Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*) states a national policy to promote an environment for all Americans free from noise. 42 U.S.C. 4910(a) prohibits any person from knowingly or willfully violating paragraphs (1), (3), (5), or (6) of section 4909(a) of title 42. These paragraphs make it unlawful for any person to distribute in commerce, or to import into the United States, any new product manufactured after noise emission standards have been established by regulation for that product, except in conformity with such regulation, to fail or refuse to comply with any requirement relating to issuance of orders for compliance, or to the establishment and maintenance of records, and to fail or refuse to comply with any regulations relating to noise emission standards for railroads or motor carriers. The penalty for a first offense is up to one year in prison and a fine of not more than $25,000 per day of violation. As is the case with respect to several of the previously discussed offenses, these penalties increase for a second or subsequent offense to a maximum of two years' imprisonment and a per day fine of $50,000.

The Rivers and Harbors Act of 1899 is designed to protect the navigable waters of the United States from contamination caused by the throwing of refuse matter of any kind into such waters. Under 33 U.S.C. 411, anyone who violates (or knowingly aids, abets, authorizes, or instigates a violation of) 33 U.S.C. 407 is guilty of a misdemeanor punishable by a fine of not less than $500 nor more than $2,500 and imprisonment for not less than thirty days nor more than one year. Section 407 of title 33 is the provision that bars the throwing, discharge, or deposit from a ship, barge, or other floating craft, or from a shore or a wharf, manufacturing establishment, or mill of any refuse matter of any kind or description into any navigable water of the United States or into any tributary thereof.

2. The Offense

Subsection (a) provides that a person commits an offense if he violates: (1) section 309(c)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(1)) (relating to discharge of pollutants into navigable waters); (2) section 113(c)(1) of the Clean Air Act (42 U.S.C. 7413(c)(1)) (relating to clean air standards); (3) section 16(b) of the Toxic Substances Control Act (15 U.S.C. 2615(b)) (relating to rules and orders, use of chemicals, and maintenance of or access to, documents); (4) section 14(b)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136*l*(b)(1)) (relating to unlawful acts involving pesticides); (5) section 3008 (d)(1) or (d)(2) of the Solid Waste Disposal Act, as added by section 2 of the Resources Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6928 (d)(1) or (d)(2)) (relating to the transportation and disposal of hazardous wastes); (6) section 24(c)(1) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(c)(1)) (relating to control of pollution and conservation of natural resources in operations under oil and gas leases on the outer continental self); (7) section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1415(b)) (relating to dumping material in ocean waters); (8) section 11(a)(1) of the Noise Control Act of 1972 (42 U.S.C. 4910(a)(1)) (relating to the manufacture, sale, and importation of products that violate noise emission standards); or (9) section 16 of the Rivers and Harbors Act of 1899 (33 U.S.C. 411) if the offense is a violation of section 13 of the Act (33 U.S.C. 407) (relating to depositing or discharging refuse into navigable waters of the United States.

The term "violates" is defined in section 111 to mean in fact to engage in conduct that is described as an offense, proscribed, prohibited, declared unlawful, or made subject to a criminal penalty. As with sections 1851 and 1852, the use of this device has the consequence that the current jurisdictional [14] and substantive content of the sections referred to will be kept intact. Whether proof of a state of mind is required with respect to the fact that the conduct is in violation of the sections incorporated is to be determined by reference to the regulatory statute and not by section 303(d)(1)(A).

3. Grading

An offense under this section is graded as a Class E felony (up to three years in prison) for conduct constituting an offense under paragraphs (a)(1) (the Federal Water Control Pollution Act), (a)(5) (the Solid Waste Disposal Act), and (a)(6) (the Outer Continental Shelf Lands Act). This constitutes a considerable drop from the ten year term of imprisonment provided in the current Outer Continental Shelf Lands Act, particularly in light of the current provisions making each day of violation a separate offense. The period of imprisonment provided in the bill, however, is more consistent with similar offenses under other statutes. Indeed, the penalty for violations of the Federal Water Pollution Control Act and the Solid Waste Disposal Act is upgraded from a one to a two year penalty in this section in an effort to harmonize the penalty for similar conduct.

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[14] See section 201(b)(2).

Offenses under the other six paragraphs are Class A misdemeanors (up to one year in prison) for the first offense and Class E felonies for subsequent offenses under the same paragraph. This accords with the general penalty scheme common under these types of regulatory statutes enacted in recent years. It should be noted that the reason the grading for violation of the Rivers and Harbors Act is treated separately in subsection (b)(2)(B) is that the current law misdemeanor is a strict liability offense, which the Committee retains for the first offense, but does not feel is appropriate for subsequent offenses upgraded to a felony in this section; accordingly, (b)(2)(B) requires a knowing mental state with respect to the second or subsequent offense under this Act.

The fine structure for this section is designed to carry forward the current approach in the various regulatory schemes involved by applying the fine level in current provisions to each day of violation where it would be higher than the fine levels generally applicable to offenses under section 2201(b) of the bill.

SUBCHAPTER G.—MISCELLANEOUS OFFENSES

(Section 1861)

This subchapter contains one offense not appropriate for location elsewhere in the Code. It applies exclusively in the special jurisdiction of the United States and continues the policy of the existing Assimilative Crimes Act, 18 U.S.C. 13, by incorporating offenses under State or local law when committed in Federal enclaves, which are not specifically punishable under other Federal criminal statutes.[1] In view of the virtual completeness of the proposed Code so far as felony coverage is concerned, the section will have far less scope than does current 18 U.S.C. 13 in terms of assimilating local felony laws. However, the Committee has intentionally refrained from defining in the Code certain felonies of a public morals nature, such as bigamy, in order to rely on local law, and section 1861 will operate to assimilate these offenses as well as a variety of misdemeanors and petty offenses not otherwise reached in the United States Code.

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[1] For example, the Committee determined (contrary to the suggestion of the National Commission; see Final Report, § 1861) not to include a disorderly conduct offense. This means that, as is presently the case, disorderly conduct offenses will be prosecutable by reference to the pertinent State or local statute as incorporated through section 1861.

SECTION 1861. VIOLATING STATE OR LOCAL LAW IN AN ENCLAVE

1. In General

The problem of the application of penal laws in Federal enclaves that exist within the territorial limits of a larger governmental entity such as a State, territory, district, or possession, having its own code of criminal laws, has long been a vexing feature of our system of government. In part the magnitude of the problem is illuminated by the facts that the United States possesses concurrent or exclusive jurisdiction over some thirty million acres of land and owns more than one-fifth of all lands in the continental United States. But these statistics, while impressive, do not begin to portray the true complexity of the issue. Far from being uniform in nature, Federal enclaves exist in widely diverse forms, ranging from parkways, housing projects, post offices, and national parks to cemeteries, military installations, and Indian reservations. Moreover the degree of Federal jurisdiction over these areas varies across a spectrum of at least three relevant categories: (1) lands where there is exclusive Federal legislative jurisdiction; (2) lands where there is concurrent legislative jurisdiction with the State or other entity in which the enclave is located; and (3) lands where there is partial Federal legislative jurisdiction as to particular subjects.[2]

Ideally, a legislator might wish to weigh all these factors, as well as others (e.g., the content of the surrounding State or local law), in deciding what penal laws should apply within a particular Federal enclave. The consequence of such an enclave by enclave legislative assessment, however, would be that Congress would need to create a multiplicity of differing criminal codes of local application—a task of forbidding scope.

Given this state of affairs, the Committee considered four principal legislative alternatives: (1) no Federal criminal laws applicable in enclaves, (2) a congressionally fashioned comprehensive criminal code for all enclaves, (3) no congressionally defined enclave crimes but instead adopting as Federal law the entire criminal code of the State or other entity in which an enclave is located, and (4) a combination of (2) and (3) in which most crimes applicable in enclaves are congressionally defined, but State or local law is assimilated to eliminate gaps in coverage.[3]

As has been pointed out, Federal enclaves embrace a large portion of the lands within the United States in which many millions of persons live, work, and travel. The Federal Government, therefore, has a clear responsibility to make all necessary and proper laws in such places, particularly in the field of defining criminal conduct. The possibilities represented by options (1) and (3), i.e., either making no Federal criminal law applicable in enclaves (which would mean no criminal laws at all in enclaves over which the Federal government has exclusive jurisdiction), or of adopting entirely the often ill-suited criminal codes of the State or locality where an enclave is located, would constitute an unacceptable abdication of this responsibility. In the opinion of the Committee, there is a sufficiently strong Federal interest in the administration of enclaves to make it incumbent on Congress to proscribe penally certain conduct therein and to draft the overwhelming majority of the basic laws defining such conduct.

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[2] See Working Papers, pp. 80–83. A fourth (and by far the largest) category exists as to certain lands where the United States has no legislative jurisdiction, but only a proprietary interest. As to this category, of course, there is no dilemma of choosing the law to be applied.

[3] See *id.* at 99–102.

In view of the perceived extent of the Federal government's interest in regulating criminal conduct in enclaves, the Committee carefully considered option (2), i.e., a comprehensive Federal code written by the Congress. Also considered was a variation of that approach, discussed by the consultant to the National Commission, of delegating to the agency responsible for administering an enclave the authority to promulgate regulations defining the penal conduct and the sanctions to be applied therein. Although a comprehensive approach would have certain advantages, such as enabling the Federal Government to tailor offenses to the needs of enclaves rather than rely in part on State or local laws to fill any gaps in Federal legislation, as a practical matter the burden on Congress would be prohibitive. Even if the effort took the slightly less onerous form of a delegation to the responsible agency, Congress would still have to undertake the task of establishing clear guidelines for the exercise of agency discretion both as to the creation of types of offenses and the imposition of penal sanctions in order to make the delegation conform to constitutional standards. Moreover the Committee did not favor the prospect of a substantial increase in the proportion of Federal criminal law found in regulations rather than legislation.[4]

For these reasons the Committee rejected the comprehensive Federal law alternative for enclaves and determined that the basic approach represented by option (4) should be followed. Under this approach a small part of the law of the State or locality in which an enclave is situated is "assimilated" as the Federal law applicable therein, when the conduct is not covered by or is consistent with a Federal statute.[5] This approach continues present law which has been in effect in this country since 1825.[6]

The Committee's approach is designed primarily to guard against Federal enclaves becoming havens for the violation of the criminal laws of the State or locality in which they are situated, thereby needlessly creating friction within our Federal system. Because proposed section 1861 by and large follows the contours of current law, it can best be understood on the basis of an issue-by-issue comparison with the present statute which it would replace, the so-called Assimilative Crimes Act, 18 U.S.C. 13.

2. What Local Law is Assimilated

A. Present Law, 18 U.S.C. 13

This section provides for assimilation of an offense when conduct "would be punishable if committed" within the State or locality where the enclave is situated "by the laws thereof in force at the time" of the conduct. The latter aspect of the statute, allowing incorporation of local laws created after its enactment, which was added by amendment in 1948, presents no problem of interpretation and was sustained against constitutional challenge in *United States* v. *Sharpnack.*[7] The language, "would be punishable if committed", is, however, ambiguous and has given rise to arguably conflicting decisions regarding the issue of whether the assimilation includes judicial constructions of the local law, and other laws or policies that would affect the prosecution in the local jurisdiction.

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[4] See *id.* at 101-103.

[5] The perplexing question of determining when a State or local law is *not* to be assimilated even though no equivalent Federal statute exists, is discussed *infra.*

[6] See Working Papers, p. 86.

In *United States* v. *Press Publishing Co.,*[8] the Supreme Court held that a State policy against more than one prosecution for the initial publication and subsequent circulation of a libel under its criminal libel statute operated to bar a Federal prosecution under the Assimilative Crimes Act based solely on the circulation of the libel within an enclave, notwithstanding that no State prosecution of the defendant had yet occurred.

In *Kay* v. *United States,*[9] the court held that in a Federal prosecution under section 13 for violation of a Virginia statute proscribing driving an automobile while under the influence of alcohol, other related sections of Virginia law providing for the taking a blood sample, the introduction of chemical analysis reports, and the creation of presumptions arising from a finding of certain alcoholic content were assimilated into Federal law along with the definition of the offense.

And in *United States* v. *Andem,*[10] the court held that a State rule of statutory construction was binding in construing an assimilated statute.

Reaching the opposite result are cases such as *United States* v. *Johnson,*[11] where the court rejected an argument that a State law precluding double punishment for conspiracy and a completed offense must be assimilated, and *United States* v. *Andem,* where the court declined to hold the State statute of limitations applicable, ruling that the time within which prosecution may be brought is not an element of the offense.[12]

Similarly, in *Smayda* v. *United States,*[13] the court held that it was not bound under the Assimilative Crimes Act by a State court ruling that certain police conduct violated the Fourth Amendment. And in *McCoy* v. *Pescor,*[14] the court held that the sufficiency of an indictment is to be tested under Federal, not State, law in a prosecution under 18 U.S.C. 13.

B. Section 1861 of the Bill, as Reported

Subsection (a)(1) provides for assimilation of a State or local offense when a person engages in conduct "that constitutes an offense under the law then in force in the state or locality." The reference to "law then in force" is intended to carry forward the 1948 amendment of 18 U.S.C. 13, pursuant to which modifications in State or local law occurring after enactment of the Federal statute are assimilated on a continuing basis. Assimilating State law as it develops, in addition to obviating periodic reenactments by the Congress, permits persons within an enclave to benefit from a State's determination that a particular law is too harsh or has some other defect warranting correction.

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[7] 355 U.S. 286 (1958).
[8] 219 U.S. 1 (1911).
[9] 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825 (1958).
[10] 158 F. Supp. 996, (D.N.J. 1908).
[11] 426 F.2d 1112, 1116-1117 (7th Cir.), cert. denied, 400 U.S. 842 (1970).
[12] *Supra* note 10.
[13] 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966).
[14] 145 F.2d 260, 262 (8th Cir. 1944), cert. denied, 324 U.S. 868 (1945).

The phrase "conduct . . . that constitutes an offense" in subsection (a)(1), as opposed to the comparable language in 18 U.S.C. 13 "[conduct] which . . . would be punishable," is intended to provide a clearer standard for the determination of whether a particular substantive provision, judicial construction, or policy affecting prosecution under a local law is to be assimilated under this section. Under the language utilized in subsection (a)(1), the touchstone of assimilability is whether the local law, judicial construction, or policy is related to the definition of the offense.[15] Thus, generally speaking, local defenses (whether affirmative or otherwise) such as duress or mistake should be assimilated, while bars to prosecution, unrelated to conduct, such as a statute of limitations, should not.[16] The Committee approves the decisions in the *Andem, McCoy,* and *Smayda* cases, discussed above, as consistent with this standard. The rationale in *United States* v. *Press Publishing Co., supra,* however, is not intended to be carried forward with the enactment of this section, as the State policy against double prosecution involved in that case was wholly unrelated to the definition of the offense.[17]

A further purpose of the phrase "conduct . . . that constitutes an offense" is to permit incorporation of a common law crime under State or local law.[18]

3. Scope of Territorial Jurisdiction

A. Present Law 18 U.S.C. 13

The Assimilative Crimes Act is by its terms applicable to conduct "within or upon" any of the places now existing or hereafter reserved or acquired as provided in section 7 of title 18, if the conduct would be punishable within the State, Territory, Possession, or District in which such place is located. Section 7 defines the special maritime and territorial jurisdiction of the United States in five subsections. Subsections (1), (4), and (5) all relate to locations which are outside the boundaries of a State, Territory, District, or Possession, and thus are not places to which the Assimilative Crimes Act can apply.[19] Subsections (2) and (3), therefore, define the areas "within or upon" which the Assimilative Crimes Act will apply:

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[15] See *Kay* v. *United States, supra* note 16 at 478–480.

[16] See Working Papers, pp. 96–99.

[17] The result in that case could be reached if, by recourse to the pattern of federal legislation, it could be shown that Congress did not intend penal sanctions to extend to the circulation of a libel.

[18] See Working Papers, pp. 94–99.

[19] Subsection (1) refers to the high seas or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any State, and to certain vessels when on a voyage in such waters. Subsection (4) refers to islands, rocks, or keys containing deposits of guano which the President may consider as appertaining to the United States; offenses on such islands (which are outside the jurisdiction of any State) are presently punished as if committed on the high seas on board a United States vessel, see 48 U.S.C. 1417; *Jones* v. *United States,* 137 U.S. 202 (1890). Subsection (5) refers to certain aircraft while in flight over the seas and waters described in subsection (1).

(2) Any vessel, registered, licensed, or enrolled under the laws of the United States and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

With respect to subsection (2), one commentator has questioned whether the Assimilative Crimes Act was meant to extend to the vessels and waters described there, arguing that the Act's "use of the word 'places' seems more appropriate in connection with land ownership" than with application to waters.[20] The question seems largely of theoretical interest, since subsection 7(2) has not been a prolific source for the prosecution of Assimilative Crimes Act offenses. In apparently the only reported case in which the issue did arise, however, the court held that the Assimilative Crimes Act was applicable to conduct on a vessel in voyage on State waters of Lake Michigan.[21]

Subsection 7(3) of title 18 sets forth the basic coverage of the Assimilative Crimes Act. The subsection has been held to apply, *inter alia,* to public lands, the Indian country, territories and possessions, military reservations and forts, locks and dams, post offices, national parks, and housing projects and airports.[22] The subsection has been held inapplicable, however, to the District of Columbia on the ground that the phrase "lands reserved or acquired for the use of the United States" connotes "proprietary and not a governmental sense." [23]

B. Section 1861 of the Bill, as Reported

Although worded somewhat differently, section 1861 is designed to mirror quite closely the extent of territorial coverage of existing law. The section is by its terms applicable to conduct "in a place within the special territorial jurisdiction of the United States described in paragraphs 203 (a)(1), (a)(2), or (a)(3)" which provide as follows: [24]

(1) any real property that is reserved or acquired for the use of the United States and that is under the exclusive or concurrent jurisdiction of the United States, and any place purchased or otherwise acquired by the United States with the consent of the legislature of the state in which such place is located for the construction of a building or other facility;

(2) any unorganized territory or unorganized possession of the United States;

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[20] See Note, *The Federal Assimilative Crimes Act,* 70 Harv. L. Rev. 685, 687 (1957).

[21] *United States* v. *Gill,* 204 F.2d 740 (7th Cir.), cert. denied, 346 U.S. 825 (1953).

[22] See generally *The Federal Assimilative Crimes Act, supra* note 20 at 686, and cases cited therein.

[23] *Johnson* v. *United States,* 225 U.S. 405, 415 (1912).

[24] A fourth subsection, not here applicable, refers to certain islands, rocks or keys and is similar to 18 U.S.C. 7(4). *See supra* note 19.

(3) the Indian country as defined in section 161 of the Criminal Code Reform Act of 1981 (25 U.S.C.——).

It is evident that subsection (a)(1) is quite similar to present 18 U.S.C. 7(3), which sets forth, with one minor exception, the sole places in which the Assimilative Crimes Act currently has force. Nothing other than a grammatical change is intended by the Committee's substitution of the word "and" (rather than "or" as used in 18 U.S.C. 7(3)) before the words "any place purchased." Nor is the substitution in subsection (a)(1) of the phrase "the construction of a building or other facility" intended by the Committee to work a modification of the existing language in 18 U.S.C. 7(3) "the erection of a fort, magazine, arsenal, dockyard, or other needful building," which has received considerable judicial interpretation.[25]

Subsections 203(a) (2) and (3), referring to unorganized territories or possessions of the United States and to the Indian country respectively are included, in this context, simply for clarity. Both areas are presently covered within 18 U.S.C. 7(3)[26] and thus are also doubtlessly encompassed within the general language of subsection 203(a)(1) of the bill.

A minor departure from present law is represented by the Committee's decision not to codify the holding in *United States* v. *Gill*, which extended the Assimilative Crimes Act to conduct on vessels registered or licensed under the laws of the United States while on a voyage upon any of the Great Lakes, their connecting waters, or the Saint Lawrence River, as defined in 18 U.S.C. 7(2). The Committee considers that such conduct to the extent not encompassed by Federal law as a part of the maritime jurisdiction of the United States may be appropriately left to prosecution by the States.

4. When Local Law Is Not To Be Assimilated

A. Present Law, 18 U.S.C. 13

The question when State or local law is *not* to be assimilated goes to the heart of the policy underlying the purpose of the Assimilative Crimes Act, yet the Act itself gives little guidance on how such a determination is to be made. It has been left to case law to fill the gaps.

The sole standard enunciated in 18 U.S.C. 13 on this issue is the direction that the conduct (in violation of State or local law) not be "punishable by any enactment of Congress." If read literally, this language would mean that assimilation would be barred only where Congress had undertaken to define an offense in virtually identical terms to the law sought to be assimilated. The cases have made clear, however, that the Act is to be read as prohibiting assimilation in a far broader range of instances where it is evident that Congress intended to immunize from penal sanction conduct otherwise made criminal by the laws of a State or locality. In the leading case of *Williams* v. *United States,*[27] the Supreme Court held that, because a specific Federal statute applicable to the

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[25] See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141-143 (1937).

[26] See e.g., *Williams* v. *United States*, 327 U.S. 711, 713 (1946); 48 U.S.C. 644a.

[27] *Supra* note 26.

Indian country made it a crime for a man to have sexual intercourse with an unmarried Indian female of less than sixteen years, the Assimilative Crimes Act could not be used to charge the defendant with an offense under the law of Arizona (where the Indian reservation was located), making the same conduct a crime as to any unmarried female up to the age of eighteen. The Court reasoned that since Congress has defined the crime of statutory rape, the State statute could not be employed to enlarge the Federal offense without doing violence to the congressional purpose.

Although in *Williams* the congressional intent was relatively easy to ascertain, it is often considerably more difficult to determine whether the congressional definition of an offense necessarily precludes assimilation of State law. For example, courts and commentators have wrestled with the issue whether the existence of a Federal statute punishing larceny in Federal enclaves (18 U.S.C. 661) should preclude assimilation of a State law punishing burglary applicable to the same conduct. The question has been answered in the negative (i.e., in favor of assimilation) by at least one court.[28] Similarly it has been held that a prosecution under an assimilated provision of Ohio law proscribing the battery of malicious shooting with intent to kill, wound, or maim was not barred by the existence of a Federal statute (18 U.S.C. 113) punishing a wide range of assaults on enclaves, including assault with intent to commit murder or any Federal felony.[29] No consistent rationale for these holdings has been articulated, but the courts seem to have proceeded on the theory that where the State and Federal penal laws are aimed at protecting different interests, Congress will not be deemed to have intended to bar assimilation of the local statute.[30]

A further issue is whether a State law is barred from assimilation if it is inconsistent with a Federal regulation or policy expressed in a Federal statute. Although it would appear to strain the pertinent language in 18 U.S.C. 13 (i.e., "not made punishable by any enactment of Congress") so to hold, the Supreme Court seemed to imply an affirmative answer in *Johnson* v. *Yellow Cab Transit Co.,*[31] while subsequently indicating that the issue was still unresolved.[32]

B. Section 1861 of the Bill, as Reported

Rather than leaving the issue for the courts and litigation with little or no guidance regarding which State or local laws should be assimilated, the Committee has chosen to undertake the difficult task of fashioning general rules governing the scope of assimilation. In subsections (a) (2) and (3) the Committee has synthesized the teachings of the *Williams, Dunaway,* and *Fields* line of cases discussed previously. The Committee intends that the rationale and results of those decisions be followed in the interpretation of proposed section 1861 with respect to the circumstances in which a State law will or will not be adopted. The Committee notes in this regard that sections 1641–1646, punishing various sex offenses, should not be viewed for purposes of this section as indicating the intent of the Congress that no other type of sexual conduct be penally proscribed. For example, it is the Committee's intent to allow prosecution for a local crime such as bigamy or incest committed within an enclave, since such a crime is designed to safeguard interests distinct from those at stake in the section 1641 series of offenses.[33]

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[28] *Dunaway* v. *United States,* 170 F.2d 11 (10th Cir. 1948); see *United States* v. *Johnson, supra* note 11 at 1116. See also Working Papers, pp. 90-91.

[29] *Fields* v. *United States,* 428 F.2d 205 (2d Cir.), cert. denied, 403 U.S. 907 (1971: compare *United States* v. *Jones,* 244 F. Supp. 181, 183 (S.D.N.Y.), aff'd. 365 F.2d 675 (2d Cir. 1965). But see *United States* v. *Big Crow,* 523 F.2d 955, 957-959 (8th Cir. 1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Butler,* 541 F.2d 730 (8th Cir. 1976) (prosecution under State law prohibiting possession of a firearm by a convicted felon held barred by possibility of prosecution under 18 U.S.C. App. 1202, notwithstanding the existence therein of an additional element of an effect on commerce).

[30] See *Working Papers,* pp. 90-91.

[31] 321 U.S. 383 (1944).

[32] See *United States* v. *Sharpnack, supra* note 7 at 293 n. 9.

The Committee also intends to reject the approach taken in some cases interpreting 18 U.S.C. 13 of using Federal policy not contained in congressional enactments to prevent assimilation of inconsistent State or local laws.[34] The phrase "offense . . . under a Federal statute" in subsection (a)(2) is meant to limit recourse only to congressional enactments for this purpose. However, where a regulation so directly implements a penal statute, by defining the conduct to be proscribed, that neither one is complete without the other, "and only together do they have any force,"[35] the regulation is to be considered tantamount to a statute.[36]

5. Grading

Under 18 U.S.C. 13, the defendant, upon Federal conviction, shall be "subject to a like [State] punishment." Despite the dearth of authority, it seems clear that the word "like" was not meant to be read as "similar," but rather as having the meaning "same." Aside from the probable unconstitutionality of a contrary construction,[37] the latter interpretation is apparently the one uniformly adopted by the courts.[38] No reported case involving a conviction under the Act has been accompanied by a sentence greater than that authorized under the assimilated law. Moreover, in the apparently sole instance where the sentence imposed was below the minimum required by the State statute, the case was remanded for resentencing in conformity therewith.[39]

In approaching this proposed section, the Committee considered whether, in view of the concept of the Code to codify nearly all serious offenses against the United States, it would not be appropriate in section 1861 to apply no more than a misdemeanor sanction to all assimilated crimes, as was done in prior versions of the Code.[40] The Committee concluded, however, that even though the Code was drafted to encompass all offenses that seemed appropriate for inclusion at the felony level, it could not be assured that some assimilated offenses might not also warrant treatment above the misdemeanor level. On the other hand, it was felt that there should be a cut-off point in order to eliminate assimilation of aberrantly harsh local penalties. Accordingly, the Committee determined to adopt, as the most serious classification of an offense under this section, the Class D felony level.

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[33] See *Working Papers*, pp. 1510–1512.

[34] See e.g., *Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949).

[35] *United States* v. *Mersky*, 361 U.S. 431, 437–438 (1960).

[36] See *United States* v. *Pardee*, 386 F.2d 368, 371–372 (4th Cir. 1966).

[37] Compare *Smith* v. *United States*, 145 F.2d 643 (10th Cir. 1944), cert. denied, 323 U.S. 803 (1945).

[38] See, e.g., *United States* v. *Patmore*, 475 F.2d 752 (10th Cir. 1973).

[39] See *United States* v. *Fletcher*, 344 F. Supp. 332, 338 (E.D. Va. 1972).

[40] See Final Report, § 209.

Section 1861 treats the matter of grading somewhat differently from existing law in order to avoid any rigid adherence to mandatory sentences provided in borrowed local statutes.[41] Subsection (b) provides that an assimilated offense is treated as a Class D felony (up to six years in prison) if the maximum term of imprisonment authorized by the State or local law is more than three years; as a Class E felony (up to three years in prison) if the maximum sentence authorized by the State or local law is three years or less but more than one year; as a misdemeanor of the lowest class for which there is authorized in chapter 23 of the Code a term of imprisonment equal to or exceeding the maximum term authorized by the State or local law if the offense is subject to imprisonment under State or local law for one year or less but more than five days; and as an infraction if the maximum penalty authorized by the State or local law is five days or less in prison or if the only penalty authorized by the State or local law is a criminal fine. However, the term of imprisonment and fine imposed may not exceed the maximum authorized under the State or local law. To illustrate how the subsection would function, if an assimilated State offense carried a maximum sentence of not less than one nor more than five years, the offense would be classified as a Class D felony under chapter 23 (carrying a maximum of six years). The Federal court would not be bound by a State's minimum prescription and could impose a lesser term of imprisonment or no imprisonment; however, the maximum imposed could not exceed that authorized under State or local law (i.e., five years).

Most offenses charged under section 1861 would be misdemeanors under State or local law. If, for example, an offense under the State law carried a 90-day term of imprisonment, the offense would be classified as a Class B misdemeanor, carrying a maximum of six months' imprisonment, but this subsection would preclude a sentence of more than 90 days' imprisonment. This system is designed to balance the values of preserving the general level of severity which a State or locality has assigned to an offense and the interest in reshaping the local maximum sentence in order to bring it within the uniform Federal penalty structure set forth in chapter 23. The task of harmonizing the penalties actually to be imposed for such offenses is left to the Sentencing Commission and the judiciary.

6. Proof

The current Assimilative Crimes Act contains no provision purporting to separate issues of fact for the jury from issues of law for the court. The cases, however, have consistently treated the determinations under 18 U.S.C. 13 of what State law applies, and when a State or local law is not to be assimilated, as posing questions of law for the courts involving the construction of the Federal Act.[42]

Subsection (c) of proposed section 1861 adopts the approach taken in the cases arising under 18 U.S.C. 13. Thus the jury will continue to decide the facts with regard to the defendant's conduct and will also determine, under appropriate instructions, whether such conduct violated the local law then in force. The question of what that local law was, however (including any gloss thereon from judicial construction or other provisions), as well as the question whether the conduct is covered by or inconsistent with a Federal statute within the meaning of subsections (a) (2) and (3), are expressly reserved for the court, notwithstanding their inclusion in the section as elements of the offense.

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[41] Compare *United States* v. *Fletcher, supra* note 39.

[42] See, e.g., *Williams* v. *United States, supra* note 26, *United States* v. *Press Publishing Co., supra* note 15.

PART III. SENTENCES

A. INTRODUCTION

Part III together with parts of chapters 37 and 38 of title 18 and several proposed chapters of title 28 of the United States Code, represents the first comprehensive sentencing law for the Federal system. It is the culmination of a reform effort begun more than a decade ago by the National Commission and championed in recent years by former United States district judges Marvin E. Frankel and Harold R. Tyler, Dean Norval Morris of the University of Chicago Law School, Professor Alan Dershowitz of Harvard Law School, and numerous others including Senators John L. McClellan and Edward M. Kennedy, who sponsored legislation in the 94th and 95th Congresses. After extensive hearings on that legislation, which resulted in further refinement of the proposals, comprehensive sentencing reform provisions were included in S. 1437, as reported in the 95th Congress by this Committee and overwhelmingly passed by the Senate on January 30, 1978. These comprehensive sentencing provisions are carried forward in the bill, with further refinements resulting from additional research and suggestions received by the Committee since S. 1437 was passed. The current version of the proposals has recently received the strong endorsement of the Attorney General's Task Force on Violent Crime.[1]

Criminal sentencing today is in desperate need of reform. It is based on an outmoded rehabilitation model in which the judge is supposed to set the maximum term of imprisonment and the Parole Commission to determine when to release the prisoner because he is "rehabilitated"—yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and now is quite certain that no one can really detect when a prisoner does become rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may become subject to widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence while the other may be sentenced to a relatively long term but be denied parole indefinitely.[2]

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[1] See Attorney General's Task Force on Violent Crime, Final Report, pp. 56–57 (1981) (hereinafter cited as Task Force Final Report).

These glaring disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any meaningful statutory guidance or review procedures to which courts and parole boards might look.[3] These problems are compounded by the fact that the sentencing judges and parole officials are constantly secondguessing each other, with the result that prisoners (and the public) remain constantly uncertain as to the real sentence a defendant will serve.

In order to alleviate these problems, the Committee set several goals that it believes any sentencing reform legislation should meet. First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth a rational set of purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for Federal offenders.

Second, it should assure that sentences are fair both as to the offender and as to society, and that this fairness is achieved both in the individual case and in the pattern of sentences in all Federal criminal cases. Third, it should assure that the offender, the individuals in the Federal criminal justice system charged with implementing the sentence, and the general public are certain as to the sentence for the offender and the reasons for it. Fourth, it should assure the availability of a full range of sentencing options from which to impose the most appropriate sentence in a particular case. Fifth, it should assure that each stage of the sentencing process, from the imposition of sentence by the judge through the end of any period during which the offender remains within the jurisdiction of any part of the criminal justice system, is working in concert with the same goals for the offender and for society.

Unfortunately, it is fair to say that current Federal law fails to achieve any of these goals. Each participant in the process from the courts through the probation and parole systems does the best it can with the legislative tools at hand, but none is able to reach the goals without the assistance of substantial reform of sentencing legislation.

Following is a description of current sentencing law and the attempts of the Federal criminal justice system to ameliorate the problems caused by that law. That description is followed by a description of the sentencing reform proposals in the bill, as reported, and a discussion of how those proposals will achieve the goals set by the Committee. More detailed descriptions of current law and the sentencing provisions are contained in the materials that follow this introduction.

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[2] Such disparate release dates are the result of the wide discretion granted to sentencing judges and the United States Parole Commission under current Federal law. See 18 U.S.C. 4203 (powers and duties of the Commission); 18 U.S.C. 4206 (parole determination criteria: prisoner may be released by the Commission "upon consideration of the offense and the history and characteristics of the prisoner . . . and pursuant to guidelines promulgated by the Commission. . . . [The] Commission may [also] grant or deny release on parole notwithstanding [these] guidelines . . . if it determines there is good cause for so doing. . . ."); 18 U.S.C. 4207 (allowing consideration of reports from any and all sources).

[3] Review of sentences imposed by the courts is confined to two special sentencing statutes (18 U.S.C. 3576, relating to dangerous special offenders, and 21 U.S.C. 849, relating to dangerous special drug offenders) unless the sentence is illegal. Review of decisions of the Parole Commission is generally confined to the question of whether it has abused its discretion.

B. CURRENT FEDERAL SENTENCING LAW

1. Lack of comprehensiveness and consistency

There is no general Federal sentencing law in the current criminal code. Instead, current law specifies the maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense.[4] These maximums are usually prescribed with little regard for the relative seriousness of the offense as compared to similar offenses.[5]

Current law also contains several specialized sentencing statutes that are each applicable to a narrow class of offenders—offenders between the ages of 18 and 22,[6] offenders between 22 and 26,[7] nonviolent offenders who are drug addicts,[8] offenders who are "dangerous special offenders," [9] and offenders who are "dangerous special drug offenders".[10] Other categories of offenders that might just as logically be covered by specialized statutes are left undifferentiated.

The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment during which the defendant was eligible for release on parole for at least two-thirds of the term. The Parole Commission was charged with setting the release date for the defendant within that period of eligibility if it concluded that the defendant was sufficiently rehabilitated that there was not an undue risk that he would commit additional offenses after release.

Current findings suggest that this approach, although noble in design, has failed dramatically.[11] Yet it is the only basis on which the continued existence of both the indeterminate sentence and the United States Parole Commission can be justified.[12] If rehabilitation, and particularly the type of "coercive" rehabilitation which ties prison release dates to the successful completion of certain vocational, educational and counseling programs, continues as the anomalous ideal upon which to base a sentencing system, then both the indeterminate sentence and the concept of parole release should be perpetuated.

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[4] For most offenses, the judge may suspend execution or imposition of the sentence and place the convicted offender on probation, or impose a split sentence of up to six months in prison followed by probation. See 18 U.S.C. 3651.

[5] For example, there are approximately 130 theft offenses under current law, with maximum sentences ranging from no imprisonment and a $500 fine, 18 U.S.C. 288, to ten years of imprisonment and a $10,000 fine, 18 U.S.C. 641. While the theft statutes occasionally vary the penalty according to the amount that is stolen, e.g., 18 U.S.C. 288, there is little difference among offenses that would justify differences in sentences. Embezzlement is an excellent illustration. The maximum penalty for embezzling manpower funds is a $10,000 fine and two years of imprisonment if the amount embezzled is more than $100; if the amount embezzled is not more than $100, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 665(a). If a bankruptcy trustee embezzles any amount of money from a bankrupt estate, the maximum penalty is a $5,000 fine and five years of imprisonment, 18 U.S.C. 153. If a person entrusted with public funds embezzled them, the maximum penalty, if the amount embezzled is more than $100, is a fine of the amount embezzled and ten years of imprisonment; if the amount embezzled is $100 or less, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 648.

[6] 18 U.S.C. 5005 *et seq.*

[7] 18 U.S.C. 4216.

[8] 18 U.S.C. 4251 *et seq.*

[9] 18 U.S.C. 3575 *et seq.*

[10] 21 U.S.C. 849.

[11] Several published analyses of correctional treatment and programs illustrate their ineffectiveness. See Robinson & Smith, *The Effectiveness of Correctional Programs,* 17 Crime and Delinquency 67 (1971); Martinson, *What Works: Questions and Answers about Prison Reform,* 1947 Pub. Int. 22; D. Lipton, R. Martinson & J. Wilks, *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). See also D. Greenburg, *Much Ado about Little: The Correctional Effects of Corrections* (June 1974) (unpublished summary of effectiveness studies prepared for the Committee for the Study of Incarceration); also discussed in A. Von Hirsch, *Doing Justice: The Choice of Punishments,* 14–15 (1976), which concludes that "the rehabilitative disposition is plainly untenable". Id. at 18.

Most sentencing judges and the Parole Commission, however, have recognized in recent years that the rehabilitation model is not an appropriate basis for sentencing decisions—too little is known about human behavior to accurately determine whether or when a particular defendant has been rehabilitated—yet the sentencing statutes have not been amended to take account of this invalidity. The judges and Parole Commission are left to exercise their discretion to carry out what each believes to be the purpose of sentencing.

The judge imposes what he believes to be an appropriate type and length of sentence in accord with what he believes to be the purposes of sentencing with little or no statutory guidance.[13] While one judge may continue to impose a relatively long prison sentence on the rehabilitation model or may impose a long sentence to incapacitate the offender, another judge may sentence a similar defendant to a shorter prison term for punishment purposes or sentence a similar defendant to probation for rehabilitative purposes.[14]

The Parole Commission, in turn, releases the defendant according to its views of the appropriate term of imprisonment. In recent years the Parole Commission has attempted to perform its function in a manner that will alleviate disparity in judicially imposed terms of imprisonment and provide increased certainty as to the prisoner's release date. It has sought to achieve the goal of reduction in disparity by considering parole guidelines[15] that recommend an appropriate period of incarceration for different combinations of offense and offender characteristics. It has sought to increase certainty in release dates by setting a "presumptive release date" in most cases within a few months of commencement of the term of imprisonment.[16]

A strong argument can be made that current law, by dividing the sentencing authority between the judge and the Parole Commission, actually promotes disparity and uncertainty. First, the dangers of an unfettered exercise of discretion can occur not only at initial sentencing, but also at the time that an offender is released on parole. For this reason, any comprehensive plan for reform should take into account the division of authority that currently exists between a sentencing judge and the Parole Commission, consolidate that authority and develop a system of sentencing whereby the offender, the victim, and society alike know at the time of the initial sentence by the court what the prison release date will be (subject to minor adjustments based on prison behavior).

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[12] 18 U.S.C. 4206. The Commission is given discretion to determine release dates on the basis of several primary considerations which include: adherence by the prisoner to institution rules during confinement, the nature and circumstances of the offense, the history and characteristics of the offender, and the public welfare in allowing release. *Id.*

[13] A recent study indicates that federal judges disagree considerably about the purposes of sentencing. While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all. INSLAW, Inc., Yankelovich, Skelly, and White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, III-4 (1981).

[14] *Id.* at III-9—III-14.

[15] 28 C.F.R. § 2.20.

[16] 28 C.F.R. § 2.12.

Second, the existence of the Parole Commission may actually invite judicial fluctuation by encouraging judges to sentence with the availability of parole in mind.[17] Sentencing judges, trying to anticipate what the Parole Commission will do, undoubtedly are tempted to sentence on the basis of when they believe the Parole Commission will release the offender.[18]

In doing so, some judges deliberately impose sentences above the parole guidelines, leaving the Parole Commission to set the release date, while others deliberately impose sentences consistent with or below the parole guidelines so that the judge will retain control over the release date.[19] Since judges need not specify reasons for their sentencing decisions, and usually do not state the length of time they expect an offender to spend in prison, the Parole Commission may inadvertently act in a manner contrary to the judge's intent. The result is that the sentencing judge and the Parole Commission may second-guess one another, and end up working at cross purposes.

2. Unfairness in sentencing

The absence of a comprehensive Federal sentencing law, and the absence of guidance as to how to select among sentencing options, creates inevitable disparity in sentences for similarly situated defendants. Unwarranted disparity occurs in the sentences imposed by judges in the same district and in sentences imposed from one district or circuit in the Federal system to another.[20] For example, in 1974, the average Federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only five and one-half years. Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York.[21] Further probative evidence may be derived from another 1974 study, in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked what sentence they would impose on each defendant.[22] The variations in the judges' proposed sentences in each case were astounding.[23]

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[17] The presentence report informs the sentencing judge as to the probable application of the parole guidelines in each case. See Division of Probation, Administrative Office of the United States Courts. *The Presentence Investigation Report*, pp. 6 and 16 (1978).

[18] It is ironic that those who would retain parole on the ground that it is a valuable "safety valve" designed to shorten lengthy sentences imposed by judges who would ignore the guidelines established under S. 1630 could very well be assuring that longer sentences would be imposed by judges trying to structure sentences to overcome prospectively the anticipated reduction by the Parole Commission. Apparently, these parole protagonists have failed to recognize this rather obvious likelihood.

[19] See 18 U.S.C. 4163.

[20] See *supra* note 13 at III-19—III-21.

[21] Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, reprinted in 119 Cong. Rec. 6060 (1973). For example, "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit," *Id.* at 167.

The following chart details the nature of the disparity (see footnote 23):

2D CIRCUIT SENTENCING STUDY

[20 cases]

	Most severe sentence	6th most severe sentence	12th most severe sentence	Median sentence
Case 1: Extortionate credit transactions; income tax violations.	20 yr pris.; $65,000	15 yr pris.; $50,000	15 yr pris	10 yr pris.; $50,000.
Case 2: Bank robbery.	18 yr pris.; $5,000	15 yr pris	15 yr pris. [(a)(2)]	10 yr pris.
Case 3: Sale of heroin.	10 yr pris.; 5 yr prob	6 yr pris.; 5 yr prob	5 yr pris.; 5 yr prob. [(a)(2)].	5 yr pris.; 3 yr prob.
Case 4: Theft and possession of stolen goods.	7.5 yr pris	5 yr pris	4 yr pris	3 yr pris
Case 5: Possession of barbiturates with intent to sell.	5 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	2 yr pris.; 3 yr prob.
Case 6: Filing false income tax returns.	3 yr pris.; $5,000	3 yr pris.; $5,000	2 yr pris.; $5,000	1 yr pris.; $5,000.
Case 7: Possession of heroin.	2 yr pris	2 yr pris	1.5 yr pris	1 yr pris.
Case 8: Mail fraud	YCA indet	YCA indet	6 mo pris.; 5 yr prob. [§ 4209].	5 mo pris.; 5 yr prob. [§ 4209].
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation.	3 yr pris	6 mo pris.; 2 yr unsup. prob.	6 mo pris	3 mo pris.; 21 mo unsup. prob.
Case 10: Postal embezzlement.	1 yr pris	6 mo pris.; 1 yr prob	3 mo pris.; 27 mo prob.	2 mo pris.; 1 yr prob.
Case 11: Bribery	6 mo pris.; 6 mo prob.; $5,000.	6 mo pris.; $2,500	2 mo pris.; 22 mo prob; $5,000.	1 mo pris.; 11 mo prob.; $5,000.
Case 12: Possession of unregistered firearm.	1 yr pris	6 mo pris.; 3 yr prob	3 mo pris.; 21 mo prob.	1 mo pris.; 11 mos prob.
Case 13: Possession of counterfeit currency.	1.5 yr pris	6 mo pris.; 2 yr prob	6 mo pris.; 18 mo prob.	5 yr prob.
Case 14: Altering a forged U.S. Treasury check.	YCA indet	YCA indet	1 yr pris	4 yr prob.
Case 15: Operating an illegal gambling business.	1 yr pris.; $3,000	6 mo pris.; 3 yr prob.; $10,000.	3 mo pris.; 2 yr prob.; $5,000.	3 yr prob.; $10,000.
Case 16: Bank embezzlement.	YCA indet	5 yr prob	3 yr prob	3 yr prob.
Case 17: Interstate transportation of stolen securities.	3 yr pris	6 mo pris.; 4.5 yr prob.	6 mo pris	3 yr prob.
Case 18: Mail theft	6 mo pris.; 18 mo prob.	5 yr prob	3 yr prob; $100	3 yr prob.
Case 19: Conspiracy to commit securities fraud.	2 yr pris.; $2,500	6 mo pris.; 2 yr prob	3 mo pris.; 33 mo prob.; $7,500..	2 yr prob.; $15,000.
Case 20: Perjury	1 yr pris.; $1,000	3 mo pris.; $1,000	3 yr prob.; $1,000	2 yr prob.; $500.

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[22] Partridge and Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges*, pp. 1-3 (1974). Designed as a self-evaluation, the study involved 43 active judges and seven of the senior judges of the six judicial districts constituting the Second Circuit. To avoid the customary complications introduced by differences in cases, and to insure a focus upon differences in judges' sentencing behavior, the study asked these 50 judges to impose sentence on 20 different defendants charged with those Federal offenses most representative of the Circuit's workload. The judges were given the same representative presentence report prepared for each hypothetical offender. The total number of sentences—901—roughly approximated the number of sentences these judges would normally render in a 6 month period.

[23] *Id.* at 6, 7.

2D CIRCUIT SENTENCING STUDY

[20 cases]

	12th least severe sentence	6th least severe sentence	Least severe sentence	Sentences ranked
Case 1: Extortionate credit transactions; income tax violations.	8 yr pris.; $20,000	5 yr pris.; 3 yr prob.; $10,000.	3 yr pris	45
Case 2: Bank robbery	7.5 yr pris. [(a)(2)]	5 yr pris	5 yr pris	48
Case 3: Sale of heroin	3 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	1 yr pris.; 5 yr prob	46
Case 4: Theft and possession of stolen goods.	3 yr pris	2 yr pris	4 yr prob	45
Case 5: Possession of barbiturates with intent to sell.	1.5 yr pris.; 3 yr prob	5 yr prob.; $500	2 yr prob	42
Case 6: Filing false income tax returns.	6 mo pris.; 2.5 yr prob; $3,000.	6 mo pris.; $5,000	3 mo pris.; $5,000	48
Case 7: Possession of heroin.	6 mo pris.; 18 mo prob	3 mo pris	1 yr prob	39
Case 8: Mail fraud	2 mo pris.; 2 yr prob. [§ 4209].	3 yr prob	1 yr prob	41
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation	1 mo pris.; 2 yr unsup. prob.	2 yr unsup. prob	Susp. if leave U.S	49
Case 10: Postal embezzlement.	3 yr prob	2 yr prob	1 yr prob	48
Case 11: Bribery	2 yr prob.; $7,500	$7,500; 2 yr unsup. prob	$2,500	43
Case 12: Possession of unregistered firearm.	2 yr prob	1 yr prob	6 mo prob	44
Case 13: Possession of counterfeit currency.	2 yr prob	2 yr prob	2 yr prob	48
Case 14: Altering a forged U.S. Treasury check.	2 yr prob	2 yr prob	1 yr prob	39
Case 15: Operating an illegal gambling business.	2 yr prob.; $5,000	2 yr prob.; $1,000	1 yr prob.; $1,000	45
Case 16: Bank embezzlement.	2 yr prob	2 yr prob	2 yr unsup. prob	42
Case 17: Interstate transportation of stolen securities.	3 yr prob	2 yr prob	1 yr prob	46
Case 18: Mail theft	2 yr prob	2 yr prob	1 yr prob	48
Case 19: Conspiracy to commit securities fraud.	2 yr prob.; $400	1 yr prob.; $7,500	$2,500	47
Case 20: Perjury	1 yr prob.; $1,500	1 yr prob.; $500	$1,000	48

NOTE.—References to "(a)(2)" signify a sentence pursuant to former 18 U.S.C. § 4208(a)(2), under which the defendant is given an indeterminate sentence and is eligible for parole at any time determined by the Board of Parole.

References to "§ 4209" signify a sentence pursuant to former 18 U.S.C. § 4209, under which young adult offenders (under age 26) are given specialized treatment.

References to "YCA indet." signify an indeterminate sentence for young offenders under age 22 pursuant to 18 U.S.C. § 5010.

See also Seymour, *supra* note 21 at 166–67.

In one extortion case, for example, the range of sentence varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine! [24]

The findings of the Second Circuit Study have been reconfirmed in a study performed for the Department of Justice in which 208 active federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases and 8 fraud cases. While there was agreement among at least 90 percent of the judges on whether a term of imprisonment was appropriate in all but 2 of the hypothetical cases, there was a substantial variation in the lengths of prison terms recommended.[25] In one fraud case, in which the mean prison term was 8.5 years, the longest term was life in prison. In another case in which the mean prison term was 1.1 years, the longest prison term recommended was 15 years.[26] The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences.[27] The remaining 34 percent of the variation is attributable to interactions among variables, with two-thirds of the 34 percent attributable to interactions between the "judge factor" and other factors. For example, some judges sentence more harshly for a particular offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record.[28]

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[24] Partridge and Eldridge, *supra* note 18, at 5. Recent studies of other jurisdictions confirm the existence of widespread sentencing disparity. See, e.g., L. Wilkins, J. Kress, D. Gottfredson, J. Caepin, and A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978) (1976 study of Colorado and Vermont); Austin & Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*. 68 J. Crim. L.C. & P.S. 306 (1977) (study of 47 Virginia district court judges); Diamond and Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975) (Northern District of Illinois and Eastern District of New York); Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471 (1967) (Texas).

Following is the table from the report showing the differences in decisions whether to incarcerate and the length of incarceration (see footnote 26):

EXHIBIT III.8.—SUMMARY OF JUDGES' SENTENCING RECOMMENDATIONS FOR THE 16 SCENARIOS [1]

	Percentage recommending imprisonment (N=208)	Mean prison term (years) (N=208)	Longest prison term (years)	Standard deviation (years)	Mean supervised time (years) (N=212)	Mean fine (N=170)
1. Bank robbery	96.6	7.3	25	6.1	1.6	$59
2. Fraud	98.1	3.7	27	2.5	1.1	279
3. Bank robbery	99.0	12.2	25	7.9	1.7	147
4. Fraud	49.0	1.0	10	1.9	2.3	297
5. Bank robbery	99.5	11.1	25	6.2	1.5	85
6. Fraud	99.0	4.0	25	3.2	1.4	206
7. Bank robbery	100.0	15.3	25	6.2	2.1	238
8. Fraud	46.2	1.1	15	2.3	2.4	240
9. Fraud	100.0	8.5	[2]	4.2	1.6	5,221
10. Bank robbery	97.6	6.6	22	4.0	1.5	1,276
11. Fraud	99.0	5.4	15	4.2	1.3	4,688
12. Bank robbery	100.0	10.0	25	5.0	1.7	1,618
13. Fraud	99.5	6.1	27	3.2	1.5	3,365
14. Bank robbery	90.4	5.3	20	4.1	1.6	2,212
15. Fraud	93.3	4.1	15	3.7	1.6	2,940
16. Bank robbery	90.0	10.2	25	3.7	1.6	1,721
All bank robberies	96.6	9.8	—	—	1.7	919
All frauds	85.5	4.2	—	—	1.7	2,154

[1] Scenarios are described in Exhibits III.6 and III.7.

[2] Life.

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[25] INSLAW, Inc. and Yankelovich, Skelly and Wright, *supra* n. 13 at III-16.

[26] *Id.*

[27] *Id.* at III-17.

[28] *Id.* at III-17—III-18. For more details of the study, see Bartolomeo, Clancy, Richardson, and Berger, *Sentence Decision Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity* (1981).

The Committee believes that this research on the scope of unwarranted sentence disparity makes clear that no variation in characteristics of offenses or offenders explains all the apparent disparities in the statistics.[29]

Disparities in sentencing that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high as compared to sentences for similarly-situated offenders is clearly unfair to the offender. Conversely, a sentence that is unjustifiably low as compared to sentences for similarly-situated offenders is clearly unfair to the public. Unjustifiably high or low sentences are unfair to offenders and the public in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense, whether they are too high or too low, create a disrespect for the law. Sentences that are too severe create unnecessary tensions among prison inmates and add to disciplinary problems.[30]

In recent years, the United States Parole Commission has attempted to alleviate the disparity in judicially imposed sentences. It now determines the release date for prisoners in its jurisdiction after considering parole guidelines that recommend a period of imprisonment for a person convicted of a particular offense who has a particular history and characteristics.[31] The release date is usually set within the range suggested by the guidelines if the prisoner is eligible for parole during that period. The Parole Commission may, of course, order the release of a prisoner at a time outside the guidelines range if it has a specific reason for doing so.

The Parole Commission is unable to alleviate disparity in all sentences. It does not have jurisdiction over offenders who are not sentenced to prison or who are sentenced to terms of a year or less.[32] It may only order release of a prisoner within the period of parole eligibility, even if the prisoner is not eligible for release within the guidelines period. It rarely amends the release date for a prisoner whose term less good time falls within or below the guidelines range. Further, the parole guidelines themselves may contribute to disparity by grouping offenses according to supposed severity, while rarely distinguishing them according to such characteristics as the amount of harm done by the offense, the criminal sophistication of the offender, and whether the offender played a major or minor role in an offense committed with others. Similarly, the offender characteristics fail to make distinctions in evaluating criminal histories between major and minor previous offenses, and give the same weight to all but very old previous offenses.

3. Uncertainty in release date

A term of imprisonment in excess of one year that is imposed by a judge frequently has little to do with the amount of time that an offender will spend in prison. The term represents only the maximum length of time the offender may spend in prison if he earns no good time credits [33] and if the United States Parole Commission does not set a release date that falls before the date of expiration of sentence.[34]

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[29] See Hearings, pp. 8870, 8881, 8897, 8903, 8916, 8960.

[30] See Hearings, p. 9095.

[31] 28 C.F.R. § 2.20.

[32] See 18 U.S.C. 4205.

[33] See 18 U.S.C. 4161 *et seq.*

The sentencing judge may influence the release date in two ways: He may specify that the prisoner is eligible for parole before the statutory period of one-third of the sentence.[35] If he believes a sentence no longer than the period specified in the parole guidelines is appropriate, he may impose a sentence that is within or below the parole guidelines range, in which case the prisoner probably will be released at the expiration of the sentence less good time.

Neither of the ways in which the sentencing judge may influence the release date informs the public of the period of time that the offender will spend in prison. The judge specifies the maximum length of time the offender may spend in prison and any early eligibility for parole in a public proceeding; the Parole Commission determines the actual release date in a closed proceeding. The public has no way of knowing when a judge has imposed a sentence that will be served in full or when he has imposed a sentence only a small percentage of which will actually be served. If the sentence appears to be short, the public may think the defendant will serve only one-third of the sentence when in fact he may serve the full term less good time deductions. Conversely, if the sentence appears to be long, the public may be confused when the defendant serves only a small percentage of it.

Under current law, a prisoner sentenced to serve more than one year in prison is released on the earlier of two dates: the date on which his sentence ends less good time allowances,[36] or the date on which he is released on parole.[37]

The United States Parole Commission recently has attempted to reduce the uncertainty in release dates by informing most prisoners of their presumptive release date soon after they begin serving their sentences.[38] The Parole Commission may tell the prisoner he will be released at the expiration of his sentence less good time, particularly if his sentence is within or below the guidelines, or may set another tentative release date. In either case, the date remains subject to change: If the presumptive release date is the date of expiration of sentence less good time, the prisoner may have the date subject to constant adjustment because of the withholding or forfeiture of all or part of the good time he has earned for compliance with institutional rules and the possible partial or total restoration of that good time at a later date. If the presumptive release date is another date, the Parole Commission may move it forward in exceptional cases or may delay it for disciplinary problems in prison—and the Parole Commission may or may not adjust the release date for a rules violation that resulted in the withholding or forfeiture of good time, and may delay the release date even though the Bureau of Prisons restored all good time lost for the same violation.[39]

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[34] See 18 U.S.C. 4163.

[35] 18 U.S.C. 4205(b).

[36] 18 U.S.C. 4163.

[37] 18 U.S.C. 4206.

[38] 28 C.F.R. § 2.12.

[39] 28 C.F.R. §§ 2.12(e), 2.14(a)(3)(ii), 2.14(a)(3)(iii), 2.34.

4. Limited availability of sentencing options

Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if there were better alternatives—or a longer term might be imposed than would be imposed if other alternatives served some of the purposes of sentencing that the judge sought to achieve in imposing a long sentence.

The only type of sentence for which current law provides an ample—some would argue too ample—range and services is a term of imprisonment. Maximum fines in current law are generally too small to provide punishment and deterrence to major offenders[40]—frequently a fine does not come close to the amount the defendant has gained by committing the offense. The probation statutes suggest few possible conditions, and do not provide for such possible alternatives to all or part of a prison term as community service or brief intervals, such as evenings or weekends, in prison. Current law also limits restitution to use as a condition of probation,[41] so that it may not be used in conjunction with a term of imprisonment or a fine. Finally, current law makes no provision for notifying victims of a fraudulent offense of the conviction so they may seek civil remedies.

5. Apparent inconsistency of purpose

Rather than working with a unified purpose in imposing and implementing a sentence, the Federal criminal justice system—no matter how well-intentioned it may be—seems frequently to be working at cross-purposes. Many theories have been advanced as to what are permissible purposes for levying a prison sentence. But no one view has been accorded the congressional imprimatur.[42] One judge may sentence an offender to a term of imprisonment in order to deter potential criminals; another may view imprisonment as an effective way to punish; a third judge may seek to incapacitate the offender; and a fourth may cling to the notion of imprisonment as a means to rehabilitate the offender.[43] Indeed, there may be other rationales which judges embrace.

Even if the sentence were appropriately tailored to the four general purposes of sentencing, the individuals in the criminal justice system will probably be unaware of the purposes the judge thinks should be served by the sentence. The judge is not required to state his reasons for giving a particular sentence, and rarely does so. If the judge does state reasons, but states them at the hearing rather than putting them in writing, the statement may never reach the appropriate officials in the criminal justice system since the statement is transcribed only if it becomes the subject of an appeal.

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[40] There are a few exceptions in recently enacted provisions. See, e.g., 15 U.S.C. 1, 2, and 3.

[41] See 18 U.S.C. 3651.

[42] The closest that existing law comes to establishing a correctional philosophy can be found in several specialized sentencing statutes that apply only to certain categories of offenders; 18 U.S.C. 5010(b) ("treatment and supervision" for youth offenders; 18 U.S.C. 4216 ("treatment" for young adults offenders); 28 U.S.C. 4252 *et seq.* ("treatment" and supervision for certain drug addicts); 18 U.S.C. 3575 *et seq.* (incapacitation for "dangerous special offenders"); and 21 U.S.C. 849 (incapacitation for "dangerous special drug offenders").

[43] See INSLAW, Inc., and Yankelovich, Skelly and Wright, Inc., *supra* n. 13 at III-4.

As a result of this all too frequent lack of communication, prisons and parole officials may not know, for example, whether the judge intended that the offender spend most of his term of imprisonment in prison because he was afraid the offender would continue to commit crimes or whether he intended that the offender spend only a brief period in prison as punishment and as a deterrent to additional crime unless his prison behavior made early parole release unjustified.

Perhaps the most serious example of parts of the criminal justice system working at cross-purposes is the secondguessing of judges' sentencing decisions by the Parole Commission.[44] The judge imposes the maximum term applicable to the defendant and may specify that the defendant will be eligible for release on parole at a time earlier than the statutory one-third.[45] The Parole Commission has full discretion to set the parole release date anywhere within the range between the date of parole eligibility and the date of expiration of sentence less good time credits. While it bases any release decision within the parole guidelines entirely on information known at the time of sentencing, and bases most other decisions on information known at the time of sentencing, this does not mean that the sentencing judge and the Parole Commission are in agreement as to the length of time the defendant should spend in prison.

Even if the judge attempts to convey his idea of how long the defendant should spend in prison under particular circumstances, the Parole Commission may ignore the judge's wishes.[46] For example, the judge may specify early parole eligibility for a defendant because he believes he should spend a short period in prison and be released early unless he fails to comply with institutional disciplinary rules. In all probability, the Parole Commission will release the defendant under the guidelines at the same time as a defendant who was not made eligible for early parole release, since the guidelines make no distinction between the two types of sentences.

The Parole Commission is not entirely at fault in secondguessing the judges. It has been assigned responsibility for attempting to alleviate unwarranted disparity in judicially imposed sentences.[47] Because sentencing judges impose each sentence according to their own views as to the purposes of sentencing, the Parole Commission cannot distinguish between a relatively short sentence that the judge intends to be served in full and the relatively long sentence of which the judge intends the defendant to serve only a small percentage. With little or no explanation by the judge of the reasons for the sentence, the Parole Commission has no choice but to treat equally two defendants who appear to the Commission to be equal.

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[44] The Supreme Court, in *United States* v. *Addonizio*, 442 U.S. 178 (1979), held that a sentence was not subject to collateral attack under 28 U.S.C. 2255 in a case in which the United States Parole Commission did not release the defendant at the time that the sentencing judge expected the defendant to be released. The sentencing judge indicated in his decision in the section 2255 proceeding that he intended that, if the defendant's prison behavior was "exemplary," he would be released on parole after serving one-third of a 10-year term of imprisonment. The U.S. Parole Commission, considering not the defendant's behavior in prison but the seriousness of the offense, refused to release the defendant at that time. In denying Federal court jurisdiction over the section 2255 motion, the Court said:

"The import of [the] statutory scheme is clear: the judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out would substantially undermine the congressional decision to entrust release decisions to the Commission and not the courts. Nothing in § 2255 supports—let alone mandates—such a frustration of congressional intent." *Id.* at 190.

[45] 18 U.S.C. 4205(b).

[46] *United States* v. *Addonizio, supra* note 44.

[47] "Whether wisely or not, Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges." *United States* v. *Addonizio, supra* note 44, at 188–189, citing S. Conf. Rept. 94-368, 94th Cong., 1st Sess., at 19 (1976).

It appears that the problem of different parts of the criminal justice system working at cross-purposes may be getting worse. Some judges deliberately sentence defendants to terms of imprisonment that fall within or below the parole guidelines.[48] The Parole Commission is then left to set a presumptive release date equal to the statutory date for expiration of sentence, leaving its function as to more than half the defendants technically within its jurisdiction virtually meaningless. While imposing sentences within the parole guidelines range has the useful result of avoiding sentencing disparity from the outset rather than waiting for the Parole Commission to correct it, it also leaves the judges in the position of second guessing the Parole Commission so the Commission cannot second guess them.

C. SENTENCING PROVISIONS IN THE CODE

1. Comprehensiveness and Consistency

The Code contains for the first time a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those purposes, and prescribes the factors that should be considered in determining what kind of sentence to impose in a particular case and the amount or length or conditions of the sentence.

The Code gives congressional recognition to four purposes of sentencing: the need to afford adequate deterrence to criminal conduct; the need to protect the public from further crimes of the defendant; the need to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment; and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[49]

The Code specifies that an individual may be sentenced to a term of probation, a fine, or a term of imprisonment, or to a combination of a fine and probation or a combination of a fine and imprisonment.[50] An organization may be sentenced to a term of probation or a fine, or to a combination of these.[51] Either an individual or an organization may be ordered as a part of the sentence to forfeit any interest in a racketeering syndicate,[52] to give notice to victims of a fraudulent offense,[53] or to make restitution to the victim of an offense that causes bodily injury, or in the course of which the defendant unlawfully obtained, damaged, or destroyed property of another.[54]

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[48] See note 17. *supra*. About half the prisoners within the jurisdiction of the Parole Commission are released at the expiration of sentence, less good time, rather than on parole.

[49] Sections 101(b) and 2003(a)(2).

[50] Section 2001(b).

[51] Section 2001(c).

[52] Section 2004.

[53] Section 2005.

The Code creates for the first time a device by which each offense is graded according to its relative seriousness.[55] This device is also useful in defining the attributes of the sentence for each grade of offense. It is used to define in a comprehensive manner the maximum terms of imprisonment, maximum fines, maximum terms of probation, and maximum terms of post-release supervision for each grade of offense. The result is a consistent pattern of maximum sentences for equally serious offenses instead of the current almost random maximum sentences caused by the piecemeal approach to creation of Federal criminal laws in the past.[56]

Rather than providing specialized sentencing statutes that cover a narrow class of offenders without regard to the fact that a given offender might fall within the classes covered by more than one such statute, the Code creates a sentencing guidelines system that will be able to treat in a consistent manner all classes of offenses committed by all categories of offenders.[57] The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by policy statements that will address such questions as: the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution; and the use of conditions of probation and post-release supervision. The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that sentences imposed are consistent with the purposes of sentencing. At the same time, the use of sentencing guidelines and policy statements will assure that each sentence is fair as compared to all other sentences.

The sentencing guidelines system will not remove the judge's sentencing discretion. Instead, it will guide the judge in making his decision as to the appropriate sentence. If the judge finds that an aggravating or mitigating circumstance is present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines.[58] A sentence that is above the guidelines may be appealed by the defendant; [59] a sentence below the guidelines may be appealed by the government.[60] The case law that is developed from these appeals may, in turn, be used to further refine the guidelines.

2. Assuring fairness in sentencing

A primary goal of the sentencing reform measures is the elimination of unwarranted sentencing disparity.[61] The Parole

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[54] Section 2006.

[55] See section 2301(b).

[56] Compare section 1731 and the statutes cited in note 5, *supra.*

[57] See proposed 28 U.S.C. 991(b) and 994(a); section 2003(b).

[58] Section 2003(b).

[59] Section 3725(a).

[60] Section 3725(b).

[61] See proposed 28 U.S.C. 991(b)(2); section 2003(a)(6).

Commission's efforts to alleviate disparity come too late in the process to achieve this goal.

One of the main benefits of the sentencing guidelines system discussed earlier is that it can achieve the purpose of eliminating disparity in sentences that is not justified by differences among offenses and offenders. The Code requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing.[62] He is then to determine which sentencing guidelines and policy statements apply to the case. He may either decide that the guideline recommendation reflects the offense and offender characteristics that should affect the sentence and impose sentence according to the guidelines recommendation, or conclude that the guidelines fail to adequately reflect an aggravating or mitigating circumstance that should affect the sentence and impose sentence outside the guidelines.[63] A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable.[64] Thus, the Code assures that the majority of cases will result in sentences within the guidelines range, while sentences outside the guidelines will be imposed only in appropriate cases.

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the factors in a case and to impose sentences outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law. The sentence now imposed too frequently depends on the identity of the sentencing judge. Under a sentencing guidelines system, the sentence will depend on a comprehensive examination of the characteristics of the particular offense and the particular offender and a comparison of those characteristics to the characteristics of similar offenses and offenders to determine whether they should result in the same or a different sentence.

The Parole Commission has argued that it should be given the function under the Code of determining the appropriate length of a term of imprisonment pursuant to guidelines after the sentencing judge has decided that a particular defendant should serve a term of imprisonment.[65] It bases this belief on the argument that a small collegial body will be better able to achieve the goal of elimination of unwarranted sentencing disparity. The Committee strongly disagrees with the view of the Parole Commission. Such a proposal is entirely at odds with the whole concept of the proposed guidelines system, and harks back to a thoroughly discredited philosophy and procedure.[66] Moreover, it has several practical deficiencies that would result in continuing some of the unfairness and uncertainty in the current system. First, it would delay the setting of the term of imprisonment, perhaps for a few months, leaving the defendant and the public in doubt as to the defendant's sentence.

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[62] Section 2003.

[63] Section 2003(b).

[64] Section 3725.

[65] Hearings, pp. 9020–28.

Second, it would draw an artificial line between imprisonment and probation, forcing the sentencing guidelines system and the judges to formulate sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine. Such an assumption would be a roadblock to the development of sensible comprehensive sentencing policy.

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[66] The Committee's view that parole should be abolished in the context of a completely restructured guidelines sentencing system is consistent with the general sentencing philosophy expressed by numerous commentators on the current sentencing process. See e.g., P. O'Donnell, J. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*, pp. 13, 14, 28, 56 (New York 1977) (the study on which the sentencing provisions in S. 1630 are largely based) (". . . [O]ur decision to recommend a guideline approach for sentencing requires abolition of parole, at least as that process has been administered in the past"); Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 Am. Cr. L. Rev. 353 (Spring 1979); Frankel, *Panel on Sentencing Provisions in the Proposed Federal Code*, 80 F.R.D. 151, 153 (1979; panel held December 28, 1977) ("Let the judges judge and be accountable. The idea of a parole board or commission serving in effect to review the judges was not sound when it was more or less covert; it does not improve as an express proposition."); Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1563, 1566 (November 1977) ("By rating cases according to offense severity and offender backgrounds only and abandoning any pretense of being able to perform the impossible task of determining when a prisoner has been 'rehabilitated,' the parole commission has demonstrated abundantly that it can now go out of business."); Morris, *Toward Principled Sentencing*, 37 Md. L. Rev. 276 (1977); Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 Hofstra L. Rev. 281, 313 (1979); van den Haag, *Punitive Sentences*, 7 Hofstra L. Rev. 123, 135 (1978); Genego, Goldberger, and Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 897 (March 1975) (". . . [T]he Parole Board can make no greater contribution than can the judiciary in fairly effectuating the goals of punishment or reducing the most serious sentencing disparity."); Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 Fed. Probation 14–19 (1974); Fairbanks, *Parole—A Function of the Judiciary?*, 27 Okla. L. Rev. 657 (1974) (". . . [P]arole boards do not have information reasonably related to prediction, they have no apparent predictive skills, they are not even the putative experts, the entire business of predicting recidivism even by so-called experts is so dubious that it can hardly stand as a rationale for the discretionary release aspect of parole. . . . The case for the abolishment of parole is not as radical or as difficult as might first appear. Having shown parole to be ineffective, and not likely to improve; and having also shown that in terms of what parole actually does it is duplicative. . . ."; McAnany, Merritt, and Tromanhauser, *Illinois Reconsiders Flat Time: An Analysis of the Impact of the Justice Model*, 52 Chicago-Kent L. Rev. 640 (1976); Stanley, *Prisoners Among Us: The Problem of Parole*, pp. 77–79 (Washington, D.C. 1976); N. Morris, *The Future of Imprisonment* (Chicago, 1974).

A number of witnesses at the Committee hearings on the Code also expressed a sentencing philosophy consistent with the abolition of parole in the context of comprehensive sentencing reform. See, e.g., Hearings, pp. 8595–96 (Testimony of Attorney General Griffin B. Bell); pp. 9008–09 (Statement of Ronald L. Gainer); p. 8961 (Testimony of former Judge Harold Tyler: "[I]f the [Sentencing] Commission works well there would then be no need of parole commissions as we now know them. . . ."); p. 8973 (Testimony of Judge Morris Lasker: "I do believe that history is showing that parole as an institution is an idea whose time may be past,"); p. 9127 (Statement of Kay Harris: "NMPC [the National Moratorium on Prison Construction] favors in principle the abolition of parole, but believes that parole abolition should not be attempted in isolation from other major criminal justice system changes. . . . [W]e believe that the parole system is fatally flawed conceptually, based as it is on prediction of future individual conduct. Parole has often served to increase, rather than decrease, arbitrary and inequitable treatment of prisoners.").

The House Judiciary Subcommittee on Criminal Justice, in the course of its consideration of a revised Federal Criminal Code in the last Congress also received testimony and letters in support of parole abolition. Former Judge Harold Tyler testified before the Subcommittee on October 11, 1979, that the proposal to retain the Parole Commission for five years under consideration by the Subcommittee, was "extremely unwise" for several reasons: first, "it will be impossible to understand or know whether judges in fact were sentencing an offender to the amount of time they actually intended or to twice the time they intended in anticipation that the Parole Commission would grant one-half parole"; second, there "is the likelihood that there would be confusion and unfairness to sentenced offenders and to the public at large"; third, "it seems to me that continuing the Parole Commission is really unnecessary in order . . . to deal with that occasional case where, in a determinant sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or 'wrong', particularly in light of post-sentence developments" and that there are alternative methods for solving this problem. See also, letter of Harvey A. Silverglate, a member of the Executive Board of the Massachusetts Chapter of the American Civil Liberties Union, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary, dated October 4, 1979, suggesting abolition of parole; and letter from Circuit Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Drinan, dated September 14, 1979, opposing even the temporary retention of the Parole Commission in a sentencing guidelines system and suggesting possible "safety valves" in the unusual case in which one is needed.

Third, it would continue the current law problem that actual terms of imprisonment are determined in private rather than public proceedings.

Fourth, it would assume that judges have no experience with sentencing guidelines even though they have been evaluating the potential impact of current parole guidelines on the sentences they impose at least since July 1, 1978, and will have gained training and further experience by the time the sentencing guidelines system goes into effect.

Fifth, it would take from the judges an essential part of the judicial function of imposing sentence. The better view is that sentencing should be solely within the province of the judiciary, since vesting the power to review judicially imposed sentences in a parole board would seriously undermine the operation of the new sentencing guidelines, improperly intrude into the judiciary's realm, and perpetuate at least the appearance of the discredited rehabilitative model. Indeed, it is arguable that the Parole Commission, by having its decisions based on factors known at the time of sentencing, rather than factors not known at that time, has already usurped a function of the judiciary.

Sixth, the argument that the Parole Commission, whose initial decisions are made by more than thirty hearing examiners, not by the nine Commissioners, is a "small collegial body" is debatable. It seems unlikely that more than 40 people making administrative decisions would result in substantially less inconsistency than a few hundred people making judicial decisions, after hearing arguments presented by counsel for both sides, which are subject to appellate review by eleven courts of appeal sitting in panels and, ultimately, by a single Supreme Court.

Seventh, under the Parole Commission's proposal the procedures for review of a sentence outside the guidelines—for example, when both a term of imprisonment and a fine outside the guidelines is imposed—would be virtually unworkable. Apparently, the fine level would be reviewed publicly in the courts of appeal while the term of imprisonment would be reviewed privately by the Parole Commission.

Finally, the Parole Commission might be basing decisions on a different sentencing philosophy than is reflected in the sentencing guidelines. This would be especially troubling if the Parole Commission were to issue its own guidelines for lengths of prison terms rather than rely on guidelines promulgated by the Sentencing Commission.

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been amended to provide a shorter term of imprisonment. The Committee believes, however, that it is unnecessary to continue the existence of the expensive and cumbersome Parole Commission to deal with the relatively small number of cases in which there is justification for reducing a term of imprisonment. The bill, as reported, provides instead in section 2302(c) for court consideration of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

3. Certainty in release date

Under the Code, the sentence imposed by the judge will be the sentence actually served. A sentence to a term of imprisonment that exceeds one year may be adjusted at the end of each year by 36 days for compliance with institutional regulations, with no adjustment or a smaller adjustment of the sentence for less than satisfactory compliance with the rules.[67] Once this credit has been given by the Bureau of Prisons, it cannot be withdrawn, nor may credit that has been denied later be granted. The prisoner, the public, and corrections officials will be certain at all times how long the prison term will be and of the consequences to that sentence of causing institutional discipline problems.

The Parole Commission will have no jurisdiction over offenders sentenced under the guidelines sentencing system.[68] The Committee believes that, in a guidelines sentencing system, no useful purpose will be served by continuing the Commission. Prison sentences imposed will represent the actual time to be served by the prisoner, and, on the average, prison sentences imposed will be approximately the length of terms of imprisonment actually served under current law. Prisoners, and the public, will know when offenders will be released from prison. Prisoner morale will improve with uncertainties as to release dates removed.[69] Public respect for the law will grow when the public knows that the sentence announced in a particular case represents the real sentence rather than one subject to constant adjustment by the Parole Commission.

The other purposes served in current law by the parole release mechanism will be better achieved under the Code than they can be under the current system. First, as already discussed, the sentencing guidelines system is better able than the parole system to achieve fairness and certainty in sentencing.

Second, the Code requires that the judge decide, based on factors known at the time of sentencing, whether a defendant who is sentenced to a term of imprisonment will need post-release supervision and what the conditions of that release should be.[70] Under current law, a prisoner is placed on parole supervision if he is released on parole more than 180 days before expiration of sentence.[71] This does not assure that the prisoner who will need post-release supervision will receive it, nor does it assure that probation system resources will not be wasted on providing supervisory services to releasees who do not need them.

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[67] Section 3824(b).

[68] Under section 134(b) of the reported bill, the Parole Commission will remain in existence for 5 years after the sentencing guidelines go into effect to set release dates for prisoners sentenced before that date. At the end of that period the Parole Commission will set final release dates for all prisoners still in its jurisdiction.

[69] The official report on the Attica riots indicates that uncertainty in release dates was a major cause of the riots. New York Special Commission on Attica, *Attica* (1972) cited in von Hirsch. *Doing Justice: The Choice of Punishments*, at p. 31, n. 11. See also Hearings, p. 8881.

[70] Section 2303.

[71] 18 U.S.C. 4164 and 4205.

Third, because of the increased certainty of release dates, the Code should enhance rehabilitation efforts in prison because prison officials will be able to work with prisoners to develop realistic work programs and goals within the context of a set term of imprisonment. It is inappropriate to detain a defendant for an indefinite period until he is supposedly rehabilitated. No one knows when or whether a prisoner has been rehabilitated, and it is unfair to base the length of a prison term on such a determination. As Norval Morris has illustrated, parole boards are not able to predict with any degree of certainty which prisoners are likely to be "good" release risks and which are not.[72] Indeed, such determination seems especially suspect when made on the basis of how a prisoner responds to prison rehabilitative programs.

Fourth, the Code provides improved mechanisms over the parole system for dealing with institution discipline problems. Credit toward service of a term of imprisonment will continue to be given for satisfactory institutional behavior,[73] but it will not be subject to constant adjustment by prison officials, nor will an agency such as the Parole Commission be able to step in and second-guess the determination of prison officials as to the effect that disciplinary problems should have on the release date. The certainty that prisoners will have that their prison behavior has a direct effect on their release date should serve to improve prison discipline by making the earning of full credit toward early release a goal that can be set by every prisoner for himself. It should be noted that prisons officials now rely on a number of disciplinary measures, such as changing institutions or privileges, in addition to the current ineffective good time allowances, to effect good institutional behavior.[74]

Finally, the Bureau of Prisons under the Code is required to assure, to the extent practicable, that the last ten percent of a prison term is spent "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community." [75] It is unnecessary to continue the parole system to carry out this purpose. In fact, since under the current system fewer than half the persons released after serving terms of imprisonment in excess of one year are supervised following release, this mechanism cannot be relied on for transition services when they are needed, and the Bureau of Prisons has instituted a program in which transition services are made available to many prisoners while they are still serving their sentences.

4. Availability of sentencing options

The comprehensive sentencing provisions of the Code provide a full range of sentencing options. The Sentencing Commission in promulgating guidelines and the sentencing judge in imposing sentence may fashion a sentence that suits the characteristics of each offense and offender.

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[72] See, e.g., N. Morris, *The Future of Imprisonment*, pp. 31-34 (1974).

[73] Section 3824(b).

[74] See Hearings, pp. 212-13.

[75] Section 3824(c).

As noted earlier, the only type of sentence for which current law provides a full range of options under current law is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purposes of sentencing equally well without the degree of restriction on liberty that results from imprisonment.

Under the Code, maximum fines have been substantially increased from current law.[76] This will permit the imposition of a substantial fine in lieu of some or all of a prison term in appropriate cases.

The Code treats probation as a form of sentence with conditions,[77] rather than as a deferral of imposition or execution of a sentence, and requires that in felony cases it be accompanied by a fine, an order to pay restitution, or an order to engage in community service.[78] The Committee encourages the fashioning of conditions of probation that may in many cases make probation a useful alternative to a term of imprisonment. A full range of possible probation conditions is suggested in the Code to encourage the sentencing judge to consider whether a probationary term appropriate to the offense and offender could be imposed.[79] For example, the Code permits the requirement that nights or weekends be spent in a penal or correctional facility as a condition of probation. It permits conditions designed to prevent the recurrence of an offense committed because of the nature of the work performed by the defendant. It continues the ability to require that the defendant reside at, or participate in a program of, a community correction facility.

The Code adds two new sanctions that may be imposed in addition to a sentence to a term of probation or imprisonment or to pay a fine. The first permits the judge to order that a defendant convicted of an offense involving fraud or other intentionally deceptive practices give reasonable notice and explanation of the conviction to the victims of the offense so that they may seek appropriate civil redress.[80] The second permits the judge to order a defendant found guilty of an offense that caused bodily injury or property damage, destruction, or loss to make restitution to the victim.[81]

5. Consistency of purpose

For the first time, the Federal sentencing law will assure that the Federal criminal justice system will function with a consistent sentencing philosophy and that each part of the system will know the purposes intended to be achieved by the sentence in each particular case.

As previously noted, the Code itself sets forth the four basic purposes of criminal sanctions.[82] It requires that the Sentencing Commission consider these purposes in developing sentencing guidelines and policy statements[83] and that the sentencing judge consider them in imposing sentence.[84]

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[76] Section 2201(b).
[77] See Sections 2001 (b) and (c) and 2101.
[78] Section 2103(a)(2).
[79] Section 2103.
[80] Section 2005.
[81] Section 2006.
[82] Sections 101(b) and 2003(a)(2)

The Code requires that the sentencing judge announce how the guidelines apply to each defendant[85] and state his reasons for the sentence imposed.[86] The judge is also required to state the reason for imposing sentence at a particular point within the guidelines or, if the sentence is outside the guidelines, specific reasons for imposing a sentence of a different kind or length than recommended in the guidelines.[87]

The statement of reasons can be used by each part of the Federal criminal justice system charged with reviewing or implementing a sentence. It will assist the appellate courts in reviewing the reasonableness of a sentence outside the guidelines. It will also assist the appellate courts in determining whether it is desirable to grant a petition to review a sentence that was imposed within the guidelines that a party alleges represents an incorrect application of the guidelines, and in reviewing such application if the petition is granted. The statement of reasons can be used by the probation or prison officials in working with the convicted defendant toward the goals the judge hoped the sentence would achieve.

Finally, the abolition of the Parole Commission will eliminate the second-guessing of the judge's sentencing by the Parole Commission and will obviate the need for the judge to attempt to guess how the sentence he imposes may be altered by the Parole Commission.

6. *Miscellaneous criticisms*

In an undertaking of this magnitude one expects criticism. Perhaps the most prevalent criticism concerns the fear that any move toward determinate sentencing would result in substantially longer terms of imprisonment than are imposed today. Complementing this argument is the view that available prison capacity will be unable to meet the flood of new prisoners likely to enter our prison system.

A comprehensive sentencing study, recently completed by the Library of Congress, indicates that such fears are not well founded in the context of the reported bill's approach.[88] In addition, the bill requires that the Commission, in promulgating its guidelines, take into account not only the average sentence currently being imposed but the average length of time currently being served in prisons where imprisonment terms are imposed.[89] The bill also directs the Commission, in promulgating its guidelines, to take into account:

> the nature and capacity of the penal, correctional, and other facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes *but also* to assure

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[83] Proposed 28 U.S.C. 991(b) and 994 (a) and (f).

[84] Section 2003(a)(2).

[85] Proposed Rule 32(a)(1), F.R.Crim.P.

[86] Section 2003(c).

[87] *Id.*

[88] Library of Congress Congressional Research Service, Sentencing provisions of major criminal code reform legislation of the 95th Congress: Possible impact on sentence length and time served in prison (November 17, 1978).

[89] Proposed 28 U.S.C. 994(*l*).

> that the available capacities of such facilities and services will not be exceeded.[90] (Italic added.)

Even in the unlikely event that the Commission ignored its statutory mandate, Congress would have an opportunity to review carefully whatever guidelines the Commission promulgated; to assess their potential impact; and, if necessary, to revise or reject them.[91] Congress has delegated authority to the Commission to promulgate the guidelines but has reserved the ultimate power either to accept, amend, or reject the finished product through the enactment of legislation.

Some have questioned the idea of a Commission promulgating the guidelines rather than the Congress. These critics view the Commission idea as an abdication of Congressional responsibility. The Committee, however, views the Commission as a major asset of the bill. Congress historically has delegated authority to a host of administrative agencies[92] where the task involves complex issues requiring continuous monitoring and fine tuning by experts in the field. The Committee believes the creation of sentencing guidelines contemplated under this bill similarly requires expert attention.

Other critics lament that the bill lacks a general presumption in favor of alternatives to imprisonment.[93] They point out the correctional system has largely failed and that archaic and decrepit prisons hardly hold out much hope for turning the criminal away from a life of crime. Still other critics fault the bill for failing to create a presumption for lengthy imprisonment—mandatory minimum sentences—in a wide variety of felonies, pointing out that probation and short prison sentences have failed to provide needed deterrence and incapacitation. Congress has engaged in over a decade of debate over whether there should be a general presumption for or against imprisonment.[94] S. 1630 bypasses this ultimately fruitless debate in the course of establishing a much superior, completely new sentencing system in which general presumptions are absent and in which specific guidelines guarantee more individual consideration in each case. There are two exceptions to this rule: the bill requires the Commission to promulgate guidelines which provide a substantial term of imprisonment for categories of offenders who are, in effect, professional or career criminals,[95] and it mandates that the Commission's guidelines reflect alternatives to imprisonment for most first offenders who have not committed a violent or otherwise serious offense.[96]

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[90] Proposed 28 U.S.C. 994(g). Among other features of the bill that statutorily encourage or mandate ameliorative sentencing practices are proposed 28 U.S.C. 994(i) (directing the Sentencing Commission to insure that the guidelines reflect the appropriateness of a sentence other than imprisonment for a first offender who has not been convicted of a crime of violence or otherwise serious offense); proposed 28 U.S.C. 994(j) (inappropriateness of imprisonment for rehabilitative purposes); proposed 28 U.S.C. 994(u) (limits on consecutive sentences); proposed 18 U.S.C. 2302(c)(2) (permitting court review of a sentence to a term of imprisonment that exceeds five years to determine, after at least five years of the term have been served, whether extraordinary and compelling reasons, or the need to avoid unwarranted disparity, call for a reduction of the sentence); proposed 18 U.S.C. 2302(c)(3) (permitting court review of a sentence imposed for an offense for which sentencing guidelines were later reduced to determine whether the sentence should be reduced in light of policy statements of the Sentencing Commission). Also, the drafting technique used in the bill of separating the criminal conduct from the jurisdictional elements of the offense in many cases drastically will reduce exposure to multiple count indictments as compared to current law. For example, every mailing in a mail fraud scheme under current law is a separate indictable offense whereas a mail fraud indictment under the reported bill would involve only offense (scheme to defraud). A similar reduction occurs where the same conduct under current law is covered by several Federal interests, e.g., theft of government property from a post office located on an army base.

[91] Sec. 134(a)(1)(B)(iii) of S. 1630 and proposed 28 U.S.C. 994(n). This point is often overlooked in any discussion of the guidelines. It is true that Congress would delegate the authority to promulgate guidelines to a Commission; but, as with the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, Congress would have an opportunity to review the guidelines. The initial guidelines could be changed by enacting legislation within twelve months after the Commission reports them, and amendments to the guidelines could be disapproved by resolution of one House of Congress within 180 days of their submission to the Congress.

[92] See, e.g., 15 U.S.C. 41 (establishing the Federal Trade Commission); 15 U.S.C. 78d (creating the Securities and Exchange Commission); 47 U.S.C. 151 (establishing the Federal Communications Commission).

[93] See testimony of representatives of the American Civil Liberties Union, Hearings, Part XVI, pp. 11957, 11962, 12006–12011.

[94] See Hearings. Parts I–XV (1971–1979).

Another frequent criticism leveled at S. 1630 is that it should not provide the government with the power to appeal a sentence. If the reforms are to be effective in reducing unwarranted sentencing disparity and achieving overall fairness, however, there must be some mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines.[97] If the defendant alone could appeal, there would be no effective opportunity for the reviewing courts to correct an injustice arising from a sentence that is patently too lenient. Appellate review for the defendant alone would not be an effective weapon to fight disparity, since the appellate court could reduce excessive sentences but not raise inadequate ones. The effort to achieve greater uniformity, therefore, might unintentionally result in a gradual scaling down of sentences to the level of the more lenient ones.

D. CONCLUSION

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentence, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes the most important attempt in two hundred years to reform and streamline the manner in which we sentence convicted offenders. The Committee believes that the bill represents a major breakthrough in this area.

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[95] Proposed 28 U.S.C. 994(h).

[96] Proposed 28 U.S.C. 994(i).

[97] The Committee rejects the argument that government appeal of a sentence would be unconstitutional under the double jeopardy provision of the Constitution. See discussion with respect to section 3725 (Review of a Sentence).

CHAPTER 20.—GENERAL PROVISIONS

(Sections 2001–2009)

This chapter contains general provisions relating to the types of sentences that can be imposed on individuals and on organizations, and to the considerations that should go into the determination of an appropriate sentence. Section 2001 lists the types of sentences that may be imposed upon a defendant who has been found guilty of an offense. Section 2002 contains the requirements for presentence investigations and reports. Section 2003 lists the factors to be considered by a sentencing judge in imposing sentence, and sets forth the requirement that the judge state reasons for a particular sentence. Sections 2004 through 2006 describe the collateral sentences of an order of criminal forfeiture, an order of notice to victims of a fraudulent offense, and an order of restitution. Sections 2007 and 2008 refer to other provisions of the proposed Code and the Federal Rules of Appellate Procedure relating to appellate review and implementation of sentences. Section 2009 classifies offenses described outside title 18 according to the grading system in section 2301.

SECTION 2001. AUTHORIZED SENTENCES

1. In General

Section 2001 outlines the authorized sentences for defendants found guilty of Federal offenses. It requires that each Federal offender be sentenced in accord with the provisions of chapter 20 in order to achieve the general purposes of sentencing. It lists separately the kinds of sentences that may be imposed on individuals and on organizations, and the possible combinations of kinds of sentences that may be imposed.

2. Present Federal Law

Section 2001 has no direct counterpart in current law. Generally, each statute in current law that defines a criminal offense specifies the maximum term of imprisonment or the maximum fine, or both, that may be imposed upon a defendant found guilty of violating the statute. A few statutes also specify minimum sentences that must be imposed.[1] Current law rarely specifies different sentences for individuals than for organizations and thus fails to recognize the usual differences in the financial resources of the two categories of defendants or the potential for substantial financial harm to the victims or substantial financial gain to an organization that may be derived from certain kinds of organizational offenses, such as fraud, or to provide for organizations a substitute for imprisonment based upon the fact that it is obviously impossible to sentence an organization to a term of imprisonment.

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[1] Most statutes that specify minimum sentences do not create mandatory minimum sentences of confinement, since they do not preclude the suspension of sentence, or the placement of the defendant on probation or parole. Compare the apparent mandatory minimum sentence applicable to a first offense under 18 U.S.C. 924(c) with the mandatory minimum sentence applicable to a second offense under the same provision.

Current law contains no list of the types of sentences that may be imposed on a particular type of defendant. It does contain general provisions for suspension of imposition or execution of sentence, other than the sentence for an offense punishable by death or life imprisonment, and for placement of the defendant on probation instead of imposing or executing the sentence.[2]

Current Federal law contains no general statement of the need for a sentence to carry out a particular purpose. It does, however, contain several very specialized sentencing statutes that apply only to certain categories of offenders—youth offenders,[3] young adult offenders,[4] certain drug users and addicts,[5] dangerous special offenders,[6] and dangerous special drug offenders[7]—that tie their provisions to congressional statements that the purpose of the sentence is treatment,[8] treatment and supervision,[9] or incapacitation.[10]

2. Provisions of the Bill, as Reported

Subsection (a) provides that a defendant found guilty of any Federal offense shall be sentenced in accordance with the provisions of the chapter "so as to achieve the purposes set forth in paragraphs (1) through (4) of section 101(b) to the extent that they are applicable in light of all the circumstances of the case." The paragraphs referred to set forth the basic purposes of sentencing—deterrence,[11] incapacitation, just punishment, and rehabilitation.[12] This part of section 2001, as well as similar provisions cross-referenced elsewhere in part III, is designed to focus the sentencing process upon the objectives to be achieved by the Federal criminal justice system, and to encourage the employment of probation, of fines, of imprisonment, or of combinations thereof in a fashion tailored to achieve these multiple objectives.

While the bill, as reported, contains a congressional statement of four purposes of sentencing, the Committee has not favored one purpose of sentencing over another unless the sentence involves a term of imprisonment.[13] While some of those who have commented on the proposed Code would prefer that one purpose or another be favored over the others or, indeed, that some of the listed purposes be deleted from the proposed Code altogether,[14] the Committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case. The Committee also recognizes that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has. For example, the purpose of rehabilitation may play an important role in a sentence to a term of probation with the condition that the defendant participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.

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[2] 18 U.S.C. 3651.

[3] Federal Youth Corrections Act, chapter 402 of title 18, United States Code.

[4] 18 U.S.C. 4216.

[5] 18 U.S.C. 4251 *et seq.*

[6] 18 U.S.C. 3575 *et seq.*

[7] 21 U.S.C. 849.

[8] E.g., 18 U.S.C. 4216 (young adult offenders) and 4253 (certain drug users and addicts).

[9] 18 U.S.C. 5010 (b) and (c).

[10] See P.L. 91-452, 84 Stat. 922-23 (Organized Crime Control Act) (Oct. 15, 1970); 18 U.S.C. 3775-78; S. Rept. No. 91-617, at 83 (1969); see also 21 U.S.C. 849(f).

[11] The subject of general deterrence as a basis for imprisonment was discussed in *United States* v. *Foss*, 501 F.2d 522 (1st Cir. 1974).

[12] Section 2003(a) contains a more elaborate description of the factors to be considered in imposing a sentence.

[13] Section 2302(a) provides, however in light of current knowledge that in determining whether to impose a sentence of imprisonment and in determining the length of a term of imprisonment, the sentencing judge should recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Proposed section 994(j) of title 28 provides that the sentencing guidelines should reflect the "inappropriatness" of using rehabilitation or availability of corrections programs as the basis of a term of imprisonment.

Subsection (b) of section 2001 specifies that an individual offender must either be placed on probation, fined, or imprisoned as provided in the chapters governing the imposition of such sentences. It requires the imposition of at least one of such sentences.[15] It further states that a fine may be imposed in addition to any other sentence, as may any of the other sanctions authorized by sections 2004, 2005, and 2006.

Subsection (b) treats a term of probation as a type of sentence, rather than as an alternative to imposition or execution of a sentence as in current law.[16] Subsection (b) also eliminates the split sentence in which a term of imprisonment is followed by a term of probation.[17]

Subsection (c) requires that an organization that is convicted of a Federal offense be sentenced to a term of probation [18] or to pay a fine, or both. At least one of such sentences must be imposed. In addition, an organization may, in appropriate case, be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.

S. 1, as introduced in the 93rd Congress, provided, as an equivalent to a term of imprisonment for an individual offender, that an organization could be barred from its "right to affect interstate or foreign commerce" for a period up to the maximum length of time that an individual convicted of an offense of the same seriousness could be sentenced to prison.[19] Because the Committee was concerned that such a provision might too readily be used in an inappropriate case, this provision was deleted in the reported version of S. 1437.[20] S. 1437 instead took the approach that, in an appropriate case, an organization could be barred, as a condition of probation, from engaging in a particular business or could be ordered to engage in such a business only under stated circumstances.[21] Such a condition of probation would, of course, apply only for the duration of the term of probation. Business groups, however, continued to express concern that the probation condition prohibiting an organization from engaging in a particular business might encourage misapplication to a business that had committed a regulatory offense but that was otherwise a legitimate business. While the intent of the Committee had been that the condition barring the conducting of a particular business be used only for an organization that conducted business in a flagrantly illegal manner, the Committee understands the concerns of business that the condition might encourage misapplication to the economic detriment of a legitimate enterprise. The Committee also believes that the situation in which an organization operates in a totally illegal manner is relatively unusual and occurs most frequently in cases where a fraudulent business is controlled by one or a few individuals whose organization exists only as a front for individuals whose purpose is to defraud the public out of its money. Accordingly, this condition of probation has been further modified by the Committee so that the language of the condition in the reported bill that permits a convicted defendant to be barred from engaging in a particular business applies by its terms only to an individual offender. In the rare case in which an organization operates in a generally illegal manner, the sentencing judge can rely on section 2103(b)(20), the general authority to set appropriate conditions of probation, and can bar an individual offender, such as an officer or even sole proprietor of a fraudulent business, from engaging in a particular business under section 2103(b)(6).

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[14] See e.g., Hearings, pp. 8582, 8590, 8374, and 8883; Hearings, Part XVI, pp. 11957 and 11962.

[15] The National Commission's recommendation that there be an alternative sentence of "unconditional discharge" (Final Report §§ 3301, 3105) has not been adopted by the Committee. It seems to the Committee that it is both illogical and unwise to convict a defendant of a criminal offense without imposing any sanction for that misconduct. In a compelling case, a similar result can be achieved by imposing a sentence to a term of probation without supervision. See sections 2101(b) and 2103.

[16] 18 U.S.C. 3651. See discussion of chapter 21.

[17] But see section 2103(b)(11) and the discussion of chapter 21. See also section 2303.

[18] A corporation may be placed on probation under current law. See, e.g., *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States* v. *J. C. Ehrlich Co., Inc.*, 372 F. Supp. 768 (D. Md. 1974).

[19] Section 1-4A1(c)(1).

[20] See S. Rept. No. 95-605, at 887 (1977).

[21] See S. 1437, section 2103(b)(6).

The Committee believes that section 2001 provides considerable flexibility in formulating an appropriate sentence for each particular case. When combined with the following chapters describing these sentences in more detail, with the purposes of sentencing set forth in section 101(b), and with the provisions for sentencing guidance to the judges set forth in section 2003 of this title and in chapter 58 of title 28,[22] these sentencing provisions should lead to the imposition of sentences which treat offenders consistently and fairly, yet permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender.

SECTION 2002. PRESENTENCE REPORTS

1. In General

Section 2002 requires the preparation of a presentence report by a probation officer in accord with the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, permits the court to request a presentence report by the Bureau of Prisons or by psychiatric examiners in appropriate cases, and requires the court to assure that these presentence reports are made available in a timely manner to the defendant and his counsel and to the attorney for the government in accord with, and to the extent permitted by, the provisions of Rule 32(c).

2. Present Federal Law

The basic provisions dealing with presentence reports are currently found in Rule 32(c) of the Federal Rules of Criminal Procedure, as enacted in Public Law 94-64, July 31, 1975. Subdivision (c)(1) of Rule 32 requires that a presentence report be made unless the defendant, with the permission of the court, waives it, or the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing discretion and explains this finding on the record. The probation service is given wide discretion in determining what matter will be included in the report, with few limitations on the kinds or sources of the information.[23] The rule specifically mentions the prior criminal history of the defendant and his characteristics, his financial condition and the circumstances affecting his behavior.

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[22] See section 126 of the reported bill.

The form used for the presentence reports is recommended by the Probation Division of the Administrative Office of the United States Courts.[24] Since July 1, 1978, most Federal judges have, as a result of those recommendations, received information in the presentence report regarding the parole guideline that the probation officer believes the Parole Commission will apply to the defendant if he is sentenceced to a term of imprisonment and information concerning sentencing practices for the offense. The information is considered by the judge in determining how the parole guidelines probably will affect any imposed sentence to a term of imprisonment.[25]

18 U.S.C. 4205(c) provides that the district court may commit a convicted offender to the care of the Bureau of Prisons for a more detailed report and analysis. The commitment is deemed to be for the maximum sentence of imprisonment prescribed by law. The results of the study must be reported to the court within three months, unless the court grants additional time, not to exceed three months, for further study. The court is then required to place the defendant on probation, affirm the maximum sentence already imposed, or reduce the sentence.

Current law contains no specific provision relating to a mental examination to determine the current mental state of a convicted defendant. Such an examination may occur in the course of the prison study in appropriate cases.

3. Provisions of the Bill, as Reported

Section 2002 amends current law to assure that presentence reports contain the information necessary to make an appropriate sentencing decision in the new sentencing guidelines system. Under subsection (a), presentence reports are required to be prepared by probation officers pursuant to the provisions of Rule 32. Rule 32(c) is amended by the bill to require the preparation of a presentence report unless the judge finds that he has sufficient information "to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 2003". The defendant would not be able to waive the presentence report, as he can under current law, since it is important that the sentencing judge assure himself that he has sufficient information from which to determine the applicable sentencing guideline.

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[23] *United States* v. *Tucker*, 404 U.S. 443 (1972).

[24] The Presentence Investigation Report, Division of Probation, Administrative Office of the United States Courts (1976).

[25] The determination of the applicable guideline made by the probation officer is, of course, not binding on the Parole Commission, which can, and frequently does, determine that a different guideline applies.

Pursuant to the recommendations of Judge Tjoflat,[26] appearing on behalf of the Judicial Conference Committee on the Administration of the Probation System, the Committee deleted from section 2002 in S. 1437 as introduced in the 95th Congress, language that would have required conviction of a defendant before the preparation of a presentence investigation. As noted by Judge Tjoflat, Rule 32, F.R. Crim. P., was amended in 1974 to authorize the making of a presentence investigation prior to conviction, provided only that the report's contents may not be disclosed to anyone until conviction, except that a judge may inspect the presentence report with the written consent of the defendant. This section is intended to continue present law in this regard.

Judge Tjoflat in the 97th Congress expressed concern that the provisions of subsection (a) as introduced could be construed to require that the probation officer who prepares the presentence investigation and report must be an officer of the particular court sentencing the defendant.[27] In accordance with his suggestion, subsection (a) has been amended by the Committee to make clear that any probation officer may make the presentence investigation and report. This assures that, for example, if a defendant has lived in more than one district in which the investigation should be conducted, it is unnecessary for a probation officer of the sentencing court to travel to a distant district to complete the investigation; he can instead call on a probation officer of the distant district to conduct all or part of the investigation.

To assist the court in determining into what guideline category a case fits, and whether special mitigating or aggravating factors warrant the imposition of a sentence outside that guideline, the existing language of Rule 32(c)(2) has been redesignated as subdivision (c)(2)(A) of the Rule and amended in title II of the bill, as reported, to refer generally to "the history and characteristics of the defendant" in conformity with the requirement of section 2003 that the judge consider these matters in imposing sentence. The Rule has been further amended to require that there be included in a presentence report:

> the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more applicable under all the circumstances [as well as] any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) [, and]

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[26] Hearings, p. 8940.

[27] Hearings, Part XVI, p. 11021.

> verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed.

Subsection (b) of section 2002 carries forward the provisions of 18 U.S.C. 4205(c), which provides that, if the court desires more information concerning a convicted defendant, either before or after receiving the presentence report and any report concerning the defendant's mental condition, it may assign the offender to the custody of the Bureau of Prisons for a period of study and preparation of a report concerning matters appropriate to the sentencing decision. The bill amends current law by reducing the maximum period for the study from six months to 120 days (60 days plus a maximum 60-day extension) in order to advance the time for final sentencing while still allowing an adequate period for study. The Committee has amended the bill to specifically require that the court order for a study specify the information sought by the court. This will assure that the Bureau of Prisons will focus its attention on the issues of most interest to the court and is consistent with the shortened period for preparation of the report. The Bureau is required to conduct a complete study of matters specified by the court, and any other matters it believes are pertinent to the factors that the judge must consider pursuant to section 2003(a) before imposing sentence. Before expiration of the study period or any extension, the Bureau must report to the court. The report may contain any information that the Bureau believes to be pertinent to the sentencing decision, and is required to include the Bureau's recommendations as to the sentencing guidelines and policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a) that the Bureau believes to be applicable to the defendant's case.

Under current law,[28] if a defendant is committed to the custody of the Bureau of Prisons for study prior to sentencing, he is deemed to have been sentenced to the maximum term of imprisonment available for the offense. After the study, the judge either affirms that sentence, reduces it, or places the defendant on probation. Under subsection (b), the temporary sentence is expressly labelled for administrative purposes as a provisional sentence, and when the study is completed, the judge proceeds to impose a final sentence [29] under the various sentencing alternatives and procedures available under the chapter. Thus, the judge will be making the sentencing decision after all the information he needs has been obtained, rather than being required to adjust a sentence that has already been set at the maximum level.

Subsection (c) adds a new provision to the law that specifically permits the court to order a presentence examination by a psychiatric examiner concerning the current mental condition of the defendant. The examination would be conducted pursuant to section 3617, and the court would be provided with a written report. The examination would be similar to that provided for in section 3614 except that it would be conducted on an outpatient basis (although the defendant might be incarcerated pursuant to section 3503) and the judge could request the examination without a motion by prosecution or defense. Unlike the hearing under section 3614, the judge could order an examination under this section if he thought the defendant's mental condition might affect the sentencing decision, even though the judge might not think the defendant "may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody or treatment in a suitable facility." The judge might believe, for example, that, while a convicted defendant has emotional problems that should be considered in fashioning an appropriate sentence, they could be dealt with in a prison setting or on an outpatient basis following a brief prison term, but wish to seek the advice of a psychiatric examiner as to the appropriate route. The report would include the recommendations of the examiner as to the application to the defendant of sentencing guidelines and policy statements relative to mental condition, and as to how the defendant's mental condition should affect his sentence. The examiner might recommend, for example, outpatient treatment for a defendant who could then safely be put on probation.

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[28] 18 U.S.C. 4205(c).

[29] See sections 2102(b), 2202(c), and 2302(b) concerning degree of finality.

The Committee has added a new subsection (d) to section 2002 that requires that the judge assure timely disclosure of the reports prepared pursuant to the section to the defendant, the defense counsel, and the attorney for the government. The disclosure is to be made pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure. Thus, disclosure may be in the form of an oral or written summary by the judge of portions of these reports if the judge finds pursuant to Rule 32(c)(3) that the report contains "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." The Committee believes that timely reports to the parties of the information on which the judge will base his sentencing decision is important to assure that counsel are reasonably prepared to address at the sentencing hearing questions relating to the appropriate application of the sentencing guidelines to the defendant.

The provisions of section 2002 thus will provide a court with the resources necessary for the acquisition of adequate information about a convicted offender, including recommendations from the probation system and, if the judge believes it would be helpful, from the Bureau of Prisons or a psychiatric examiner, in order to assure a sound basis in fact for the sentencing decision. The section also assures that the defendant and government have sufficient information concerning the basis for a sentencing decision to enable them to prepare for the sentencing hearing.

SECTION 2003. IMPOSITION OF A SENTENCE

1. In General

Section 2003 lists for the first time the factors that a judge should consider in imposing sentence. It requires that the court impose sentence within the sentencing guidelines unless it finds that an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence. It requires for the first time that a sentencing judge state reasons for the sentence imposed. Finally, it contains special provisions concerning presentence procedures to be followed if the court is considering imposition of an order of notice pursuant to section 2005 or of an order of restitution pursuant to section 2006.

2. Present Federal Law

One of the most glaring defects in current sentencing law is the absence of general legislative guidance concerning the factors to be considered in imposing sentence.[30] This defect is aggravated by the fact that the sentencing judge is not required to state his reasons for imposing a particular sentence.[31] Each judge is left to formulate his own ideas as to the factors to be considered in imposing sentence, and the effect that each factor should have on the sentence imposed. The not surprising result is unwarranted disparities among sentences imposed by different judges.[32]

3. Provisions of the Bill, as Reported

Subsection (a) sets out the factors a judge is required to consider in selecting the sentence to be imposed in a particular case. This applies both to the decision of the appropriate type of sentence (e.g., fine, probation, imprisonment, or a combination thereof) and to the decision as to the length or amount of the sentence.

Subsection (a)(1) directs the judge to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." Under this provision, the judge would consider as to the nature and circumstances of the offense such matters as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. In considering the history and characteristics of the defendant, the judge would consider such matters as the criminal history of the defendant, and the nature of any previous criminal sanctions and their effectiveness. All of these considerations, and others that the judge believed to be appropriate, would assist the judge in assessing how the sentencing guidelines and policy statements that the judge is required to consider pursuant to subsections (a)(3) and (a)(4) would apply to the defendant. They would also assist the judge in determining whether there were circumstances or factors not taken into account in the sentencing guidelines that called for imposition of a sentence outside the applicable guideline.

Subsection (a)(2) requires that the judge consider the need for the sentence imposed to carry out the four purposes of sentencing, restated from section 101(b). First is the need to impose sentences that deter others from committing the offense. This need is receiving particular emphasis in the white collar crime area, where major white collar criminals often have been sentenced to small fines and little or no imprisonment. This has the unfortunate effect of leaving the impression that certain offenses can be committed with the only sanction being a minor fine that can be written off as a cost of doing business.

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[30] As discussed in connection with section 2001, a number of sentencing statutes applicable to specialized categories of offenders offer limited legislative guidance as to the purpose of a sentence under the specialized statute.

[31] See M. Frankel, *Criminal Sentences: Law Without Order*, 39-49 (1972).

[32] See INSLAW, Inc., and Yankelovich, Skelly and Wright, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions III-1—III-19* (1981); A. Partridge and W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* (1974), excerpts in Hearings, p. 8101.

Second is the protection of the public from further crimes of the defendant. This is especially important for those offenders whose criminal histories show repeated serious violations of the law.

Third is the need for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense." [33] This purpose should be reflected clearly in all sentences, since it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the defendant's standpoint it should not be too harsh under all the circumstances of the case and should not unreasonably differ from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.[34] From the public's standpoint the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense and the public interest in preventing a recurrence of the offense.

Fourth, the sentencing court is directed to consider the need for the sentence to provide rehabilitation. During the hearings concerning the Code, arguments were advanced that rehabilitation should be eliminated completely as a purpose of all sentencing (not just as a purpose of imprisonment). The Committee has rejected this view. Instead, the Committee has retained rehabilitation and corrections as a purpose of a sentence,[35] while recognizing, in light of current knowledge, that "imprisonment is not an appropriate means of promoting correction and rehabilitation".[36] It has also required that the Sentencing Commission "insure that the [sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." [37] Rehabilitation is particularly important in formulating conditions for persons placed on probation. Their participation in such programs as educational or vocational training, or in treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes. The Committee recognizes that the purpose of rehabilitation is not currently thought to be an appropriate purpose of a sentence to a term of imprisonment or, where there are other reasons for imprisonment, such as deterrence or incapacitation, to be a fair basis for determining the length of a term of imprisonment. The belief that the length of sentence should not be based on rehabilitative considerations stems in part from the fact that the criminal justice community increasingly believes that the state of knowledge of human behavior is insufficient to permit the determination of when or whether a defendant has been "rehabilitated." The Committee in no way means to suggest that we should abandon our efforts to rehabilitate prisoners. Programs within the prison setting should be available and encouraged to enhance the possibility of rehabilitation. Also, as noted previously, the purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.

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[33] It has been suggested that one aspect of this purpose of sentencing, "just deserts," should be the sole purpose of sentencing. See Testimony of Andrew von Hirsch, Hearings, pp. 8977–78 and 8982–83; von Hirsch, *Doing Justice: The Choice of Punishments* (1976). While the Committee obviously believes that a sentence should be "just" and that the punitive purpose is important, it also believes that it is consistent with that purpose to examine the other purposes of sentencing set forth in section 2003(a)(2) in determining the type and length of sentence to be imposed in a particular case. Rehabilitative considerations may call for a sentence to probation with appropriate conditions where a sentence to a term of imprisonment in other circumstances might be "just": incapacitation for an extended period of an offender with a serious criminal history might be appropriate where such a long term would not be "just" if the offender's criminal record were not considered.

[34] See section 994(b)(1)(B) of title 28, United States Code, as added by section 126 of the bill, as reported.

[35] Sections 101(b)(4) and 2003(a)(2)(D).

[36] Section 2302(a).

[37] Proposed 28 U.S.C. 994(j), as added by section 126 of the reported bill. It is understood, of course, that if the Commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. A balancing of competing interests is necessary.

In setting out four purposes of sentencing, the Committee has deliberately not shown a general preference for one purpose of sentencing over another, in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants.[38] The Committee recognizes that a particular purpose of sentencing may play no role in the sentence in a particular case. The intent of subsection (a)(2) is to recognize the four purposes of sentencing and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

Subsection (a)(3) requires the judge to consider the kinds of sentences available. The provision was added by the Committee in the 95th Congress to assure that the judge would consider all possible types of sentence that might be imposed in a particular case. The provision was added in response to two concerns: the concern that prison sentences are imposed in many cases in which equally effective sentences that involve less restraint on liberty would serve the purposes of sentencing, and the concern that some major offenders, particularly white collar offenders, frequently do not receive sentences that reflect the seriousness of their offenses. In the former case, for example, it might be possible to fashion a sentence that involved a high fine and weekends in prison for several months, instead of a longer period of incarceration. In the latter case, the judge might impose a sentence to a term of imprisonment and a fine proportionate to the gain to the offender, instead of simply a fairly low fine that amounted only to a cost of doing business.

Subsections (a)(4) and (a)(5) require that the sentencing judge consider the kinds of sentence and the sentencing range applicable to the category of offense committed by the category of offender under the sentencing guidelines issued pursuant to 28 U.S.C. 994(a) and any applicable policy statements issued by the Sentencing Commission.

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[38] See discussion of section 2001(a).

The guidelines and policy statements to be applied are those in effect at the time of sentencing. Use of guidelines and policies since revised would not only create significant administrative difficulties but would be inconsistent with the philosophy embodied in this legislation that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they represent the most sophisticated statements regarding the sentences that will most appropriately carry out the purposes of sentencing. 28 U.S.C. 991(b)(1)(C) and 995(a) contain specific statutory direction and authority for such continual refinement. To impose a sentence under outmoded guidelines would seem to foster unnecessary irrationality in sentencing, contrary to the goal of the guidelines system to avoid unwarranted disparity in sentencing.[39] The practice of the Parole Commission has been to use the guidelines currently in effect, and this practice has generally withstood challenges that it violated the prohibition against ex post facto laws in Article 1, Section 9 of the Constitution.[40] The Committee believes that the reasons given for upholding the Parole Commission practice are equally applicable to the sentencing guidelines: The statutory maximum sentence applicable for an offense is unchanged by a change in the guidelines. Instead, the guidelines are designed to structure the exercise of discretion in making decisions, primarily to accommodate increased knowledge as to the differences among offenses or offenders. The guidelines do not eliminate the discretion to set a release date outside the guidelines if there is a valid reason for doing so.

Subsection (a)(6) requires the judge to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct". Similarly, proposed 28 U.S.C. 991(b)(1)(B) states that one of the goals of the Sentencing Commission is to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices". It is important that both the Sentencing Commission and the judge keep in mind the importance of avoiding unwarranted disparity. A major premise of the sentencing guidelines is the need to avoid unwarranted sentencing disparity—but judges must also seek to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines.

Subsection (b) is a new provision added to S. 1437 during the Senate debate in the 95th Congress.[41] It requires the sentencing judge to impose a sentence consistent with the sentencing guidelines unless he finds that there is an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the sentencing guidelines and that the circumstance should result in a different sentence. The provision is designed to assure that the sentencing guidelines are able to achieve the goal of avoiding disparity in sentences that are not justified by differences among offenses or offenders. At the same time the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in a particularly extreme form which happens to be present in a particular case. The provision recognizes, however, that even though the judge finds an aggravating or mitigating circumstances in the case that was not adequately considered in the formulation of guidelines, the judge might conclude that the circumstance did not justify a sentence outside the guidelines. Instead, he might conclude that a sentence toward the upper end of the range in the guidelines for an aggravating circumstance, or toward the lower end of the range for a mitigating circumstance, was more appropriate—or that the circumstance should not affect the sentence at all.

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[39] See the discussion of 28 U.S.C. 991(b)(1)(B), as added by the reported bill, *infra.*

[40] *Ruin* v. *United States,* 555 F.2d 1331 (6th Cir. 1977); *Kreis* v. *Seigler* (No. 75-1543, M.D. Penn., Mar. 31, 1976). But see, e.g., *Geraghty* v. *United States Parole Commission,* 579 F.2d (3d Cir. 1978), reversed and remanded on other grounds, 445 U.S. 388, and *United States* v. *Tully,* 521 F. Supp. 331 (D. N.J. 1981), in which concern is expressed that, if the amended guidelines are applied mechanically rather than on an individualized basis, there would be an *ex post facto* problem.

[41] 124 Cong. Rec., S289 (January 23, 1978 (daily ed.)).

Subsection (c) contains a new requirement that the court, at the time of sentencing, state the reasons for the imposition of the sentence in each case. It also requires that, if the sentence is within the guidelines, the court state the reason for imposing sentence at a particular point within the range, and that, if the sentence is of a different kind or outside the range set out in the sentencing guidelines, the court state the specific reason that the sentence imposed differs from the guidelines. The latter requirement would essentially be a statement of why the court felt that the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court felt the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range simply because he would have promulgated a different range. The offender before him should not receive more favorable or less favorable treatment solely because he happens to be sentenced by a particular judge. A judge who disagrees with a guideline may, of course, make his views known to the Sentencing Commission, and may recommend such changes as he deems appropriate.

The statement of reasons is made in open court. The Committee does not intend that the statement of reasons for a sentence within the guidelines become a legal battleground for challenging the propriety of a particular sentence or the probation or institutional program in which the defendant is placed. In particular, a statement that one purpose of a sentence is to permit the defendant to participate in a rehabilitation program is in no way intended to be the basis of a challenge to participation in the program because it is allegedly ineffective. It is very important that efforts to rehabilitate continue so that the criminal justice system can learn how to improve the effectiveness of those efforts. It is also important that the judge state general reasons for a sentence within the applicable guideline in order to inform the defendant and the public of those reasons and the reasons why the offender is subject to that particular guideline, and in order to guide probation officers and prison officials in working with the defendant to develop a program in an effort to meet his needs.

The statement of reasons for a sentence outside the guidelines is especially important. Under section 3725, a defendant sentenced above the applicable guideline may appeal the sentence, and the government may appeal a sentence below the guidelines. If the appellate court finds that a sentence outside the guidelines is unreasonable, the case may be remanded to the trial court for resentencing or the sentence may be amended by the appellate court. The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence. In fact, its role is sufficiently important that, if the sentencing judge failed to state specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement.

Sentences within the guidelines are subject to reconsideration by the sentencing judge under Rule 35 of the Federal Rules of Criminal Procedure for illegality or on allegations of an incorrect application of the guidelines. Refusal to change an illegal sentence is, of course, appealable, as it is under current law,[42] and the statement of reasons may play a role in the appellate court's decision as to legality. An order of a court denying or granting a motion under Rule 35(b)(2) to correct a sentence for incorrect application of the guidelines may be reviewed if the court of appeals grants leave to appeal to a petitioning party pursuant to section 3723(b) or 3724(d). The statement of reasons in such cases probably plays only a minor role in the appellate process since the court will be deciding factual issues concerning offense and offender characteristics which might not be discussed in the statement of reasons.

Regardless of the grounds for appeal, the statement of reasons should not be subjected to such legalistic analysis that the judge will be reluctant to sentence outside the guidelines when it is appropriate or will begin stating reasons in a standardized manner similar to that now in use in pattern jury instructions.

The statement of reasons for a sentence plays other important roles in the criminal justice system. It informs the defendant and the public of the reasons for the sentence. It aids the probation and prison officials in fashioning an appropriate program for the defendant. Finally, it provides information to criminal justice researchers evaluating the effectiveness of various sentencing practices in achieving their stated purposes and assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.

The Committee added subsection (d) to allay concerns of the business community that an order of notice or an order of restitution might be imposed without adequate consideration by the court of the issues involved. The subsection requires that the court give prior notice to the defendant and the government that it is considering imposing an order of notice under section 2005 or an order of restitution under section 2006 as part of the sentence. The purpose of the notice is to enable the parties to prepare adequately for the sentencing hearing. The subsection also requires that the court, upon motion of the defendant or the government or on its own motion, permit the parties to submit affidavits and written memoranda concerning matters relevant to the imposition of an order of notice or restitution, including identification of individual, or classes of, victims, valuation issues, and defenses that a defendant could assert in a civil action with respect to any victim; afford counsel an opportunity to address in open court the issue of the appropriateness of such an order; and include in its statement of reasons for the sentence specific reasons for imposing the order. The court may also, upon motion of either party or its own motion, employ additional procedures, including hearing the testimony of witnesses, that it concludes will not unduly complicate or prolong the sentencing process. The Committee does not intend that either the mandatory or discretionary procedure be used to resolve difficult issues. If the complexity would unduly complicate or prolong the sentencing process, the court should not consider imposing an order of notice or restitution.

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[42] The government has the right under current law to seek correction of an illegal sentence by a writ of mandamus. See *United States* v. *Denson*, 588 F.2d 1112, 1127 (5th Cir. 1979).

SECTION 2004. ORDER OF CRIMINAL FORFEITURE

1. In General

At common law, a person convicted of treason and certain other felonies automatically forfeited to the crown his personal goods and chattels.[43] Furthermore, when a person had been attained [44] for an act of high treason [45] or outlawry,[46] all of his interests in real property held at the time of the offense or since that time were forfeited to the crown. According to Blackstone, the rationale for criminal forfeiture was that: [47]

> [H]e who hath thus violated the fundamental principles of government, and broke his part of the original contract between king and people, hath abandoned his connection with society; and hath no longer any right to those advantages, which before belong to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.

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[43] *The Palmyra,* 25 U.S. (12 Wheat.) 1. 14 (1827) (opinion of Mr. Justice Storey).

[44] Attainder was a legal declaration of a man's death which occurred as an inevitable consequence of the declaration of final sentencing for high treason or outlawry; once attainted a person could not act as a witness in court, make a will, convey property, or bring an action. 4 Blackstone, *Commentaries* 347 (New ed. 1813).

[45] High treason generally included killing the king, promoting revolt against the king, or counterfeiting the great seal. *Id.* at 66–75.

[46] Outlawry consisted of flight while accused of an offense. It was declared *in absentia* but was attaintable only in cases where treason had originally been charged. *Id.* at 353.

[47] *Id.* at 349.

While there is one indication that the concept of criminal forfeiture was in usage in the colonies, the First Congress by Act of April 20, 1790,[48] abolished forfeiture of estate and corruption of blood, including such punishment in cases of treason. From that time until 1970 there was no criminal forfeiture provision in the United States Code. In 1970, Congress passed Title IX of the Organized Crime Control Act and Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[49] which reinstated the common law provision of criminal forfeiture in organized crime cases, including major drug trafficking cases. The purpose for enacting this provision was to give law enforcement authorities greater flexibility in their fight against organized crime. In addition to the traditional penalties of imprisonment and fines, this provision was intended to separate the leaders of organized crime from their sources of economic power.[50]

In any discussion of forfeiture statutes, it is important to distinguish between criminal forfeiture and civil forfeiture. Criminal forfeiture is part of the sentence which is imposed upon conviction for a particular crime. In this sense, the proceeding is *in personam* against the defendant. There is no additional proceeding required before the property is forfeited to the United States.[51] The forfeiture is automatic upon imposition of sentence. On the other hand, under those Federal statutes which provide for civil forfeiture, the forfeiture is not part of the sentence. Before property may be civilly forfeited, the United States Attorney must bring a separate *in rem* action against the property which is declared to be unlawful or contraband under the statute, which is used for an unlawful purpose, or which is used in connection with the prohibited act or transaction. The concept of an *in rem* action is that the property is the offender and thus the action is brought against the property,[52] a concept that developed from the ancient Roman religious practice of deodands. According to this custom, when a person was accidentally killed the object that caused his death—the tree that fell on him, the horse that threw him, or the bull that gored him—was forfeited to the church.[53] Later, the crown replaced the church as the recipient of the forfeited object or its value and the proceeds were distributed for charitable purposes.[54] Today, examples of civil forfeiture provisions are those contained in the customs, narcotics, and revenue laws.[55]

2. Provisions of the Bill, as Reported

Subsection (a) of section 2004 provides that any person found guilty of an offense described in section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds) is to forfeit any property (1) constituting his interest in the racketeering syndicate or enterprise involved, (2) constituting a means by which he has exerted influence over the racketeering syndicate or enterprise involved, (3) constituting, or derived from, his proceeds from the racketeering syndicate or enterprise involved, and (4) to the extent that the property constituting, or derived from, the interest, means, or proceeds described in the preceding paragraphs cannot be obtained, located, or identified because the defendant knowingly concealed or commingled the property or placed it beyond the jurisdiction of the court, any other property of the defendant to the extent of the value of such unlocated, unobtained, or unidentified property. The forfeiture is mandatory as an addition to any other sentence for the offense required by section 2001(b) or (c). The section thus carries forward the criminal forfeiture concept found in the Organized Crime Control Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970.[56] Unlike those Acts, however, subsection (a) does not limit the property subject to forfeiture to the defendant's interest in the racketeering syndicate or enterprise involved.[57] Rather, the Committee has enlarged the scope of the criminal forfeiture provisions applicable to the organized crime offenses involving a racketeering syndicate or enterprise, with a view toward totally removing the potential profit from these activities. Thus, under paragraphs (a)(2) and (a)(3), property constituting a means by which influence was exerted, including, for example, another enterprise that is operated as a parent company, or constituting the proceeds from the racketeering syndicate or enterprise that was the subject of the conviction, are to be forfeited. This will prevent, for instance, a defendant, who learns that he is under investigation for an offense in section 1801, 1802, or 1803, from transferring his interest in the racketeering syndicate or enterprise at issue in advance of conviction so as to avoid ultimate forfeiture of the proceeds from the venture.[58] Lastly, under paragraph (a)(4), if not all of the property described in the foregoing paragraphs can be located, obtained, and identified because the defendant knowingly concealed or commingled it or placed it beyond the jurisdiction of the court, but its value can be proved, any other property of the defendant, to the extent of such value, is to be forfeited. Nevertheless, this criminal forfeiture provision is not as extensive as the common law criminal forfeiture provision whereby a person convicted of a felony forfeited all his personal property. On the other hand, this forfeiture provision is somewhat broader than common law criminal forfeiture in that both real and personal property will be subject to forfeiture. The purpose, once again, of this forfeiture provision is to deprive the principals involved in organized crime of the sources of their economic power, which in turn will help to free the channels of commerce from racketeering influence.

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[48] 1 Stat. 117.

[49] 18 U.S.C. 1963 and 21 U.S.C. 848(a)(2). The former provision was held constitutional in *United States* v. *Amato*, 367 F. Supp. 547 (S.D.N.Y., 1973).

[50] See S. Rept. No. 91-617, 81st Cong., 1st Sess. 79 (1970).

[51] Thus 28 U.S.C. 2461(b), which provides that:

Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty, is not applicable to cases coming under this section.

[52] *Calero-Toledo et al.* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[53] Blackstone, *Commentaries*, p. 306 (New ed. 1813); 3 Coke, *Institute*, pp. 57-58 (1817 ed.).

[54] Holmes, *The Common Law*, p. 25 (1938 ed.).

[55] See subchapter A of chapter 40 for the civil forfeiture provisions of the Code.

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[56] 18 U.S.C. 1963; 21 U.S.C. 848(a)(2).

[57] See S. Rept. No. 91-617, 91st Cong., 1st Sess., at 80 (1970).

[58] Although, as discussed below, under subsection (b) the court is authorized to enter a protective order or injunction with respect to property that may be subject to criminal forfeiture, such an order may be entered only after the arrest of the defendant for, or the filing of an indictment or information charging, an offense under section 1801, 1802, or 1803. Paragraphs (a)(2) and (a)(3) are necessary because the transfer may occur prior to the defendant's arrest or the filing of charges, and because the proof necessary to support the entry of a restraining order even after such event may not be readily available to the government at that time.

Subsection (b) provides that at any time after the arrest of the defendant, or after an indictment is returned or an information is filed, in a case in which an offense is charged for which criminal forfeiture may be ordered, a court may enter a restraining order or injunction or may require a performance bond or take any other appropriate action with respect to any property that may be subject to criminal forfeiture. The purpose of this subsection is to prevent a defendant from transferring his interest in the racketeering syndicate or enterprise prior to conviction in order to avoid forfeiture. The United States attorney could seek a court order restraining the defendant from taking such an action or seek other appropriate court action, or the court could take appropriate action on its own motion.

Subsection (c) authorizes the Attorney General to seize property ordered forfeited and directs him to dispose of such property as soon as commercially feasible, making provision for the rights of innocent persons. It also provides that even if the property cannot be disposed of, it will not revert to the defendant.

Subsection (d) provides for certain procedures to govern the disposition of forfeited property. In general, it incorporates by reference the well-established customs law provisions concerning the disposal of civilly forfeited property, the distribution of the proceeds from the sale of such property, and the remission or mitigation of forfeitures. These customs law provisions will apply except to the extent that they are inconsistent with the other provisions of this section, with the Attorney General performing the duties as to the property forfeited pursuant to section 2004 that would be performed under the customs laws by a customs officer or other person.

SECTION 2005. ORDER OF NOTICE TO VICTIMS

1. In General

Section 2005 is a new provision that allows a court to require a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices to give notice and explanation of the conviction to the victims of the offense.

2. Present Federal Law

There are no provisions of the current Federal law requiring an offender to give notice of his conviction to his victims.[59] There is, however, an analogous concept contained in present statutes that require motor vehicle and tire manufacturers to notify the Secretary of Transportation of defects in their products and that permit the Secretary to disclose those defects to the public (15 U.S.C.

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[59] Under current law, a court could accomplish the same result as a condition of probation, but could not require such notice in more serious cases in which imprisonment, rather than probation, is warranted. Also, the Federal Trade Commission today has considerable latitude in formulating cease and desist orders pursuant to 15 U.S.C. 45, violation of which is a criminal offense, to require a party which has engaged in unfair methods of competition such as false advertising, to take affirmative steps to assure that the deception is prevented in the future. See e.g., *Waltham Watch Company* v. *Federal Trade Commission*, 318 F.2d 28 at 32 (7th Cir. 1963), citing *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951).

1402(d)). The extension of the concept to the area of criminal law was proposed by the National Commission.[60]

3. *Provisions of the Bill, as Reported*

This section will permit a court to assure notification to the persons injured by a multiple victim offense involving fraud or other intentionally deceptive practices that the perpetrator of the offense has been adjudged criminally responsible. The provision should facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (for example, that the mining stock they purchased is counterfeit) until it is too late to seek legal redress, or may not be able to ascertain the perpetrator's current whereabouts (for example, a "fly-by-night" roofing operation). The provision should also serve to alert fraud victims to the advisability of other action on their part (for example, news of the worthlessness of a phony "cancer cure" may prompt a victim to visit a doctor in time for proper medical attention).

The provisions may be expected to result in an increase in individual actions and class actions for civil recovery, and should have the collateral effect of reducing the attractiveness of large-scale, profit-seeking, deceptive practices.[61] While the perpetrator of a fraud may be convicted upon the testimony of one or two victims, the vast majority of those who have suffered from his offenses are not as readily identifiable. Since their potential claims remain unsatisfied for want of knowledge as to the offender's criminal responsibility and whereabouts, and since current fine levels are rarely high enough to permit the court to reach more than a fraction of the defendant's realized profits, the defendant, after serving the relatively limited period of imprisonment that is ordinarily imposed upon white collar defendants, is often free to enjoy a substantial remainder of the profits of his criminal venture. In combination with the higher fine levels permitted by the Code, this provision's prompting of a substantially increased likelihood of successful civil suits should materially decrease the incentive to engage in this kind of criminal operation.

The power of the court to designate the advertising areas and media in which notice is to be given, and to approve the form in which notice is given, avoids the possibility of the offender's making only token efforts of giving notice. It is actual notice rather than constructive notice that is sought to be obtained. Thus, if the group injured is readily identifiable and small, notice by letters to individuals may be sufficient. If there are multiple unknown persons injured, as in the case of a major fraud, specified newspaper ads might be used. The power of the court to approve the form of notice will give the court the ability to assure that the notice is adequate to explain to persons wronged by the offense what the defendant has done. Incentive to abide by a court's order under this section is provided not only by the court's contempt power under the Code (under which, incidentally, the court is not limited in the amount of the fine it may impose for violation of its order),[62] but by permitting the fulfillment of the order to be made an express condition of probation in those cases in which imprisonment is not also imposed,[63] or to be made an express condition of post-release supervision if such a term is imposed.[64]

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[60] Final Report § 3007.

[61] See generally 16 CrL. Rptr. 2178-2183 (Nov. 1974) (transcript of interview with Judge Charles R. Renfrew of the United States District Court of the Northern District of California).

The Committee has made several changes in section 2005 as adopted by the Senate in S. 1437 of the 95th Congress. The changes were in response to the concern of the business community that the provision might be used in an inappropriate case, such as a technical violation of a regulatory offense, with an injury to business and reputation not justified by the nature of the offense or the amount of harm done by it. The changes also reflect concerns that, even where notice might be appropriate, costs of giving notice might exceed costs that should reasonably be borne by the offender given the nature of the offense and the amount of harm done. Accordingly, the Committee has limited the nature of the offenses for which notice may be ordered to those offenses that involve fraud or other intentionally deceptive practices, regardless of whether the offense is committed by an individual or by an organization. The Committee has also amended the notice requirement to provide that the convicted offender may be ordered to give "reasonable" notice and explanation of the offense and to require that the judge shall consider, in determining whether to require notice, not only the factors set forth in section 2003(a), but also the cost of giving notice as it relates to the loss caused by the offense. In addition, the Committee has limited to $20,000 the amount of costs that the court may order the defendant to pay for such notice.[65] These amendments are intended to assure that the order of notice requires only such publication as is reasonable under the circumstances of the case. In a major fraud case involving identifiable consumers defrauded of substantial amounts of money, the defendant might reasonably be expected to give individual notice. In a major fraud case involving hundreds or thousands of consumers, each of whom sustained minor losses, notice might more appropriately be given by publication in newspapers reaching the bulk of the persons defrauded instead of individual notice. The Committee does not intend that the section be used to order "corrective advertising" or to subject a defendant to public derision. Publication should not be required beyond that which is necessary to notify the victims of the defendant's conviction. Further, if identifying the victims is so complex an undertaking that it could unduly complicate or prolong the sentencing process, the court should not require that such notice be given. The procedures set forth in section 2003(d) are designed to assist the court in determining whether notice should be ordered in those cases in which complex issues are not raised. The fact that notice was ordered or given is not intended to confer any legal right on any person, and the notice may include a caveat that it is merely informational and creates no legal rights.

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[62] See sections 1331(e) and 1335(c).

[63] See section 2103(b)(4).

[64] See section 2303.

[65] In certain cases where the execution of the order has not been stayed any costs in excess of that amount might be assumed (or costs pending payment of the ordered amount might temporarily be assumed) by the government, if otherwise appropriate and authorized, especially in cases in which timely notice is important because of the fraud's risk to the health of the victims or because of the incipient running of the civil statute of limitations.

Section 3725 permits a defendant to appeal a sentence that includes an order of notice. Because of the potential harm to business and reputation, the execution of an order of notice should be stayed unless the court finds that the appeal or petition for review of sentence is frivolous or taken for purposes of delay.

SECTION 2006. ORDER OF RESTITUTION

1. In General

Section 2006 permits the court, for the first time, to order payment of restitution in addition to any other sentence imposed pursuant to section 2001.

2. Present Federal Law

Current law does not contain a provision covering an order of restitution as a part of any sentence other than a sentence to probation. 18 U.S.C. 3651 provides that as a condition of probation the defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had".

3. Provisions of the Bill, as Reported

Subsection (a) permits the court, in addition to the sentence imposed for an offense other than one described in subchapter G of chapter 17 (Investment, Monetary, and Antitrust Offenses) or section 1737(a)(3) (relating to fraud in certain land transactions), to order a convicted defendant who caused bodily injury, or who unlawfully obtained, damaged, or destroyed property, to make restitution directly to the victim. This section expands the current law provision by authorizing an order of restitution independent of a condition of probation, thereby permitting its use in conjunction with any other sentence. It could also be required as a condition of post-release supervision if the defendant is sentenced to a term of imprisonment subject to such a term. The Committee sees no reason to restrict the payment of restitution to those instances where a term of probation is imposed. Where a defendant is financially able, restitution can be equally as appropriate where a term of imprisonment or a fine is imposed, although it is important that the court examine the overall financial implications to the defendant of ordering payment of both a fine and restitution.

Subsection (a)(1) provides that, in the case of an offense causing bodily injury, restitution is limited to expenses necessarily incurred by the victim for medical services. Subsection (a) also provides that a restitution order for payment of medical services shall not exceed "such portion of the victim's medical expenses . . . as the court determines can be ascertained without unduly complicating or prolonging the sentencing process."

Subsection (a)(2) provides that, in a case in which the defendant unlawfully obtained, damaged, or destroyed the property[66] of another in the course of committing the offense, the court could order the defendant to restore the property to the victim or to make restitution in an amount that does not exceed the value of the property. Subsection (a) also provides that a restitution order regarding property be limited "to the property that the court can identify, or to the amount that does not exceed . . . such portion of the value of the property as the court determines can be ascertained, without unduly complicating or prolonging the sentencing process."

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[66] "Property" is defined in section 111.

The section requires that the court be able to make its determination "without unduly complicating or prolonging the sentencing process," because the Committee believes that restitution should be ordered only when the court can easily resolve the issues involved. To further assure that restitution is ordered only in such instances, the section also specifies the particular items that can be covered in a restitution order. In addition, because complex issues such as standing, reliance and causation are frequently involved, the section specifically provides that restitution is not to be ordered in cases arising under the antitrust laws, the securities laws, or certain other regulatory statutes. For the same reason, the Committee expects that restitution would be inappropriate in cases arising under most other regulatory statutes as well. The procedures to be followed in imposing an order of restitution, which are described in section 2003(d), are intended to permit noncomplex issues to be resolved fairly and are not to be used to make difficult factual determinations.

Section 3725 permits a defendant to appeal a sentence that includes an order of restitution. The execution of an order of restitution may be stayed, upon appropriate findings, as in the case of a sentence of fine, if an appeal from the conviction is taken or a petition for review of sentence is filed.

Within limitations specified in subsection (a), the purpose of restitution is to restore the victim as much as possible to the condition in which he would have been if there had been no offense. Thus, medical services should be read to include such things as necessary home nursing care and needed future medical care. The property restoration provision should be read to require that the property be returned in at least as good condition as that in which it was at the time of the offense or the defendant should be required to pay for restoring it to that condition. If the property cannot be returned, the victim should receive the greater of the value of the property at the time it was taken and the value at the time of sentencing. In appropriate cases, the payment for property should include a payment for loss of the use of the property.

Sections 2202 and 2203, which define the factors to be considered in imposing a fine, the time and method of payment, and possible modification or remission of a fine, are made applicable to an order for restitution. Section 2202(a)(3) includes among the factors to be considered in determining the ability of the defendant to pay a fine that the defendant has paid, or been ordered by the court to pay, restitution to the victim of the offense. Section 2203(a)(2) permits a defendant who has voluntarily paid restitution to petition the court for a reduction in his fine up to the amount of restitution.

Sections 3812 and 3813 are also made applicable, thereby permitting use of the upgraded fine collection procedures in enforcing an order to pay restitution.

Subsection (b) provides that the court shall not order restitution if the victim is bound by a judgment or settlement in a civil proceeding involving the same injury or property loss, damage, or destruction. An amount paid in restitution is to be set off against an amount otherwise recoverable in a civil proceeding for the same injury or property loss, damage, or destruction. The purpose of these provisions is to assure that the victim does not receive double damages.

Subsection (b) also provides that the fact that restitution was ordered or paid is not admissible in evidence. This provision is intended to preclude evidence of restitution from being used as evidence that the defendant is liable in a civil proceeding. It does not, of course, mean that the evidence may not be used, e.g., for purposes of impeachment in an appropriate situation.

The order of restitution serves two purposes. First, it is a mechanism for restoring the victim financially to the extent that the offender is financially able to do so. Second, it is a penal sanction against the defendant. Unlike most other sanctions, however, it is designed to require the offender to recognize his obligation to the victim of the offense directly rather than being a payment of a "debt to society." Obviously, the imposition of an order of restitution creates no legal right of action against the United States by the person to whom the restitution is directed to be paid.[67]

The Code contains provisions, in subchapter B of chapter 44, for the compensation of victims of crime. A claim for compensation can be made against the fund even if a restitution order has been entered (although restitution that is paid may in some instances, specified in section 4113(e), limit or bar subsequent payment by the fund or require repayment of paid claims covered by the subsequent payment of restitution).

To assist in the enforcement of an order of restitution, the court may make the payment of restitution under the order a condition of probation or post-release supervision. Failure to pay restitution when ordered as a condition of post-release supervision or probation would be a violation subject to the provision of section 2105. Violations of such an order made a condition of post-release supervision would be contempt of court. Of course, if the offender was independently sentenced pursuant to section 2006, either with or without a requirement to make restitution as a condition of probation or post-release supervision, he would have a continuing obligation to fulfill the requirements of the order and would be in contempt of court if he failed to do so.

SECTION 2007. REVIEW OF A SENTENCE

This section, which has no counterpart in current law, refers to the provisions in sections 3723, 3724, and 3725, section 1291 of title 28, United States Code, and the Federal Rules of Appellate Procedure, which define the circumstances and procedures for review of sentences imposed pursuant to section 2001. The systematized guideline sentencing procedures introduced by part III are designed to eliminate from Federal criminal law the plainly disproportionate sentence. The provisions for appellate judicial review of sentences in chapter 37 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.

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[67] See section 3812(b).

SECTION 2008. IMPLEMENTATION OF SENTENCE

This section simply calls attention to the provisions of chapter 38 of the Code that govern the implementation of sentences imposed pursuant to section 2001.

SECTION 2009. SENTENCING CLASSIFICATION OF OFFENSES OUTSIDE THIS TITLE

1. In General

Section 2009 describes what letter grade in section 2301 will apply to an offense described outside title 18 for which no letter grade is otherwise specified. It also provides that the maximum term of imprisonment may not exceed the maximum provided in the statute that defines the offense, and that the maximum fine is the fine authorized by the Code or by the statute describing the offense, whichever is greater.

2. Present Federal Law

There is no counterpart for this provision, since current law contains no systematic grading scheme for sentences.

3. Provisions of the Bill, as Reported

Section 2009 did not appear in S. 1437 as passed by the Senate in the 95th Congress. That bill instead amended each section outside title 18 that described an offense to indicate the sentence grade that applied to the offense. In general those amendments specified that an offense had the grade for which the Code specified a maximum term of imprisonment closest to that for the offense in current law.

The Committee has reexamined the desirability of amending current law in an attempt to conform sentencing provisions to the grading scheme of the Code, and has decided that a general provision such as section 2009 is preferable at this time. To amend each individual section implies that the Committee has given the careful consideration to grading offenses outside title 18 that the grading for offenses within the Code has been given, while this has not generally been the case. Instead, the amendments in the last Congress usually reflected a sentence close to the current law with little attempt to rationalize the grading according to the relative seriousness of the offenses described.

The primary goals achieved by the amendment are to clarify the applicability of the various sentencing provisions in the Code to offenses outside title 18 and to substantially increase maximum fine levels for most offenses. Section 2009 achieves these goals in a much simpler fashion without implying that sentences for non-title 18 offenses have been rationalized—a step which the Committee believes should be undertaken with the assistance of the Department of Justice and interested agencies, after passage of the new title 18.

Not only do there appear to be too many regulatory offenses, and little rationality in the sentences provided for those offenses, but there also appears to be a very hazy line between the use of civil and criminal sanctions for these offenses.

Section 2009(a) grades offenses described outside title 18 for which no letter grade is provided according to the maximum term of imprisonment applicable to the offense, except that it provides that no offense outside title 18 may be more than a Class A misdemeanor. The only felony sentencing permitted pursuant to section 2009(a) is provided for offenses for which current law contains an enhanced penalty for a second or subsequent offense that is two years' imprisonment or longer, in which case the second or subsequent offense is a Class E felony.

Subsection (a) is made expressly inapplicable to the sentences for offenses described outside title 18 if another provision of title 18 provides a different sentence for the offense. Thus, the offenses covered by subchapter C (Espionage and Related Offenses) of chapter 11 and by section 1822(a)(2) (Firearms Offenses) retain the sentences set forth in current law.

Section 2009(b) states that the sentence for an offense graded according to subsection (a) has the attributes of any other sentence with that grade under the Code, with two exceptions: the maximum term of imprisonment may not exceed the term authorized by the statute that describes the offense, and the fine may not exceed the maximum fine authorized by the Code or the statute that describes the offense, whichever is higher. Thus, section 2009 may have the effect of lowering the maximum term of imprisonment from that in current law, but never of raising it. Conversely, section 2009 will often have the effect of increasing the maximum fine provided in current law, but never of lowering it. In addition, all the provisions of the general sentencing laws relating to promulgation of guidelines and policy statements, factors to be considered in imposing sentence, appeal of sentence, and implementation of sentences apply to the offenses described outside title 18 just as they apply to offenses described in title 18.

The Committee intends that future legislation creating new Federal offenses specify the grade for the offense, and that any new felony be placed in the appropriate place in the Code. It encourages the Committees with other substantive jurisdiction to consult with this Committee and the Department of Justice in determining the appropriate placement of an offense in the Code and the appropriate grade for the offense. The Committee is aware, however, that future legislation may be passed that inadvertently fails to take these steps. Accordingly, section 2009 will clarify questions that might otherwise arise as to the applicability of the general Federal sentencing law to the new offense. It is important to note that section 2009 would have the effect of lowering a new felony placed outside title 18 to a misdemeanor unless a letter grade was specified for it.

CHAPTER 21.—PROBATION

(Sections 2101-2106)

This chapter governs the imposition, conditions, and possible revocation of a sentence to a term of probation. In keeping with modern criminal justice philosophy, probation is described as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.

SECTION 2101. SENTENCE OF PROBATION

1. In General

Section 2101 authorizes the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A felony or an offense for which probation has been expressly precluded, or the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense. The section also specifies the maximum permissible terms of probation and specifies a minimum of one year's probation for a convicted felon. Separate terms are set forth for felonies (not less than one nor more than five years), misdemeanors (not more than two years), and infractions (not more than one year).

2. Present Federal Law

18 U.S.C. 3651 authorizes the court to suspend the imposition or execution of the sentence of a person convicted of an offense, other than one punishable by death or life imprisonment, and place the person on probation.[1] The maximum term of probation, including any extension, is five years for any offense. The section also provides that, if an offense is punishable by more than six months in prison but is not punishable by death or life imprisonment, the judge may impose a sentence split between imprisonment and probation. Such a split sentence must be for a term in excess of six months, with no more than six months spent in prison, and with the remainder suspended and the defendant placed on probation. A few statutes, such as 18 U.S.C. 924(c), provide that an offender convicted of a particular offense may not be placed on probation.

3. Provisions of the Bill, as Reported

Section 2101, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence. Section 2101(a) specifies that a term of probation may be imposed except in three instances. First, subsection (a)(1) excludes Class A felony offenders from receiving a sentence of probation, thus excluding, as does current law, those offenders subject to a penalty of life imprisonment or death. Second, under subsection (a)(2), probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded.[2]

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[1] See section 2001; ABA, *Standards Relating to Sentencing Alternatives and Procedures*, § 18-2.3(a) (1979).

Third, subsection (a)(3) differs from the provision of 18 U.S.C. 3651 that permits a sentence to be split between a term of imprisonment and a suspended sentence with probation[3] by specifically barring a sentence to probation in a case in which a defendant has been sentenced at the same time to a term of imprisonment either for the same offense or for a different offense. The same result may be achieved by a more direct and logically consistent route—under sections 2301 and 2303, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release. The provision will permit latitude in the specification of the time to be spent in the custody of the Bureau of Prisons and in the nature of the facility. It will also be more flexible than current law in permitting a sentence to imprisonment of any permissible length to be followed by a term during which the defendant received street supervision. The Committee is of the opinion that this flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant. For example, a convicted defendant could in an appropriate case be required to spend the first three months in prison, followed by two years of street supervision, or could be sentenced to spend two years in prison followed by six months' street supervision. If, instead, the judge believes that full-time incarceration of a convicted defendant is not appropriate but is concerned that the defendant needs more supervision than is generally available to a person on street supervision, he can sentence him to probation on the condition that he spend evenings or weekends in prison as a condition of probation (section 2103(b)(11)) or live in a community corrections facility during part of his term of probation (section 2103(b)(12)). Such provisions would permit the defendant to continue employment and his contacts with him family and community.

The major distinction between the proposed section and existing law is in the maximum term of probation authorized for an offense. 18 U.S.C. 3651 provides a term of probation of up to five years without regard to the seriousness of the offense. Section 2101(b), on the other hand, provides for differing terms depending on the seriousness of the violation. Where the offense is a felony there is a minimum term of one year and a maximum of five years. A misdemeanor conviction may lead to a term of probation of up to two years with no required minimum. An infraction may result in up to one year's probation, again with no minimum.[4]

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[2] The Committee generally looks with disfavor on minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws. The Committee believes that for the most offenses the sentencing guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation. Because of the harm caused by the offense, however, the bill as reported, does specifically preclude imposition of a term of probation for most persons convicted of two offenses: trafficking in an opiate in violation of section 1811(a), and using or possessing a firearm or destructive device in the course of a crime in violation of section 1823(a)(1) or (a)(2). In order to preclude unduly harsh application of these provisions, however, both sections provide that if the judge finds that one of a number of specified mitigating circumstances is present, the mandatory provisions need not be applied. Instead, the judge may sentence the defendant to a shorter term of imprisonment or sentence him to a term of probation.

[3] 18 U.S.C. 4205(f) provides a procedure, which would achieve the same result, by which the court may specify that a person sentenced to a term of imprisonment of more than six months and less than one year shall be released as if on parole at a date prior to the expiration of his sentence.

While the Committee is generally opposed to statutory minimum sentences, it believes that a convicted felon who is not sentenced to a term of imprisonment should at least be subject to the jurisdiction of the court for a period of a year to assure that he is able to comply with the laws for that period.

The section, like current law, creates no presumption for or against probation. The Committee believes that the sentencing guidelines can more adequately delineate those cases in which a term of probation is preferable to a term of imprisonment, or vice versa, as a means of achieving the purposes of sentencing set forth in section 2003(a)(2).

SECTION 2102. IMPOSITION OF A SENTENCE OF PROBATION

1. In General

Section 2102 sets forth the criteria to be considered by the court in determining whether to impose a sentence of probation and in determining the length of the term and the conditions of probation. It also makes clear that, despite the susceptibility of a term of probation to modification, revocation, or appeal a judgment of criminal conviction that includes such a sentence constitutes a final judgment for all other purposes.

2. Present Federal Law

18 U.S.C. 3651 authorizes the court to impose probation when it is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." [5] 18 U.S.C. 5010(a) permits the judge to place a youth offender or young adult offender [6] on probation if the "court is of the opinion that the . . . offender does not need commitment". Probation is a matter of discretion and not of right. [7]

While the statutory law is silent on the subject of the finality of a judgment that includes probation, the courts have held that such a judgment, whether it suspends execution of the sentence or suspends imposition of sentence, constitutes a final judgment for purposes of appeal from conviction.[8] They have also held that the courts may not suspend imposition of execution of sentence unless they place the convicted offender on probation.[9]

3. Provisions of the Bill, as Reported

Section 2102(a) requires that the judge consider, in determining whether to impose a sentence to a term of probation upon an organization or an individual, and in setting the term and conditions of any sentence to probation that is imposed, the factors set forth in section 2003(a) to the extent that they are applicable. In the abstract, the factors required to be considered create no presumption either for or against probation. They are set out merely to make more specific the considerations traditionally taken into account by the courts under the broad language of 18 U.S.C. 3651 and to assure their being given appropriate weight in all cases. They are designed to assist the court in exercising its discretion reasonably.

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[4] The National Commission had proposed inflexible terms of probation of five years for a felony, two years for a misdemeanor, and one year for an infraction. The Committee believes that such fixed periods might unduly restrict the court's options. See the recommendation of the National Legal Aid and Defender Association. Hearings, p. 1420.

[5] It has been held that probation is authorized, under reasonable conditions, pursuant to this statute for organizations as well as individuals. *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States* v. *J. C. Ehrlich Co. Inc.*, 372 F. Supp. 768 (D. Md. 1974).

[6] See 18 U.S.C. 4216.

[7] *United States* v. *Birnbaum*, 421 F.2d 993 (2nd Cir.), cert. denied, 397 U.S. 1044, rehearing denied, 398 U.S. 944 (1970).

[8] *Korematsu* v. *United States*, 319 U.S. 432 (1943).

[9] *United States* v. *Ellenbogen*, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968).

The effect of these considerations is to require the court to focus carefully upon the needs of the defendant and the needs of society. Those who emphasize the rehabilitative purpose of sentencing to the exclusion of other purposes have supported the view that probation should be the sentence of preference.[10] Others who would emphasize the necessity of providing effective deterrence to criminal conduct and to insure just punishment of offenders in a time of rapidly rising crime rates have suggested that there should be a presumption against the utilization of the sentence of probation for some of the most serious offenses by calling for mandatory minimum prison terms. There is no doubt that imprisonment, when compared with probation, is more effective as a punishment qua punishment, is more readily perceived by the public as a deterrent, and is clearly the most effective means of incapacitation for protection of the public. Where the purpose is providing the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be plainly preferable to imprisonment. Nevertheless, on balance, the Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases.

In its application to particular cases, the required consideration of the purposes of sentencing and of the sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a) should serve to sharpen the court's focus on all matters pertinent to its decision. The Committee is of the view that in the past there have been many cases, particularly in instances of white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of an embezzler, a confidence man, a corrupt politician, a businessman who has repeatedly violated regulatory laws, an operator of a pyramid sales scheme, or a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying deterrent or punitive impact. This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.[11] This is particularly true in light of the new requirement in section 2103(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service; he cannot simply be released on probation with no meaningful sanction. Similarly, the Committee expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions. In sum, the presence of the same predominant reason for imposing a sentence in different cases will not always lead logically to the same type of sentence. The statement of a preferred type of sentence in the bill, as reported, might serve only to undermine the flexibility with which the criminal justice system can determine the appropriate sentence in a particular case as knowledge of human behavior increases.

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[10] See Hearings, pp. 7796–7862 (statement on behalf of the National Legal Aid and Defenders Association).

During a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing. Conversely, in a situation involving an offense of little notoriety that is not frequently committed and that is committed under circumstances indicating little likelihood of recidivism, the singular significance of the rehabilitative purpose of sentencing may well almost mandate a sentence to probation. In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations.

The application of the specified considerations requires the court first to consider the nature of the offense and the history and characteristics of the offender. With those in mind, it is to consider the four basic purposes of sentencing as established in section 101(b) to the extent that one or more of them are applicable to the case, and to examine the sentencing guidelines and policies of the Sentencing Commission. Having considered these factors, the court is then required to determine whether probation would be appropriate and, if so, the length and conditions of such a term.

The language of section 2102(b) is intended to codify current judicial decisions which hold that judgments imposing probation are final judgments for all purposes, particularly for purposes of appeal, even though the sentence is subject to compliance with specified conditions, is revocable for noncompliance with those conditions,[12] and is subject to modification, extension, or early termination in certain situations.[13] The language of section 2102(b)(3) is intended to make clear that a sentence that may be appealed because it is outside the guidelines is provisional for the purpose of appeal of the sentence pursuant to section 3725, but is otherwise final.[14]

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[11] See, e.g., 16 Cr.L. Rptr. 2178, 2183 (Nov. 1974) (transcript of interview with Judge Charles B. Renfrew of the Northern District of California).

[12] *Nix* v. *United States,* 131 F.2d 857 (5th Cir.), cert. denied, 318 U.S. 771 (1943); *Buhler* v. *Pescor,* 63 F. Supp. 632 (W.D. Mo. 1945).

[13] See, e.g., *United States* v. *Albers,* 115 F.2d 833 (2d Cir. 1940).

SECTION 2103. CONDITIONS OF PROBATION

1. In General

Section 2103(a) specifies, as a condition of probation for a defendant convicted of any Federal offense that the court is required to provide, that the defendant not commit another Federal, State, or local crime during the term of probation, and to provide as a condition of probation for a defendant convicted of a felony that the defendant pay a fine or restitution or engage in community service.

Section 2103(b) sets out optional conditions which may be imposed, the last of which makes clear that the enumeration is suggestive only, and not intended as a limitation on the court's authority to consider and impose other appropriate conditions.

Section 2103(c) permits the court, after a hearing, to modify or enlarge the conditions during the term of the probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

Section 2103(d) requires that the defendant be provided with a written statement clearly setting out all the conditions of the sentence of probation.

2. Present Federal Law

18 U.S.C. 3651 authorizes the imposition of probation "upon such terms and conditions as the court deems best." The section does not mandate the imposition of any condition of probation but does list several specific conditions which may be required, i.e., payment of a fine, making of restitution, supporting of dependents, submission to treatment of addiction, or residing in or participating in the programs of a residential community treatment center. These, however, in view of the broad general grant of statutory authority, have been viewed as examples of, rather than limitations on, the kinds of conditions that a court may place on probation. 18 U.S.C. 3651 also authorizes the court to impose a split sentence, if the maximum authorized term of imprisonment is more than six months and the offense is not punishable by death or life imprisonment. Such a sentence is for no more than six months' imprisonment with the imposition or execution of the remainder of the sentence suspended and the defendant placed on probation. The court may revoke or modify any condition of probation.

3. Provisions of the Bill, as Reported

Section 2103(a) goes beyond the provisions of current law in requiring that the court impose one mandatory condition of probation on an offender convicted of a misdemeanor or an infraction, and two mandatory conditions on an offender convicted of a felony.

Under subsection (a)(1), the court is required to provide as a condition of probation for any offense that the defendant not commit another crime during the term of probation.[15] It should be emphasized, however, that this is the only mandatory condition of probation for an offender convicted of a misdemeanor or an infraction. The court is not required, for example, to specify as a condition of probation even that the offender report regularly to a probation officer since in some cases the court may conclude that unsupervised probation is appropriate.

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[14] See section 3725.

Under subsection (a)(2), the court is also required to impose on a convicted felon who is sentenced to a term of probation a condition that he pay a fine or restitution or that he engage in community service. This assures that a convicted felon will receive a publicly discernable penalty even if the circumstances of the offense do not justify a term of imprisonment. The court may in appropriate cases impose a combination of the conditions described in subsection (a)(2).

Section 2103(b) lists some of the discretionary conditions that may be placed on a probationer's freedom to the extent that they are reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender, and the four purposes of sentencing set forth in section 2003(a)(2). If a condition involves a deprivation of property or liberty, that condition must be reasonably necessary to carry out the purposes of sentencing set forth in section 2003(a)(2). In addition, under section 2102(a), the policy statements and sentencing guidelines promulgated by the Sentencing Commission would be considered in determining the conditions of probation. Most of the conditions set forth in section 2103(b) have been used and sanctioned in appropriate cases under the current statute.[16] The list is not exhaustive, and it is not intended at all to limit the court's options—conditions of a nature very similar to, or very different from, those set forth may also be imposed. Except as provided in subsection (a)(2), none of the conditions listed in the subsection, on the other hand, are required to be imposed. The conditions, many of which closely follow the proposals of the National Commission,[17] are simply designed to provide the trial court with a suggested listing of some of the available alternatives which might be desirable in the sentencing of a particular offender.[18] It is anticipated that, in determining the conditions upon which a defendant's probation is to be dependent, the court will review the listed examples in light of the Sentencing Commission's guidelines and policy statements, weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances. It is not intended that all the conditions suggested in subsection (b) be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of probation in his case. In addition, the court may not impose a condition of probation which results in a deprivation of liberty for the defendant unless that deprivation is "reasonably necessary" to carry out the purposes of the sentence.

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[15] By use of the term "crime" rather than the term "offense", the noncommission of felonies and misdemeanors, as defined in section 111, is made a mandatory condition of probation, while noncommission of infractions is not.

[16] See, e.g., *Bernal-Zazueta* v. *United States*, 225 F.2d 64 (9th Cir. 1955) (no commission of crime during term of probation); *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972) (support dependents and meet family obligations); *Stone* v. *United States*, 153 F.2d 331 (9th Cir. 1946) (payment of fine, refrain from specified employment); *United States* v. *Velazco-Hernandez*, 565 F.2d 583 (9th Cir. 1977).

[17] Final Report § 3103.

[18] While most of the conditions would have as their primary purpose the rehabilitation of the offender, some of the listed alternatives, of course, would also tend to effect the punitive and deterrent purposes of sentencing—and even, to a certain degree, the incapacitive purpose in limited kinds of cases.

Paragraph (1) carries forward the discretionary probation condition in current law that requires the defendant to support his dependents and expands the condition to permit the court to order in appropriate cases that the defendant meet other family responsibilities.

Paragraph (2) carries forward current law in permitting the imposition of a condition of probation requiring payment of a fine, thus making the recalcitrant offender face the possibility of a summary increase in punishment for such a probation violation as opposed to leaving him to face only the normal fine collection procedures. Of course, as provided by section 2202(a), the fine may be not set so high that the defendant, acting in good faith, is unable to pay it. A fine may be imposed both as a separate sentence and as a condition of probation. It also may be imposed pursuant to subsection (a)(2) as a mandatory condition of probation on a convicted felon instead of or in addition to a condition ordering payment of restitution or community service.

Paragraph (3) carries forward the current law provision permitting imposition of a condition that the defendant be required to make restitution to a victim. Restitution may be ordered both as a separate sentence and as a condition of probation. The use of the separate sentence is discussed in connection with the section dealing with that provision. The use of the condition of probation need not necessarily be as limited, since the court could in an appropriate case order restitution not covered by paragraph (3) (and section 2006) under the general provisions of subsection (a)(2). In an appropriate case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses. The defendant in a particular case may have an interest in satisfying such a condition if it will cause the court to forego sentencing him to a term of imprisonment. The court may also choose to impose a requirement of payment of restitution as the mandatory condition of probation he must impose pursuant to subsection (a)(2).

Paragraph (4) permits the judge to require that the defendant give notice of his conviction to victims of the offense in accord with the provisions of section 2005. An order of notice may be both a separate sentence and a condition of probation. Making an order of notice a condition of probation gives the court the revocation of probation as an enforcement tool for violation of the condition.

Paragraph (5) permits the judge to order as a condition of probation that the defendant work conscientiously at suitable employment or conscientiously pursue a course of study or vocational training that will equip him for suitable employment. When combined with other appropriate conditions, this condition might enable the court to avoid sending some defendants who might otherwise be incarcerated to prison. For example, a judge might devise a probation program for a non-dangerous defendant whereby he spent evenings or weekends in prison or lived in a community corrections facility and worked or went to school during the day.

Paragraph (6) suggests the condition that an individual defendant refrain from engaging in a specific occupation, business, or profession or that either an individual or organizational offender engage in a specified occupation, business, or profession only to a stated degree or under specified circumstances. The condition may be imposed only if the occupation, business, or profession bears a reasonably direct relationship to the nature of the offense. Thus a bank teller who embezzles bank funds might be required not to engage in an occupation involving the handling of funds in a fiduciary capacity.[19] Similarly, an organization convicted of executing a fraudulent scheme might be directed to operate that part of the business in a manner that was not fraudulent. The Committee recognizes the hardship that can flow from preventing a person from engaging in a specific occupation, business, or profession, particularly for those activities requiring many years of education and experience. This particular condition of probation should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person. Insofar as this paragraph might be used to disqualify a person from holding a management position in an organization, the Committee emphasizes that, absent some other relationship between the position held and the nature of the offense, such a disqualification must bear a reasonable relationship to an abuse of the management position for a criminal purpose. Paragraph (6) is intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result. The Committee has modified paragraph (6) from the language in S. 1437 as passed by the Senate in the 95th Congress. The provision had originally permitted the judge to order an organization, as well as an individual, to refrain from engaging in a particular occupation, business, or profession. Because of business concerns that the listing of the conditions might encourage inappropriate use to put a legitimate enterprise out of business, that part of the provision has been modified to relate only to individual offenders. This deletion should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law.

Paragraph (7) allows the court to require the offender to refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.[20] As in the case with the other discretionary conditions of probation listed in section 2103, the conditions suggested by this paragraph would have to be tailored to the particular circumstances of the defendant. For example, if the defendant were a convicted drug trafficker, it might ordinarily make sense to condition his probation upon his avoidance of other known drug traffickers, but if he were to be employed during the period of his probation by a business that makes a practice of hiring former offenders, the application of such a condition would have to be designed to avoid any suggestion that the defendant could not engage in necessary occupational associations with his co-workers.

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[19] The constitutional permissibility of such a condition has been recognized. See *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), cert. denied, 376 U.S. 911 (1964).

[20] This kind of provision has also been recognized as permissible. See *Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972). The phrase "unnecessarily associating" is meant to be construed as not precluding "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer." *Arciniega* v. *Freeman*, 404 U.S. 4 (1971).

Paragraph (8) permits the court to require as a condition of probation that the defendant refrain from the excessive use of alcohol and from any use of narcotic drugs or other controlled substances without a prescription from a licensed medical practitioner. It is not intended that this condition of probation be imposed on a person with no history of excessive use of alcohol or any illegal use of a narcotic drug or controlled substance. To do so should be considered a departure from the principle that conditions of probation be reasonably related to the considerations provided in section 2003(a)(1) and (a)(2).

Paragraph (9) permits the imposition of a condition of probation prohibiting the defendant from possessing a firearm, destructive device, or other dangerous weapon. While this condition may only be imposed if it is reasonably related to the purposes of sentencing, there are, of course, other Federal, State, and local restrictions on firearms and explosives which may apply to the defendant as well.

Paragraph (10) notes the availability of the condition that the defendant undergo medical or psychiatric treatment as specified by the court and remain in a specified institution if required for medical or psychiatric purposes. Under this paragraph a court may require a defendant to participate in the program of a narcotic or alcohol treatment facility, regularly visit a psychiatrist, participate in recognized group therapy programs, or undergo other forms of treatment for physical or emotional problems. Because receipt of treatment in an institution rather than on an outpatient basis would involve a deprivation of liberty, the judge would have to assure himself that it was reasonably necessary to a purpose of sentencing set forth in section 2003(a)(2) to require residence at an institution.

Paragraph (11) authorizes as a condition that the probationer remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time not to exceed in the aggregate one year, during the first year of probation. This provision permits short periods of commitment to a training center or institution as a part of a rehabilitative program. Flexibility is provided by permitting confinement in split intervals, thus authorizing, for example, week-end imprisonment with release on probation during the week for educational or employment purposes, or nighttime imprisonment with release for such purposes during working hours. This condition could be used only to deprive the defendant of his liberty to the extent "reasonably necessary" for the purposes set forth in section 2003(a)(2). The condition has been amended by the Committee in the reported version of S. 1630 to apply only to confinement for intervals of time, such as weekends or nights. It could also be used, for example, to provide a brief period of confinement, e.g., for a week or two, during a work or school vacation. It is not intended to carry forward the split sentence provided in 18 U.S.C. 3651, by which the judge imposes a sentence of a few months in a prison followed by probation. If such a sentence is believed appropriate in a particular case, the judge can impose a term of imprisonment followed by a term of supervised release under section 2303.

Paragraph (13) provides that the judge may require as a condition of probation that the defendant work in community service as directed by the court. This provision is intended by the Committee to encourage continued experimentation with community service as an appropriate condition in some cases. This condition is also one of the three choices from which the judge must select in imposing a mandatory condition on a convicted felon who is sentenced to probation. This condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victim cannot be readily identified or the actual amount of injury is slight.

Paragraph (14) notes that the probationer may be required to reside in a certain place or refrain from residing in a particular place, thus permitting the court to remove the defendant from a detrimental environment which apparently contributed to his prior anti-social behavior (e.g., a criminogenic environment) and to reside during the term of probation in an area—perhaps in a distant district [21]—more conducive to rehabilitation.

Paragraphs (15) through (19) contain commonly employed conditions relating to day-to-day supervision of a probationer. Paragraph (15) permits the court to order that the defendant remain in the jurisdiction of the court unless he receives permission from the court to leave. In appropriate cases, of course, jurisdiction over the probationer may be transferred from one district to another, even on a short-term basis, in order to assure continuing supervision over the probationer. Paragraph (16) permits the court to order that the defendant report to a probation officer as directed by the court or the probation officer. This condition is not mandatory—a defendant may be placed on unsupervised probation with only the condition that he not commit a crime or with another condition that does not require day-to-day supervision, such as an order to pay a fine or to make restitution. Paragraph (17) permits the judge to order as a probation condition that a probation officer be permitted to visit the defendant at home or at another place specified by the court (but not by the probation officer). Paragraph (18) relates to answering inquiries of the probation officer and notifying him of any change of address or employment. Paragraph (19) permits the court to require that the defendant notify the probation officer promptly if he is arrested or questioned by a law enforcement officer.

Finally, paragraph (20), like current law, permits the judge to fashion other conditions of probation. These would include, inter alia, conditions to achieve the assistance of the defendant in effectuating the goals of other listed conditions.

Unlike current law, subsection (b) specifically states that the conditions must be reasonably related to the factors set forth in section 2003(a)(1) and (a)(2) and any condition that involves a restriction of liberty must be reasonably necessary to the purposes of sentencing. This language is designed to allay the fears of such disparate groups as the ACLU and the Business Roundtable that probation conditions might be too restrictive in a particular case or might involve more supervision than is justified by the case. The judge is limited in imposing conditions of probation to imposing only those that carry out the purposes of sentencing in a particular case. He cannot restrain liberty of a defendant who does not need that level of punishment or incapacitation—nor can he place business conditions on an organization that are unrelated to the purposes of sentencing for the offense of which the organization is convicted. It is not the intent of the Committee that the courts run organizations as a part of probation supervision—but it is the intent of the Committee that all necessary conditions related to the characteristics of the offense and the offender and the purposes of sentencing be imposed.

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[21] See section 3805.

Section 2103(c) provides that the court, after a hearing,[22] may modify, reduce or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation pursuant to the provisions applicable to the initial setting of conditions of probation. This provision brings forward the substance of current law (18 U.S.C. 3651), except that the provision does not now contain a requirement of a hearing. It enables the court to adjust the conditions of probation to the changed circumstances of the defendant.

The requirement in section 2103(d) that the court direct the probation officer to provide to a defendant a written statement that sets forth the conditions of a sentence of probation with sufficient clarity and specificity to serve as a guide for the defendant's conduct and for such supervision as is required, is new to Federal law.[23] The Committee believes, however, that it should be required both as a matter of fairness and as a matter of efficient program administration.[24]

SECTION 2104. RUNNING OF A TERM OF PROBATION

1. In General

This section governs the commencement of a term of probation; the effect of other sentences upon the running of the term; and the court's power to terminate or extend a term of probation.

2. Present Federal Law

While the probation provisions of current title 18 are silent as to when a term of probation commences, the courts have held that, unless another time is specified in the order, it begins when the judge imposes sentence.[25] Rule 38(a)(4) of the Federal Rules of Criminal Procedure provides that if the order placing the defendant on probation is not stayed, the court shall specify when the term of probation shall commence.

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[22] See *Skipworth* v. *United States*, 508 F.2d 598 (3d Cir. 1975).

[23] See *Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966); *McHugh* v. *United States*, 230 F.2d 262 (1st Cir.), cert. denied, 351 U.S. 966 (1956).

[24] An error in the recitation of conditions in the statement, or even an accidental failure to supply such a statement, should not necessarily be construed as a reason to impugn the propriety or validity of a decision to revoke or modify the probation because of a breach of a condition actually imposed, since the court will have stated those conditions during the sentencing proceeding in any event.

[25] *Gaddis* v. *United States*, 280 F.2d 334 (6th Cir. 1960); *Davis* v. *Parker*, 293 F. Supp. 1388 (D.C. Del. 1968).

The provisions of the current statutes are also silent with regard to the running of multiple terms of probation. Where the question has arisen, the courts have held that such terms may be consecutive but may not exceed the maximum term of five years provided by 18 U.S.C. 3651.[26] If, however, the court has not specified whether two terms of probation are to run consecutively or concurrently, it has been held that the presumption is that they run concurrently.[27]

The current statutes do not specify whether a term of probation can run concurrently with a sentence of imprisonment. While most courts have held that probation is tolled by a sentence of imprisonment,[28] at least one court has held that incarceration for an offense committed prior to the imposition of probation does not toll the term of probation.[29]

18 U.S.C. 3653 grants discretion to a court, upon review of a probationer's conduct, to discharge the probationer from supervision and terminate the proceedings against him, or to extend the term of probation. However, the authority to extend the term of probation is subject to the five year limitation contained in 18 U.S.C. 3651.[30]

3. Provisions of the Bill, as Reported

Subsection (a) of section 2104 provides that the term of probation commences on the day the sentence of probation is imposed, unless otherwise ordered by the court.

Subsection (b) provides that multiple terms of probation are to run concurrently, regardless of when or for what offenses or by what jurisdiction they are imposed and that a term of probation is to run concurrently with a term of supervised release; consequently, unlike the situation under current law, consecutive terms of probation may not be imposed. Of course, if a defendant is sentenced to terms of probation for offenses of varying seriousness, the maximum term of probation would be measured according to the term for the most serious offense. This subsection also makes it clear that probation does not run during any period during which the defendant is imprisoned in connection with a conviction for any other offense, except, of course, during limited periods of confinement as a condition of probation or supervised release.

Subsection (c) authorizes the court, after considering the factors set forth in section 2003(a), to terminate a term of probation and to discharge the defendant prior to its expiration at any time in the case of a misdemeanor or an infraction or at any time after one year in the case of a felony, if the conduct of the defendant and the interest of justice warrant such action. While 18 U.S.C. 3653 permits such early termination at any time without regard to the degree of the offense, it appears appropriate to retain the court's jurisdiction over an offender convicted of a felony for at least a one year period. If the court determines that an offender need not be actively supervised during such a period, it may, of course, impose only the least onerous discretionary conditions of probation that it decides to be advisable, or may permit the probationer to remain at liberty subject only to the conditions that he not commit another offense and, if he is convicted of a felony, that he pay a fine or restitution or engage in community service.[31]

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[26] *United States* v. *Pisano,* 266 F. Supp. 913 (E.D. Pa. 1967). But see *United States* v. *Lancer,* 361 F. Supp. 129 (E.D. Pa. 1973), vacated and remanded on other grounds, 508 F.2d 719 (3d Cir. 1975), cert. denied, 421 U.S. 989, in which the court held that, where two indictments were consolidated at the defendant's request, the court could impose two consecutive terms of imprisonment.

[27] *Engle* v. *United States,* 332 F.2d 88 (6th Cir. 1964), cert. denied, 379 U.S. 903.

[28] *U.S. ex rel Demarois* v. *Farrell,* 87 F.2d 957 (10th Cir.), cert. denied, 302 U.S. 683, rehearing denied, 302 U.S. 775 (1937); *Ashworth* v. *United States,* 392 F.2d 245 (6th Cir. 1968).

[29] *United States* v. *Pisano, supra* note 26.

[30] *United States* v. *Edministon,* 69 F. Supp. 382 (W.D. La. 1947); *United States* v. *Buchanan,* 340 F. Supp. 1285 (E.D. N.C. 1972).

Section 2104(d) authorizes the court, after a hearing and pursuant to the provisions applicable to the initial setting of the term of probation, to extend a term of probation, unless the maximum term was previously imposed, at any time prior to its expiration or termination. This provision is necessary, the Committee believes, to encourage judges to initially impose what appears to be the most appropriate length for the term of probation. If judges feared that a term would later be found to be too short and that the court would be powerless to extend it, they might well impose the maximum term in all cases.

Section 2104(e) provides that a term of probation remains subject to revocation during its continuance.

SECTION 2105. REVOCATION OF PROBATION

1. In General

This section provides that probation may be revoked if the defendant violates a condition of probation, and specifies the period during which such revocation may take place.

2. Present Federal Law

18 U.S.C. 3653 provides that during the term of probation a probationer may be arrested by his probation officer without a warrant "for cause." It further provides that within the maximum term permitted by section 3651 (five years) the court may issue a warrant for the arrest of the probationer for a violation of a condition occurring prior to expiration of the term imposed. After arrest, the probationer must be taken as speedily as possible before the court having jurisdiction over him, whereupon the court may revoke probation and reinstate the sentence originally imposed, impose a lesser sentence, or, if imposition of the sentence was suspended, impose any sentence which could have been imposed at the time of the judgment of conviction. The courts have held that after revocation, no further probation may be ordered.[32]

3. Provisions of the Bill, as Reported

Section 2105(a) provides that if a defendant violates a condition of probation the court either may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, continue the defendant on the sentence of probation, subject to such modifications of the term or conditions of probation as it deems appropriate, or may revoke probation and impose any other sentence which could have been imposed at the time of the initial sentencing. Provisions governing the arrest of a probationer are contained in sections 3026 and 3806 of the Code; provisions governing the hearing to be accorded the probationer are contained in Rule 32.1.[33] The Committee felt it appropriate to leave procedural provisions concerning probation revocation rights in Rule 32.1 where they will remain subject to periodic revision by the Judicial Conference of the United States.

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[31] See section 2103(a).

[32] *Fox* v. *United States*, 354 F.2d 752 (10th Cir. 1965).

Section 2105(b) provides that revocation of probation or imposition of another sentence may occur after the term of probation has expired if a violation of a condition occurred prior to the expiration, if the adjudication occurs within a reasonable period of time, and if a warrant or summons on the basis of an allegation of such a violation was issued prior to the expiration of the term of probation. Thus, the section more narrowly restricts the time within which probation may be revoked than does 18 U.S.C. 3653, which permits revocation at any time within the maximum period of five years regardless of the term initially imposed or the seriousness of the offense.

SECTION 2106. IMPLEMENTATION OF A SENTENCE OF PROBATION

This section, which has no counterpart in current law, merely directs attention to the fact that provisions governing the implementation of probation are contained in subchapter A of chapter 38.

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[33] See e.g., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); see also *Morrisey* v. *Brewer*, 408 U.S. 472 (1972).

CHAPTER 22—FINES

(Sections 2201-2204)

This chapter sets the maximum monetary fines that may be imposed for the various levels of criminal offenses, specifies the criteria to be considered before imposition of fines, and provides for the subsequent modification or remission of fines previously imposed. In so doing the Code makes major advances in using the mechanism of fines as an effective sanction for white collar crime.

The Committee is of the view that fines generally have been an inappropriately under-used penalty in American criminal law, even though there are many instances in which a fine in a measured amount can constitute a highly effective means of achieving one or more of the goals of the criminal justice system. Part of the reason for the under-utilization of fines as a criminal sanction is the fact that the levels of fines under current law, with rare exceptions,[1] are pegged so low that the courts are not able to use them effectively as a sentencing option. These statutory limits are largely the products of an earlier era when the average wage earner achieved a yearly income considerably lower than that common today, and when inflation had not yet reduced the value of currency to its present level.

There exists today the anomalous situation in which a typical felony may be punishable on the one hand by a maximum of five years' imprisonment, and on the other hand by a fine of only $5,000 or $10,000.[2] Before the two facets of the stated penalty may be seriously considered as alternatives to one another, they must be of roughly equivalent severity. Yet today, five years of a person's freedom, even when measured according to the average individual's earning power alone, carries a value in excess of $50,000. In a case in which a serious violation has occurred, but in which the court has found reason to explore alternatives to incarceration, the current state of the law needlessly hampers the court in its fashioning of an appropriate sentence. It is with the intent of enhancing the ability of the courts to fashion remedies appropriate to offenses by providing maximum fines at levels that are suitable to our times—and at levels that will help to eliminate the popular view that certain offenses will lead only to a nominal fine equatable to a minor cost of doing business—that the Committee has drafted the provisions of this chapter.

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[1] A dramatic exception is the provision of 21 U.S.C. 848 which permits a fine of $100,000 ($200,000 if the defendant is a recidivist) for the offense of operating a continuing drug-trafficking enterprise. Under this section, fines of up to $300,000 have been imposed on individuals under multiple-count indictments. See *United States* v. *Sperling,* 506 F.2d 1323 (2d Cir. 1974). See also 15 U.S.C. 1, 2, and 3.

[2] Under most current law provisions, of course, such a statement of a penalty is not a recitation of two mutually exclusive alternatives: both the five-year maximum term of imprisonment and the $5,000 maximum fine may be imposed.

SECTION 2201. SENTENCE OF FINE

1. In General

Section 2201 establishes the general statutory authority for the imposition of a fine as a penal sanction. The maximum amount of the fine that may be imposed in a particular case depends on whether the offense is classified as a felony, misdemeanor, or infraction: whether the offender is an individual or an organization; and, in the case of a misdemeanor, whether the offense resulted in loss of human life.

2. Present Federal Law

Under the present Federal law, fines are specified as an authorized form of sentence for virtually all offenses. It is recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual Federal offenders. The authorized maximum limits, however, are generally very low. Complaints that current fine levels are insufficient to accomplish the purposes of sentencing are being voiced by Federal judges with increasing regularity.[3]

Present Federal law also includes large and logically inexplicable disparities in the levels of fines permitted as criminal sanctions for offenses of essentially similar natures. The following are examples.

A. Conspiracy to defraud the United States or to commit any offense against the United States is punishable by a maximum prison term of five years and by a fine of up to $10,000.[4] On the other hand, a conspiracy to prevent a person from accepting Federal office or to prevent a Federal official from discharging his duties, while graded more seriously in terms of the authorized maximum prison term, which is six years, carries a lesser maximum fine—$5,000.[5]

B. Forgery of naturalization or citizenship papers carries the same maximum five-year prison term as does forgery of an entry visa, yet the former offense carries a maximum fine of $5,000 and the latter a maximum fine of only $2,000.[6] Moreover, another offense of this kind, falsification of an invoice by a consular official, carries a maximum prison term of three years and thus, presumably, is conceived to be a less serious offense than the two cited forgery offenses. Yet, it provides for a $10,000 fine.[7]

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[3] See the statement of Judge Renfrew of the Northern District of California in which he complains that the $50,000 maximum that he imposed in a price-fixing case was not sufficient under the circumstances and that "had the maximum been more than $50,000, the amount of the fines would have been substantially more as to all of the defendants. . . . [H]ere, it seems to me, is a situation where clearly there's a need for increasing the amount of the fine." 16 Cr.L. Rptr. 2178, 2181 (Nov. 1974). See also the statement of Judge MacMahon of the Southern District of New York in which, upon imposing the maximum available fines of $75,000 on each of two millionaire defendants found guilty of evading $761,000 in taxes, he said that he regretted that the tax laws did not permit him to impose a higher fine on each defendant. New York Times. March 20, 1973, p. 26, col. 1. (Note too, that in each of these cases the fines available were substantially higher than those generally available in Federal criminal cases. Note also that the maximum fine levels for many antitrust offenses were substantially increased in the 94th Congress (15 U.S.C. 1, 2, and 3).)

[4] 18 U.S.C. 371.

[5] 18 U.S.C. 372.

[6] 18 U.S.C. 1426; 18 U.S.C. 1546.

[7] 18 U.S.C. 1019.

C. Robbery of a Federally insured bank is punishable by a fine of up to $5,000, as well as by a sentence to imprisonment.[8] Robbery of a post office must result in a term of imprisonment but cannot result in a fine.[9]

D. A postmaster who demands more than the authorized postage for mail matter and a vessel inspector who collects more than the authorized fee both are subject to a maximum prison term of six months. The vessel inspector can be fined up to $500, while the postmaster is subject to a maximum fine of only $100.[10]

E. One who injures property of the United States is subject to a fine of up to $10,000 if the damage exceeds $100, and a fine up to $1,000 if the damage is less than $100.[11] One who injures property of the United States on a wildlife refuge, no matter how much the damage, is subject to a maximum fine of only $500.[12]

F. A clerk of court who converts funds which have come into his hands by virtue of his official position may be punished by up to ten years' imprisonment if the amount exceeds $100.[13] Conversion by a clerk of court of funds which belong in the registry of the court also carries a maximum sentence of ten years in prison if the amount exceeds $100.[14] But in the former case a fine can equal double the amount converted, while in the latter a fine cannot exceed the amount converted.

3. Provisions of the Bill, as Reported

Subsection (a) authorizes the use of fines in criminal sentencing. There are no offenses for which a fine may not be imposed. As provided in sections 2001 (b) and (c), a fine may be imposed alone or in addition to any other sentence. Payment of a fine may also be made a condition of probation pursuant to section 2102(b)(2), or a mandatory condition of probation for a convicted felon pursuant to section 2102(a)(2), so that revocation of probation is available as a means of enforcing the fine. A fine may also be made a condition of post-release supervision, permitting the court to hold a defendant in contempt if he fails to pay it.

Subsection (b) establishes the maximum limits of fines for felonies, misdemeanors, and infractions, except to the extent that a different limit may be authorized for the offense.[15] The fine levels set forth in the subsection are considerably higher than those generally authorized by current law, and are designed to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realities.[16] Penalties for organizations are set at higher levels than those for individuals, following the New

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[8] 18 U.S.C. 2113(a).

[9] 18 U.S.C. 2114.

[10] 18 U.S.C. 1726; 18 U.S.C. 1912.

[11] 18 U.S.C. 1361.

[12] 18 U.S.C. 41.

[13] 18 U.S.C. 645.

[14] 18 U.S.C. 646.

[15] Sections 1331 and 1335, for example, specifically authorize the imposition of a fine in any amount deemed just by the court. Section 1853 (Environmental Pollution) specifies maximum fines that would sometimes be higher than those applicable under section 2201, as do some sections in other titles. See also subchapter C of chapter 11 and sections 1822(c) and 2009 of the Code.

[16] Such substantially higher fine levels were recommended, by, inter alia, the Committee on Reform of Federal Criminal Laws of the American Bar Association. Hearings, pp. 5425, 5817.

York model,[17] in order to take cognizance of the fact that a sum of money that is sufficient to penalize or deter an individual may not necessarily be sufficient to penalize or deter an organization, both because the organization is likely to have more money available to it and because the sentence for an organization obviously cannot include a term of imprisonment.

The fine levels in subsection (b) for felonies and misdemeanors committed by individuals and for felonies committed by organizations, are considerably higher than the levels provided in S. 1437 as passed by the Senate in the 95th Congress. In addition, subsections (b)(1)(A) and (b)(2)(A) were amended in the 96th Congress to provide the same maximum fine for a misdemeanor that results in the loss of life as for a felony. These amendments are designed to offset the deletion in the 96th Congress of section 2201(c) in S. 1437, which provided that, as an alternative to the maximum fines set forth in subsection (b), "a defendant who has been found guilty of an offense through which pecuniary gain was directly or indirectly derived, or by which bodily injury or property damage or other loss was caused, may be sentenced to pay a fine that does not exceed twice the gross gain derived or twice the gross loss caused, whichever is the greater." The business community expressed concerns that the standard for determining the amount of the fine set forth in the provision could result in an unwieldy sentencing proceeding that was virtually a trial on the question of damages. The Committee concluded that an increase in the maximum fine levels for serious offenses could assure that a fine could be imposed that would usually reach the defendant's illgotten gains while avoiding undue complexity in the sentencing hearing. Of course, in a situation in which, for example, the defendant obtained millions of dollars in the course of committing an offense, the provisions for an order of restitution or an order of notice to victims may be used, depending on the circumstances, in conjunction with a fine to assure that a convicted defendant cannot keep what he obtained, if to do so would not unduly complicate or prolong the sentencing process.

It is intended by the Committee that the increased fines permitted by this section will help materially to penalize and deter white collar crime. Certainly no correctional aims can be achieved where the maximum sentence imposable is at such a low level that it can be regarded merely as a cost of doing business which may in fact be more than offset by the gain from the illegal method of doing business. The need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners.

While the Committee believes that the increased fine levels will be of particular importance in the white collar crime area, it does not mean to imply that fines are not an important aspect of sentencing in other areas as well. It is hoped that the sentencing provisions will lead to more creative use of sentencing options, as for example the use of a sentence to pay a fine for minor offenders who may not be able to pay a fine in a lump sum but are sentenced to pay a reasonable fine in installments over a period of time. Such a sentence could be particularly important, for example, in the case of a defendant who is too poor to pay a fine as a lump sum but who is convicted of a minor offense that warrants some sentence, for punishment and deterrent purposes, that is short of imprisonment but still enough of a sentence to carry out those purposes.

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[17] McKinney's N.Y. Crim. Law § 400.30 (1969).

It might be noted at this point that fines collected in criminal cases under the Code will be paid into, and will form a substantial portion of, the new Victim Compensation Fund.[18] The fact that fines will indirectly result in restitution to the victims of offenses provides an added reason for the Congress to assure that fine levels are set at realistic levels and an added incentive for judges to carefully consider the merits of imposing high fines in particular cases.

SECTION 2202. IMPOSITION OF A SENTENCE OF FINE

1. In General

Section 2202 sets out factors that the court must consider in imposing a fine, specifies the degree to which a sentence to pay a fine is final, places a limit on the aggregation of multiple fines, provides that the court may specify the time and method of payment of the fine, precludes the imposition at the time a sentence to pay a fine is imposed of an alternative sentence to be served if an imposed fine is not paid, provides notice that agents of an organization who are authorized to disburse its assets are individually responsible for payment from the funds of the organization of the fine assessed against it, and provides that a fine imposed on an agent or shareholder of an organization may not be paid from the assets of the organization, unless expressly permissible under applicable state law.

2. Present Federal Law

The provisions of this section generally are not the subject of any current Federal statutes, although imprisonment in lieu of the payment of a fine is inferentially authorized.[19]

3. Provisions of the Bill, as Reported

Subsection (a) specifies the factors, through cross-reference to section 2003(a), to be considered by the court in determining whether to impose a fine, and in determining its amount and the means of payment. As is the case with regard to other potential sanctions, the court is required to consider both the nature and circumstances of the offense and the history and characteristics of the defendant, the purposes of sentencing with regard to which a fine may be an appropriate response, and the guidelines and any policy statements which may be applicable. Use of the qualifier "to the extent that they are applicable" in referring to the four stated purposes of sentencing is intended as recognition that a fine may often be a highly useful means of supplying just punishment and of deterring others from engaging in like offenses—particularly offenses affording the opportunity for monetary gain—while the other purposes of sentencing would less commonly be served by a sentence to pay a fine.

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[18] See section 4111 *et seq.* See also sections 3811-3813.

[19] See 18 U.S.C. 3565. But see *Tate* v. *Short,* 401 U.S. 395 (1971); *Williams* v. *Illinois,* 299 U.S. 235 (1970).

In considering the characteristics of the defendant, the court is specifically required to consider the ability of the defendant to pay a fine in the amount and manner contemplated in view of the defendant's income, earning capacity, and financial resources, and, if the defendant is an organization, the size of the organization. The court is also required to consider the burden that the fine will place on the defendant and on his dependents, any payment of restitution by the defendant or any requirement that the defendant make reparation to the victim, the impact of the fine on the future financial stability of the defendant, any effort by an organizational offender to discipline the persons responsible for the offense or ensure against recurrence of the offense, and any other equitable considerations that are pertinent.

The maximum fine levels are sufficiently high to permit considerable flexibility in tailoring the fine level to the situation in a particular case. While it is not intended that a fine for a solvent individual should be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a fairly high fine would serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine. On the other hand, the court need not avoid the use of a sentence to pay a fine against an individual who is not wealthy since the Code would permit installment payments of a fine. In some cases, the most appropriate sentence might be, for example, the payment of a fairly substantial fine by paying installments of a specified amount out of each pay check over a period of time.

The considerations in setting fine levels can obviously be quite complex, and they warrant careful attention by the Sentencing Commission in formulating sentencing guidelines and policy statements to aid in imposing sentence.

The requirement that the court, in assessing the ability of a defendant to pay a fine, consider any payment of restitution by the defendant or any requirement that the defendant make restitution to the victims of the offense is not intended necessarily to result in the court's avoiding imposition of a fine that might otherwise be imposed or reducing the fine by the amount of restitution to be paid. Either of these results might, however, be appropriate in a particular case, depending upon the effect of payment of restitution upon the defendant's ability to pay a fine and upon the purposes of sentencing to be served by requiring payment of a particular fine. The provision is intended to encourage the court to order restitution under section 2006 or to make payment of restitution a condition of probation or post-release supervision under section 2103(b)(3) or 2103(a)(2) in appropriate cases. Of course, if the defendant has, prior to sentencing made reparation or made arrangements to make reparation to the victims of his offense, this will have an effect on his financial resources which should be taken into account in assessing the ability of the defendant to pay a fine, and may, for example, alleviate somewhat the need to impose a high fine for purposes of punishment and deterrence.

Subsection (b) was added by the Committee in this Congress. It provides that, unless otherwise expressly permitted, the aggregate of fines that may be imposed on a defendant at the same time for offenses that arise from a common scheme or plan and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense. The provision was added in response to concerns that there might be some offenses, particularly regulatory offenses, where an ongoing pattern of conduct constituted numerous minor offenses, with the result that the defendant might be subject to an unjustifiably high maximum fine.

Subsection (c) makes clear that, even though a fine imposed by the sentencing judge may be modified or remitted pursuant to section 2203, corrected pursuant to rule 35 and section 3723 or 3724, or appealed and modified pursuant to section 3725 if it is outside the guidelines, the judgment of conviction that includes a fine is final for all other purposes. This clarifies the provisional nature of the sentence pending any later modifications authorized by the Code while making clear that the conviction is otherwise final.

Subsection (d) permits the court to authorize payment within a specified period of time or in installments. Such flexible payment schedules are now specifically authorized in the Federal system for a fine imposed as a condition of probation,[20] and are authorized in many States.[21] Clearly, if the defendant can earn the fine and pay it over a period of time, there seems little justification for choosing imprisonment or a lesser fine where the higher fine would otherwise be the clearly more appropriate sentence.

Subsection (e) prohibits the imposition at the time the sentence to pay a fine is imposed of an alternative sentence to be served if the fine is not paid. If the defendant fails to pay his fine, the court may determine the remedy after the nonpayment and after an inquiry into the reasons for it.[22] If, for example, nonpayment has occurred because the defendant's financial circumstances have made payment an undue financial burden, it may be necessary to adjust the amount of the fine pursuant to the provisions of section 2203. If, on the other hand, the defendant is able to pay the fine but chooses to ignore his legal obligation to pay it, the provisions of subchapter B of chapter 38 regarding collection of fines may be utilized to collect the fine.

Subsection (f) specifies that where an organization is fined it is the duty of each of the organization's employees or agents who is authorized to make disbursement of the organization's assets to pay the fine from its assets. This provision is designed to assure that a corporation will not be able to escape or delay liability by means of obfuscating the nature of its structure.[23] The subsection also precludes the payment of a fine imposed on an agent or shareholder of an organization from being paid out of the assets of the organization unless such payment is expressly permissible under applicable State law. The purpose of the exception is simply to recognize that the governing of internal corporate operations is appropriately a matter for the law of the State of incorporation. Most States, the Committee understands, carefully circumscribe indemnification for fines. The term "expressly permissible" is intended to distinguish between situations in which State statutes or court decisions authorize indemnification and those in which State law prohibits it or is silent. The court's finding is to extend only to that issue. If indemnification is authorized, State law governs the manner for determining whether it is proper in a particular case.

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[20] 18 U.S.C. 3651.

[21] Working Papers, p. 1285.

[22] This is in opposition to the existing statute, 18 U.S.C. 3565, but in line with constitutional requirements. See *Williams* v. *Illinois*, *supra* note 19.

[23] The Committee had considered including specifically in this subsection a reference both to the disbursing officers of the organization and "their superiors". It was decided, however, that such a reference to "superiors" would be redundant since whatever authority a disbursing officer or cashier would have, would also be within the authority of every individual from his immediate superior through the chief executive officer. Cf. section 403.

SECTION 2203. MODIFICATION OR REMISSION OF FINE

1. In General

Section 2203 provides the flexibility necessary to accommodate changes in the financial condition of a defendant. Since section 2202 specifies that the ability of a defendant to pay is relevant to the amount of a fine, a modification or remission of the fine should be available when that ability changes. The court is thus equipped to adjust the fine of the well-intentioned defendant in order to avoid creating unjustifiable impoverishment. An unexcused failure to pay a fine, however, may be prosecuted as any other criminal contempt.[24]

2. Present Federal Law

There is no counterpart to this section in existing Federal law; as previously noted, the current statute permits a judgment in a criminal case to require imprisonment until the fine is paid.[25]

3. Provisions of the Bill, as Reported

Subsection (a) permits a defendant who has been sentenced to pay a fine to petition the court for changes in the terms of payment or remission of all or part of the fine in specified circumstances. Under paragraph (1), a defendant who has paid part of a fine for whom the circumstances that justified imposition of a fine in a particular amount or payment by a particular time or method have changed, may petition the court for modification of the method of payment, remission of all or part of the unpaid portion of the fine, or a change in the time or method of payment. The provision recognizes that the amount or method of payment of a fine may become too harsh to serve the purposes of sentencing fairly. Paragraph (2) permits a defendant who has voluntarily made restitution to the victim of his offense after a fine was imposed to petition the court for a reduction in the amount not exceeding the amount of restitution. This provision places the defendant who voluntarily makes restitution after a fine is imposed on the same financial footing as the defendant who voluntarily makes restitution before sentencing or who is ordered to make restitution as part of his sentence.[26]

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[24] See subchapter D of chapter 33. It should also be pointed out that the unexcused failure to pay a fine in the time and manner specified may, if payment was made a condition of probation, result in a revocation of probation and the imposition of any other sentence that originally was available. See sections 2103(b)(2) and 2105(a)(2).

[25] 18 U.S.C. 3565.

[26] Section 2202(a)(3).

Subsection (b) permits the judge to enter an appropriate order if the circumstances warrant relief. Of course, the considerations set forth in section 2202(a) for the setting of the initial fine and its time and method of payment are equally applicable to a determination whether a remission in the fine or a change in the time or method of payment is warranted.

These provisions allow the reasonable implementation of the underlying principles of this chapter, as suggested by the American Bar Association,[27] the Model Penal Code,[28] and several State statutes.[29]

SECTION 2204. IMPLEMENTATION OF A SENTENCE OF FINE

Section 2204 notes that implementation of a sentence to pay a fine is governed by the procedures outlined in sections 3811 through 3813 of the Code. Full discussion of these procedures is contained in the report on subchapter B of chapter 38.

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[27] ABA Standards Relating to the Administration of Justice, Sentencing Alternatives and Procedures, § 18-7.4 (1979).

[28] Model Penal Code § 302.3 (P.O.D. 1962).

[29] See also Working Papers, pp. 1286, 1328.

CHAPTER 23.—IMPRISONMENT

(Sections 2301-2306)

Chapter 23 sets forth the basic considerations governing the imposition of sentences of imprisonment. It creates the frame of reference used throughout the Code to determine the maximum sentence that may be imposed for each offense. It deals specifically with the terms of imprisonment and supervised release authorized for the various grades of offenses; criteria for imposing such sentences; collateral aspects of sentences of imprisonment; operation of multiple sentences; and calculation of terms of imprisonment.

SECTION 2301. SENTENCE OF IMPRISONMENT

1. In General

Section 2301 provides that a defendant convicted of an offense may generally be sentenced to a term of imprisonment, establishes the classes of offenses and specifies the maximum authorized term of imprisonment for each class. If no term of imprisonment is specified under current law for an offense outside title 18, section 2009 precludes the addition of such a term. If a section of current title 18 is moved by section 201 of the bill, as reported, to title 18 Appendix and the section provides no term of imprisonment in current law, an offense under the provision will continue not to be punishable by imprisonment.

2. Present Federal Law

Present Federal criminal law, which has grown by sporadic addition and deletion, has resulted in there being authorized by the current title 18 at least seventeen levels of confinement, ranging from life imprisonment to thirty days. By combining imprisonment and fine variations, some seventy-five different punishment levels may be isolated. Comparison of punishment provisions for particular offenses leads to the exposure of numerous apparent inconsistencies.

In addition to the sentencing provisions found in the text of each individual criminal statute there are two generally applicable special offender sentencing provisions in current law.[1] These two provisions allow a term of imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law" for a special offender in certain clearly defined instances. Both require notice and a hearing with rights of counsel, confrontation, and compulsory process if the special offender sentence is sought by the prosecutor, and a sentence pursuant to the provisions may be appealed by the defendant or the government.[2]

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[1] 18 U.S.C. 3575 and 21 U.S.C. 849.

A sentence to a term of imprisonment in excess of one year is subject to the defendant's eligibility for release on parole for at least two-thirds of the sentence. The time at which a prisoner is eligible for release on parole is determined pursuant to the provisions of 18 U.S.C. 4205, which provides three possible actions by the sentencing judge that will affect a convicted defendant's parole eligibility date. First, if the judge specifies no parole eligibility date, a prisoner sentenced to a term of imprisonment that exceeds one year will be eligible for parole under 18 U.S.C. 4205(a) after serving one-third of the term or ten years, whichever is less. Under 18 U.S.C. 4205(b)(1), the judge may specify a time for parole eligibility that occurs before the time that would apply under 18 U.S.C. 4205(a). Under 18 U.S.C. 4205(b)(2), the judge may specify that the defendant will be immediately eligible for parole, and specify only the maximum term of imprisonment.[3]

In addition, the Parole Commission has in recent years used parole guidelines that recommend an appropriate length of time to be spent in prison by a defendant who was convicted of a particular crime and who has a particular history and characteristics.[4]

As presently structured, the laws concerning the imposition of a term of imprisonment and the determination of a date for parole eligibility often are not only incompatible but also work to promote disparity and lack of certainty in the criminal justice system. If a sentencing judge wishes to assure that he has a high degree of control over the time a defendant will actually spend in prison, he must not only determine what that period of time is, but must also evaluate the effect that the parole eligibility statute and the parole guidelines will have on the sentence that he imposes. If, for example, a judge believes that a defendant should spend 20 months in prison, less good time, for a robbery offense that carries a maximum term of imprisonment of 15 years,[5] committed under mitigating circumstances, he could achieve that result under current law by sentencing him to exactly 20 months imprisonment, but could achieve the result only because the existing parole guidelines would not permit parole during such a short period. If, instead, he tried to achieve that result by sentencing the defendant to 60 months in prison, with eligibility for parole in one-third that time pursuant to 18 U.S.C. 4205(a), in the belief that most prisoners are released on parole at their parole eligibility date, the result would probably be that the defendant would spend at least 24 months in prison, the lowest period provided for robbery in the parole guidelines. Only if the Parole Commission agreed with the judge that there were particular mitigating circumstances not taken into account in the guidelines would the defendant serve the length of time that the judge intended.[6] On the other hand, if the judge thought the defendant should spend five years in prison, he would have to sentence the defendant to a 15-year term without early parole eligibility in order to assure that operation of the parole guidelines would not result in an earlier release from prison than the judge intended.[7] If the judge thought the defendant should serve seven years in prison, he could not control that result at all; such a sentence exceeds any period recommended in the parole guidelines for the offense of robbery (except for multiple offenses) and exceeds any period for which the judge could make the defendant ineligible for parole.

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[2] See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980); *United States* v. *Neary*, 552 F.2d 1184 (7th Cir. 1977); *United States* v. *Stewart*, 531 F.2d 326 (6th Cir. 1976); *United States* v. *Ilacqua*, 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

[3] In addition to the parole eligibility provisions for regular adult offenders, current law contains a number of specialized parole eligibility requirements. Those for youth offenders and young adult offenders included in 18 U.S.C. 5017 specify that a defendant sentenced to imprisonment under one of those provisions is eligible for parole immediately and must be released on parole at least two years before expiration of sentence, and those relating to persons sentenced under title II of the Narcotic Addict Rehabilitation Act in 18 U.S.C. 4254 specify parole eligibility after six months.

[4] The parole guidelines appear in 28 C.F.R. § 2.20.

[5] See, e.g., 18 U.S.C. 2111 and 2112.

Thus, sentencing judges and the Parole Commission second-guess each other, often working at cross-purposes. The argument that early release on parole should be retained to help alleviate judicial sentencing disparity fails to take into account the fact that it is the very availability of such release that helps to create that disparity. The judges are attempting to apply their individual sentencing philosophy to control the true sentence of the defendant, while the Parole Commission is attempting to alleviate the resulting disparity. Obviously neither is successful under current law. The problem is compounded by the fact that the judges do not generally state reasons for their sentences or the lengths of time they believe defendants should actually spend in prison, effectively precluding the Parole Commission from evaluating the judges' views, to the extent it might find them pertinent, as to the influencing factors in particular cases.

3. Provisions of the Bill, as Reported

Section 2301(a) states the general rule that all individual offenders, regardless of the type of offense committed, may be sentenced to a term of imprisonment.[8] This differs slightly from the approach taken by the National Commission in that the Commission's sentencing provisions did not provide for imprisoning persons committing the lowest class of offenses.[9] The Committee is of the belief that a very short term (five days) of imprisonment is appropriate for some offenders who are found to have committed infractions since, inter alia, the shock value of a brief period in prison may have significant special deterrent effect. In addition, as a practical matter imprisonment may be the only available punishment for indigents.[10]

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[6] It should be noted that even if the defendant who was sentenced to 60 months in prison had been made eligible for parole either at a designated time less than one-third the sentence or immediately upon commencement of sentence pursuant to 18 U.S.C. 4205(b), the application of the parole guidelines to the defendant would not be altered regardless of the judge's (usually unstated) purpose in specifying early parole eligibility.

[7] While the parole guidelines do provide that the worst two groups of offenders who commit robbery should spend from 48 to 72 months in prison, the Parole Commission's conclusions as to which prisoners would fall within those groups might differ from those of the sentencing judge.

[8] That rule is subject to limited exceptions. If an offense outside title 18 is not punishable under current law by a term of imprisonment, it will not be punishable by imprisonment under section 2009.

[9] Final Report § 3201.

[10] *Tate* v. *Short*, 401 U.S. 395 (1971). See the recommendation by the Committee on Reform of the Federal Criminal Laws of the American Bar Association, Hearings, pp. 5815, 5817.

Subsection (b) sets forth nine classes of offenses.[11] There are five felony classes with authorized terms of imprisonment ranging from life imprisonment to three years; three misdemeanor classes with maximum terms ranging from one year to thirty days; and the aforementioned infraction category carrying a maximum of five days. This categorization of offenses accords fairly closely with the range and number of categories adopted in several recent state codifications, and, except for the addition of a three-year felony and a six-month misdemeanor, accords closely with the recommendation of the National Commission concerning the number of categories adopted.[12]

It must be remembered that the terms set forth are the *maximum* periods for which a judge is authorized to sentence an offender in each such category—they represent the Committee's judgment as to the greatest period the Congress should allow a judge to impose for an offense committed under the most egregious of circumstances. It should also be remembered that the Sentencing Commission will be promulgating guidelines that will recommend an appropriate sentence for a particular category of offender who is convicted of a particular category of offense, and that the guidelines would reserve the upper range of the maximum sentence for offenders who repeatedly commit offenses or those who commit an offense under particularly egregious circumstances.[13] It is expected, for example, that the ordinary sentence imposed for a Class C felony will be considerably less than the twelve-year maximum authorized. This subsection is designed simply to provide a maximum limit on the broad range within which the Sentencing Commission and the judges are to operate. The subsection is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current Federal statutes that also customarily set forth only the maximum limit on the judge's discretion.

It should also be noted that, with the deletion of current law provisions authorizing extended terms for special dangerous offenders beyond the terms ordinarily applicable, the maximums authorized by subsection (b) represent the maximums of the upper-range penalties appropriate for use against such special offenders.[14]

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[11] All offenses are categorized in one of the nine grades except espionage and related offenses (sections 1121–1124, 1131) where current law language, including penalty provisions, is retained verbatim.

[12] The National Commission in its Final Report proposed generally higher terms of imprisonment for felonies since it retained parole: it proposed a supergrade category of felony permitting life imprisonment (§ 3601); three other classes of felonies, entailing imprisonment for thirty, fifteen and seven years (§§ 3002(1); 3201(1)): two categories of misdemeanors, carrying one-year imprisonment and thirty days' imprisonment (§§ 3002(2); 3201(1)); and one infraction category (§ 3002(3)). Under the Commission's proposed formulation, with the lowest felony carrying a maximum of seven years, many offenses presently carrying a two to five years' maximum would either have to be upgraded to a six-year felony or reduced to a one-year misdemeanor. To avoid a six-fold jump in potential penalty between one offense category and the next higher category, the Committee felt it appropriate to include a three-year felony, in accord with the recommendation of the cognizant committee of the American Bar Association that there not be a gap in possible maximum sentences from a one-year maximum to a maximum several times as high. (Hearings, p. 6816. Similar considerations dictated the inclusion of a six-month misdemeanor.

[13] See Hearings, p. 7814 (statement on behalf of the National League Aid and Defenders' Association); ABA Standards Relating to Sentencing Alternatives and Proceedings, § 18–2.1(e) (Second Edition Tentative Draft 1979).

[14] See section 994(h) of title 28, United States Code, as proposed by section 126 of the reported bill.

Moreover, the Committee believes that when the maximum authorized sentences are compared with their actual applicability to particular substantive offenses in the Code the limited availability of the longer term sentences will become apparent. For instance, Class B felonies carry the high maximum penalty of twenty-five years—but the Class B penaltities are available for only nine offenses, all of a patently serious nature.[15] Further, for the first time in Federal criminal law, the sentencing judge will be sentencing within the maximum permissible term of imprisonment after consideration of sentencing guidelines that will recommend the top of the possible sentencing range only for the most egregious cases, and the defendant will be able to obtain appellate review of the sentence if it exceeds the guideline range applicable to him.[16]

A sentence imposed by a judge pursuant to section 2301 will represent the actual period of time that the defendant will spend in prison, except that a prisoner, after serving one year of his term of imprisonment, may receive credit at the end of each year of up to 36 days per year toward service of sentence for satisfactory compliance with the institution rules.[17] The use of such "determinate" sentences, as noted earlier, represents a substantial departure from the sentencing philosophy on which current law is based. At the time the original parole statutes were drafted a judicial sentence was to represent only the maximum term that a defendant was to remain incarcerated, and the role of the Parole Commission was to determine when in the course of that incarceration the defendant had become sufficiently rehabilitated to be safely returned to society. While for the reasons stated previously the rehabilitation model is no longer the basis of the parole release decision, the theory on which it is based still pervades the existing Federal sentencing statutes that govern the sentencing process. Under current law, if a judge sentences a defendant to a term of imprisonment that exceeds one year in length, that sentence will always result in the prisoner's being eligible for parole after serving one-third of the term, or less if the judge so specifies. In no case can the judge specify that, for example, a defendant should serve two years in prison and then be released for a transitional period of supervision. This is true even though logically the attributes of the entire sentence could now be set at the time of sentencing, with potential disparity avoided by a combination of guidelines and appellate review. The factors routinely considered today by the Parole Commission in setting release dates [18] relate entirely to information known at the time of sentencing.[19]

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[15] Section 1102(a)(1) (Armed Rebellion or Insurrection intended to overthrow the government of the United States or sever a state from the United States); 1111 (Sabotage, in certain wartime or national defense emergency situations); 1621 (Kidnapping if the victim is released voluntarily and in a safe place before trial); 1631 (Aircraft Hijacking); 1641 (Aggravated Rape); 1801 (Operating a Racketeering Syndicate); 1802 (Racketeering); 1811 (Trafficking in an Opiate, if the amount of the opiate is 100 grams or more, or if the offense consists of distributing the opiate to a person who is under 18 years of age and is at least 3 years younger than the defendant, or the offense is committed after a previous conviction for an opiate offense or while the defendant was on release pending trial for an offense described in section 1811(a)); 1812 (Trafficking in Drugs, if the offense involves a Schedule I of II substance that is a kilogram or more of a narcotic drug other than an opiate or 500 grams or more of phencyclidine (PCP) or 5 grams or more of lysergic acid diethylamide (LSD)).

[16] See section 3725. There are two specialized provisions for appellate review of a sentence in current law: 18 U.S.C. 3576, relating to review of a sentence as a dangerous special offender, and 21 U.S.C. 849(h), relating to review of a sentence as a dangerous special drug offender.

[17] See section 3824(b) of the reported bill.

The Committee is of the view, in light of the reasons that have been reviewed previously, that the indeterminate sentence no longer has a role to play in the context of a guideline sentencing system. The guideline sentencing system must totally supplant the indeterminate sentencing system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate.

It is the expectation of the Committee that determinate sentences imposed under this new sentencing system will not, on the average, be materially different from the actual times now spent in prison by similar offenders who have committed similar offenses. Logic and reason on the part of the Sentencing Commission, as reviewed and accepted by the Congress, will control the length of the recommended terms, but historical averages will be the starting point for their development.[20] There will be some logical changes from historical patterns, of course, as in the case of a white collar offense for which plainly inadequate sentences had been imposed in the past, but for the most part the average times served should be similar. Certainly the guidelines will remove from the criminal justice system the artificially high terms of imprisonment that are imposed today as a means of taking into account the effects of the parole laws on the time the defendant will serve. Both the offender and society will benefit.[21]

SECTION 2302. IMPOSITION OF A SENTENCE OF IMPRISONMENT

1. In General

This section specifies the factors to be considered by a sentencing judge in determining whether to impose a term of imprisonment and, if a term is to be imposed, the length of the term. The section also provides that, if a term of imprisonment is imposed, the judge may recommend a type of prison facility suitable for the defendant. The section also makes clear that a judgment of conviction is final even though the sentence is provisional in that it may be modified, corrected, or appealed, and describes the circumstances under which the term of imprisonment may be modified.

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[18] The "salient factor score" set forth in 28 C.F.R. § 2.20, provides for consideration by the Parole Commission, in determining whether and when to release a prisoner on parole, of the number of prior adult or juvenile convictions and incarcerations of more than 30 days, the age at time of commencement of current offense, recent period free of incarceration, whether the defendant was on parole or probation, or in confinement or escaped at time offense was committed, any history of heroin or opiate dependence. 46 Fed. Reg. 35638 (July 10, 1981).

[19] Only in some of those cases in which a hearing examiner sets a parole release date outside the Parole Commission guidelines, or in which a prisoner has a record of serious institutional rules violations, may factors not known at the time of sentencing affect the release date. Hoffman and DeGostin, *Parole Decision-Making: Structuring Discretion*, United States Board of Parole Research Unit, Report 5, Table II, at p. 11 (June 1974), set out in the Hearings at p. 9217. In addition, if a prisoner has forfeited "good time" that has not been restored, he is deemed to have "violated the rules of the institution to a serious degree" and thus to be ineligible for parole, 28 C.F.R. § 2.6(a), 41 F.R. 37320 (September 3, 1976).

[20] See section 994(*l*) of title 28, as proposed by the bill, as reported.

[21] The Sentencing Commission is required to take into account, inter alia, the nature and capacity of the existing penal and correctional facilities and services, as well as the purposes of sentencing, when it promulgates the sentencing guidelines. 28 U.S.C. 994(g). This requirement itself will help to avoid any unjustified material change in the actual median time spent in prison by Federal prisoners.

2. Present Federal Law

At present there are no general Federal statutes prescribing factors that a judge must consider in deciding whether to sentence a defendant to a term of imprisonment and, if so, how long that term of imprisonment should be.

In addition, as noted before, the sentencing judge has very limited control under current law over the question of how long a defendant will actually spend in prison. The defendant whose sentence is over a year long is eligible for release on parole by operation of law after serving one-third of the term of imprisonment or ten years, whichever is less,[22] unless the judge has specifically made him eligible for parole at an earlier time [23] or immediately upon commencement of service of sentence.[24] The law contains no statement concerning when the judge should specify early or immediate eligibility for parole. It also does not permit the judge in any case in which the term of imprisonment exceeds one year to make the defendant ineligible for parole for a longer period than one-third of his term of imprisonment.

There are several specialized sentencing statutes that provide some statutory guidance concerning the factors to be considered in imposing a sentence under their provisions. These statutes relate to dangerous special offenders, dangerous special drug offenders, youth and young adult offenders, and drug addicts.

Detailed criteria for a sentence to a term of imprisonment longer than that which would ordinarily be provided for a felony are provided in 18 U.S.C. 3575 for "dangerous special offenders" and in 21 U.S.C. 849 for "dangerous special drug offenders." The criteria for the two classes of offenders are parallel, except that the dangerous special offender provisions may apply to any felony if the criteria are met, while the dangerous special drug offender provisions apply only to felonies involving controlled substances. In order for the dangerous special offender or dangerous special drug offender sentencing provisions to apply to a defendant he must be found to be both "dangerous" and a "special" offender because he fits one of three classifications set forth in the statute. A defendant is considered "dangerous" if a period of confinement for a felony that is longer than the maximum provided in the statute defining the felony "is required for the protection of the public from further criminal conduct by the defendant." [25]

The dangerous special offender provisions apply to an offender who (1) was previously convicted of two or more separate felonies, and has either been convicted of the last one within five years of the current offense or been released from prison, on parole or otherwise, on one of the offenses within the past five years; (2) committed the charged felony as part of a pattern of criminal conduct which generated a substantial source of his income and in which he manifested special skills or expertise; or (3) committed the felony as part of, or in furtherance of, a conspiracy with three or more other persons in which the offender played or had agreed to play a leadership role, or in which he used, or had agreed to use, bribery or force. The classifications of dangerous special drug offenders are substantially the same, except that they relate only to persons charged with controlled substances felonies, and where the characterization of the offense is dependent on previous convictions, these convictions are for felonies concerning dealing in controlled substances. Under either statute, the applicability to the defendant of the special offender classification must be established by a preponderance of the information, including information from the trial, the sentencing hearing, and the presentence report.

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[22] 18 U.S.C. 4205(a).

[23] 18 U.S.C. 4205(b)(1).

[24] 18 U.S.C. 4205(b)(2).

[25] 18 U.S.C. 3575(f); 21 U.S.C. 849(f).

The Federal Youth Corrections Act [26] provides that a person who is under 21 years of age at the time of conviction may be sentenced under the Act under specified circumstances. Section 5010(d) provides that a youth offender may be sentenced to a regular adult sentence if the court finds that he "will not derive benefit from treatment" under the Act. This provision has been interpreted by the Supreme Court to require that the court consider whether to sentence a youth offender pursuant to the Act but not to require that the court state reasons for deciding that it will or will not impose sentence under the Act.[27] If the court does sentence a youth offender under the Act, it may either sentence him to an indeterminate sentence for purposes of "treatment and supervision" [28] or, if it finds "that the youth offender may not be able to derive maximum benefit from treatment . . . prior to the expiration of six years," may sentence him to the custody of the Attorney General "for treatment and supervision" pursuant to the provisions of the Federal Youth Corrections Act to any "further period that may be authorized by law for the offense or offenses." [29]

In both cases, the defendant is immediately eligible for parole.[30] In the case of an indeterminate sentence pursuant to 18 U.S.C. 5010(b), the defendant may spend no more than four years in prison and must be discharged unconditionally from supervision on or before six years from the date of his conviction.[31] If he is sentenced pursuant to 18 U.S.C. 5010(c) to a sentence that would apply to a regular adult offender, the defendant must be released on parole at least two years before the expiration of his sentence and must be released from supervision by the expiration of his term.[32]

If a defendant is a "young adult offender" between the ages of 22 and 26 at the time of conviction, the judge may sentence him, after considering his previous criminal record and record of juvenile delinquency, his background and capabilities, his physical and mental health, and "such other factors as may be considered pertinent," pursuant to the Federal Youth Corrections Act if it finds "that there are reasonable grounds to believe that the defendant will benefit from treatment" under the Act.[33] Unlike the sentencing of offenders under the age of 22,[34] the sentencing judge is not required to consider imposing sentence pursuant to the Federal Youth Corrections Act; rather, the sentencing judge has the option of imposing sentence pursuant to that Act in his discretion.

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[26] 18 U.S.C. 5001 *et seq.*

[27] *United States* v. *Dorsynski,* 418 U.S. 424 (1974).

[28] 18 U.S.C. 5010(b).

[29] 18 U.S.C. 5010(c).

[30] 18 U.S.C. 5017(a).

[31] 18 U.S.C. 5017(c).

[32] 18 U.S.C. 5017(d).

[33] 18 U.S.C. 4216.

[34] See *United States* v. *Dorszynski,* 418 U.S. 424 (1974), which requires the judge to find that an offender under the age of 22 will receive no benefit from sentencing under the Youth Corrections Act, but does not require that the judge state reasons for his conclusion.

Finally, title II of the Narcotic Addict Rehabilitation Act [35] provides that, if the court finds that an "eligible offender" [36] is an addict and "is likely to be rehabilitated through treatment," the court must sentence the defendant to the custody of the Attorney General for treatment unless the Attorney General certifies that adequate facilities and personnel for such treatment are not available.[37] Such a commitment is for an indeterminate period of up to ten years, but not "to exceed the maximum term of imprisonment" applicable to the offense. The defendant may be released on parole at any time after six months of treatment if the Attorney General recommends such release to the Board of Parole and the Surgeon General certifies "that the offender has made sufficient progress to warrant his conditional release under supervision." [38]

3. Provisions of the Bill, as Reported

For the first time in the Federal criminal law, a court would be required, pursuant to section 2302(a), to consider specified factors prior to the imposition of a sentence of imprisonment [39] in all cases in which a defendant was convicted of a Federal offense. The court must consider, to the extent that they are applicable,[40] the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment, a deterrent effect, incapacitation, and an opportunity for rehabilitation; and the guidelines and any policy statements of the Sentencing Commission that are applicable. While judges generally consider offense and offender characteristics in determining the type and length of sentence to be imposed under current law, the listing of the factors to be considered serves to focus attention on the specific purposes of the sentencing process and to assure that adequate emphasis is given to each. Again, it should be noted that there will be cases in which incarceration would be appropriate to serve only one or two of the listed purposes of sentencing; nevertheless, if imprisonment is found to be justified for any one of the purposes, except as noted below, its imposition is authorized under this section. In such a case, whether it should be imposed when authorized is a question to be resolved after balancing all the relevant considerations.

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[35] 18 U.S.C. 4251 *et. seq.*

[36] "Eligible offender" is defined in 18 U.S.C. 4251(f) to include any individual convicted of an offense against the United States except an individual whose conviction is for a crime of violence, or whose conviction is for trafficking in narcotic drugs (unless the offense was committed primarily to support the defendant's addiction), or against whom a felony charge is pending, or who is on probation or parole, or who has been convicted of a felony on two or more prior occasions, or who has previously been committed for narcotic addiction on three or more occasions.

[37] 18 U.S.C. 4253(a).

[38] 18 U.S.C. 4254.

[39] The factors are required to be considered in determining whether a term of imprisonment should be imposed, in determining the appropriate length of any such term, and in determining whether it should be followed by a period of supervised release. The court is also required to consider policy statements issued by the Sentencing Commission in deciding whether to make a recommendation as to the appropriate type of prison facility for the defendant. See section 3821(b).

[40] The phrase "to the extent that they are applicable" acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.

Subsection (a) specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is to discourage the employment of a term of imprisonment on the ground that a prison has a program that might be of benefit to the prisoner. This does not mean, of course, that, if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

The bill, as reported, drops the special sentencing provisions permitting extended terms of imprisonment for dangerous special offenders, but does not reject the idea that the most dangerous groups of offenders should receive the most substantial sentences. The Committee believes that the guidelines provide an appropriate means for embodying the same considerations which are contained in current dangerous special offender statutes. In 28 U.S.C. 994(h), the Sentencing Commission is specifically directed to assure that the sentencing guidelines require a substantial term of imprisonment for categories of defendants in which the defendant has an extended criminal history, is a career criminal, or is engaged in racketeering in a managerial or supervisory capacity, or committed a violent felony while on release pending trial, sentence, or appeal from another felony charge or conviction.

The bill, as reported, also drops the special sentencing provisions for youth offenders, young adult offenders, and drug addicts. Under the bill, as reported, the Sentencing Commission is required to consider what impact, if any, such characteristics of the defendant as his age and his physical condition, including drug dependence, should have on the appropriate sentence.[41] By including such considerations in the formulation of sentencing guidelines, uniform treatment of the characteristics for all defendants similarly situated will be promoted. In addition, the converse situation is also recognized; the bill places in 28 U.S.C. 994 a recognition that a young first offender, who has not committed a serious crime, ordinarily should not receive a sentence to imprisonment. The Committee believes that this approach to such factors as youth is far preferable to the approach in current law. While the Bureau of Prisons has found that it is better from the standpoint of both prisoners and the criminal justice system to have prisoners in different age groups in the same institution, providing separate wings within an institution for youthful offenders, some courts have recently held that the Youth Corrections Act requires separate institutions for these offenders.[42] The Bureau of Prisons thus has taken steps to provide separate institutions despite its misgivings concerning the wisdom of doing so, both because the limited number of offenders for such institutions causes most of them to be incarcerated far from home and because an institution containing only youthful offenders tends to have more discipline problems than one with a variety of age groups. The Committee shares these concerns and believes that these provisions should be deleted. The directive to the Sentencing Commission contained in proposed 28 U.S.C. 994(d) to consider the effect that age should have on sentences, and the authority of the Bureau of Prisons under proposed 28 U.S.C. 572(b) to provide specialized programs for youthful offenders, are appropriate to assure such specialized treatment as is desirable for this category of offenders.

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[41] Section 994(d) of title 28, United States Code, as added by section 126 of the bill, as reported.

[42] *Watts* v. *Hadden*, 651 F.2d 1354 (10th Cir. 1981); *Dancy* v. *Arnold*, 572 F.2d 107 (3d Cir. 1978); *Brown* v. *Carlson*, 431 F. Supp. 775 (W.D. Wis. 1977). Other courts have held that strict or total separation of youthful offenders from adult offenders is not required. See, e.g., *Outing* v. *Bell*, 632 F.2d 1144 (4th Cir. 1980).

Subsection (b), is added to make clear that a judgment of conviction is final even though it includes a provisional sentence that is subject to modification as described in subsection (c), correction pursuant to rule 35 of the Federal Rules of Criminal Procedure [43] and section 3723 or 3724, or, if the sentence is outside the guidelines, appeal and modification pursuant to section 3725.

Subsection (c) provides that a court may not modify a sentence except as described in the subsection. The subsection provides "safety valves" for modification of sentences in three situations.

The first "safety valve" applies, regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner. In such a case, under subsection (c)(1)(A), the Director of the Bureau of Prisons could petition the court for a reduction in the sentence, and the court could grant a reduction if it found that the reduction was justified by "extraordinary and compelling reasons" and was consistent with applicable policy statements issued by the Sentencing Commission.

The second "safety valve," appearing in subsection (c)(2), permits the court to review the sentence of an individual who has served five years of a term of imprisonment if either the defendant or the Director of the Bureau of Prisons requests the review. The court may, after considering the applicable factors set forth in section 2003(a), reduce the term of imprisonment "if it finds that extraordinary and compelling reasons require such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission". Subsection (c)(2) makes clear that the court may consider only two such motions; one, after the defendant has served at least five years of his sentence, and another one if the defendant has served at least the minimum sentence specified in the applicable guideline and the minimum guideline is eight years or longer.

The third "safety valve," set forth in subsection (c)(3), permits the court to reduce a term of imprisonment, upon motion of the defendant or the Director of the Bureau of Prisons or on its own motion, if the term was based on a sentencing range in the applicable guideline that was lowered by the Sentencing Commission after the defendant's sentence was imposed and if such a reduction is consistent with applicable policy statements of the Sentencing Commission.

The value of the form of "safety valves" contained in this subsection lies in the fact that it assures the availability of specific review of lengthy terms of imprisonment while, at the same time, it avoids the current unacceptable division of sentencing authority between the court and the parole authority. Unlike the current situation, where the court and Parole Commission second-guess one another in determining the appropriate release date, the approach taken in the reported bill keeps the sentencing power in the judiciary, where it belongs, yet permits later review of especially lengthy sentences, or in other particularly compelling situations.

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[43] As amended in Part II of the bill, as reported.

Paragraph (1)(B) notes that the court may modify an imposed sentence to the extent that modification is otherwise permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure. Most sentence modifications will occur pursuant to Rule 35 of the Federal Rules, as amended by Part II of the Criminal Code Reform Act of 1981. That rule carries forward current law provisions concerning correction of an illegal sentence or one illegally imposed. It also contains new provisions that permit the sentencing court to correct a sentence in four new situations. First, the court is permitted to correct a sentence within the guidelines that is the result of an incorrect application of the sentencing guidelines. Second, the court is permitted to correct a sentence imposed under 18 U.S.C. 2006 as a result of an inappropriate procedure to determine the amount of restitution. Third, the court is permitted to lower a sentence to reflect the defendant's subsequent substantial assistance in the investigation or prosecution of another person if such assistance is a factor in applicable guidelines or policy statements. Fourth, the court is required to correct a sentence that has been found by a court of appeals to be unreasonable or to be the result of an incorrect application of the guidelines and that has been remanded for imposition of a greater or lesser sentence, and to correct a sentence if the court of appeals has found the original sentence to be unreasonable and has required additional sentencing proceedings, if the proceedings indicate that the original sentence was incorrect.

Two other salient points should be noted in conjunction with this section. First, in articulating for the first time a general philosophy of sentencing—embodying the concepts of deterrence, incapacitation just punishment, and rehabilitation—the Code avoids the highly emotional past debate over whether or not there should be a general sentencing presumption either in favor of incarceration or an alternative to incarceration. The approach taken in the Code is to avoid any general reference to either presumption and, instead, rely on the general purposes of sentencing, leaving to the specific guidelines promulgated by the Commission the issue of whether imprisonment in an individual case is appropriate or not. Second, it is, of course, apparent that the general purposes of sentencing, in and of themselves, will not solve the problem of disparity. Obviously, this section must be read in conjunction with the specific guidelines, and other provisions of the bill, which are designed to deal with the immediate practical problem of disparity.

Subsection (d) permits the court to order, in conjunction with a term of imprisonment, that a defendant convicted of a felony that is a violation of subchapter A of chapter 18, relating to organized crime offenses, or subchapter B of chapter 18, relating to drug offenses, that the defendant not associate or communicate with a specified person if there is probable cause to believe that association or communication with the person is for the purpose of continuing the defendant's participation in an illegal enterprise. The order may be issued at the time of sentencing or may be issued at a later date if the Bureau of Prisons or the United States attorney requests. The order may not extend to association or communication with the defendant's counsel. The purpose of the provision is to prevent the defendant from continuing his illegal activities from his place of confinement. The provision is similar in concept to the provision of section 2103(b)(7) that permits the court to order as a condition of probation or supervised release that a defendant not associate unnecessarily with a specified person. The provision is not intended to limit in any way the current authority of the Bureau of Prisons to take appropriate measures to control similar or related activities on the part of prisoners or otherwise to impose reasonable restrictions on association or communication by prisoners. This aspect of a sentence is not expressly made subject to judicial review since the concerns with limitations on communications are constitutional concerns to be decided on constitutional grounds by the courts on a case-by-case basis.

SECTION 2303. INCLUSION OF A SENTENCE OF SUPERVISED RELEASE AFTER IMPRISONMENT

1. In General

Section 2303 is a new section that permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to impose as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

2. Present Federal Law

Under current law, both the length of time that a defendant may be supervised on parole following a term of imprisonment and the length of time for which a parolee may be reimprisoned following parole revocation are dependent on the length of the original term of imprisonment.

Under 18 U.S.C. 4210(a), a parolee remains in the legal custody and under the control of the Attorney General until the expiration of the maximum term or terms of imprisonment to which he was sentenced. Thus, the smaller percentage of his term of imprisonment a prisoner spends in prison, the longer his period of parole supervision. The jurisdiction of the Parole Commission may be terminated by operation of law at an earlier date under 18 U.S.C. 4210(b) if the defendant was released as if on parole at the end of his term of imprisonment less credit toward good time [44] and there are less than 180 days of the term of imprisonment remaining. Supervision may be discontinued before the termination of jurisdiction if, upon its own motion or motion of the parolee, the Parole Commission determines to terminate it before the statutory time.[45] The Parole Commission is required to review periodically the need for continued supervision,[46] and may not continue supervision for more than five years after the parolee's release on parole unless it makes a finding after a hearing "that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law".[47]

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[44] See 18 U.S.C. 4164.

[45] 18 U.S.C. 4211(a).

[46] 18 U.S.C. 4211(b).

Under current law, the question whether a defendant sentenced to a term of imprisonment in excess of one year will be supervised on parole following release is dependent on whether or not the defendant is released on good time or on parole with more than 180 days remaining of his prison term.[48] It is not necessarily dependent on whether the defendant needs supervision following release—a defendant who needs supervision may have had such a poor disciplinary record in prison that he has less than 180 days of good time; a defendant who needs no supervision may have served only one-third of an unusually long sentence.

Under present law, if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, subject to periodic consideration for re-release as required for any prisoner who is eligible for parole.

Current law also contains two provisions that result in street supervision of a person sentenced to a period of confinement of less than a year following that confinement. Under 18 U.S.C. 3651, a defendant who is convicted of an offense for which the maximum term of imprisonment is more than six months may be sentenced to a split sentence with no more than six months' imprisonment followed by probation. Under 18 U.S.C. 4205(f), the sentencing judge may specify that a defendant sentenced to between six months and one year in prison will be released as if on parole (i.e., subject to street supervision) after serving one-third of the term.

3. Provisions of the Bill, as Reported

This section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant be placed on a term of supervised release after he has served the term of imprisonment. Unlike current parole law, the question whether the defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question whether a particular amount of his term of imprisonment remains. The term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment.

Subsection (b) specifies the authorized terms of supervised release, with the terms ranging from one year for a defendant sentenced for a Class E felony or for a misdemeanor, to a term of not more than three years for a defendant released after serving a term of imprisonment for a Class A or B felony. The length of the term of supervised release will be dependent on the needs of the defendant for supervision rather than, as in current law, on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment before the defendant is released.

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[47] 18 U.S.C. 4211(c)(1).

[48] 18 U.S.C. 4164 and 4210(b).

Subsection (c) specifies the factors that the judge is required to consider in determining whether to include a term of supervised release as a part of the defendant's sentence, and, if a term of supervised release is included, the length of the term. The judge is required to consider the history and characteristics of the defendant, the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the applicable sentencing guidelines and policy statements, and the need to avoid unwarranted sentencing disparity. The Committee has concluded that the sentencing purposes of deterrence and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

Subsection (d) describes the conditions that the judge may impose on the term of supervised release. The court is required to order, as a condition of supervised release, that the defendant not commit another crime during the period of supervision. It may also order any of the conditions set forth as conditions of probation in section 2103 (b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers appropriate, if the condition is reasonably related to the history and characteristics of the offender and the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant, and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. The condition also may not involve a greater deprivation of liberty than is necessary to protect the public and to provide needed rehabilitation or corrections programs, and must be consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

Subsection (e) permits the court, after considering the same factors considered in the original imposition of a term of supervised release, to terminate a term of supervised release previously ordered at any time after one year of supervised release or, after a hearing, to extend the term of supervised release (if less than the maximum term was originally imposed) or modify, reduce, or enlarge the conditions of supervised release.

Subsection (f) requires the court to direct the probation officer to provide the defendant with a clear and specific statement of the conditions of supervised release.

The term of supervised release in effect takes the place of parole supervision under current law. Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every release who does need supervision will receive it.[49] The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or deterrence since those purposes will have been served to the extent necessary by the term of imprisonment. Unlike a term of probation, however, the term of supervised release is not subject to revocation for a violation. Instead, for the usual violations, the term or conditions of supervised release may be amended pursuant to subsection (e). For a more serious violation, the defendant may be held in contempt for violating a court order pursuant to section 1331 or 1335. If the violation is a new offense, the defendant may, of course, be prosecuted for the offense. The Committee did not provide for revocation proceedings for violation of a condition of supervised release because it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense.

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[49] The functions of probation officers with respect to supervised release are described more fully in the discussion on section 3803 of the bill, as reported.

SECTION 2304. MULTIPLE SENTENCES OF IMPRISONMENT

1. In General

This section provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense. It specifies the factors to be considered in determining whether to impose concurrent or consecutive sentences. It further provides that consecutive sentences, and any portions thereof during which the defendant is subject to early release, shall be treated as a single sentence for administrative purposes.

2. Present Federal Law

There are no provisions of current law covering the contents of this section.[50] Sentences may be imposed to run either concurrently or consecutively and no statutory guidance is provided to the courts.[51] Terms of imprisonment imposed at the same time are deemed to be concurrent rather than consecutive sentences if the sentencing court has not specified otherwise.[52] Exceedingly long consecutive terms commonly are avoided through the exercise of judicial restraint.

A term of imprisonment for a person already serving a term of imprisonment at the time that he receives a second sentence is deemed to be concurrent with the first sentence if the first sentence is for a Federal offense,[53] and is deemed to be consecutive if the first sentence is for a State or local offense.[54]

3. Provisions of the Bill, as Reported

Section 2304(a) provides that sentences to multiple terms of imprisonment may be imposed with one exception to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed while the defendant is serving another one. Consecutive terms of imprisonment may not, contrary to current law, be imposed for an offense described in section 1001 (Criminal Attempt) and for an offense that was the sole objective of the attempt. This limitation on consecutive sentences follows the recommendation of the National Commission.[55] Of course, if the attempt involved plans for a complex pattern of criminal activity and the defendant was convicted of attempting, conspiring, or soliciting such a pattern of activity, the fact that he was also convicted of completing one or more, but not all, the planned offenses would not preclude, under the provisions of section 2304(a), the imposition of consecutive terms of imprisonment.

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[50] 18 U.S.C. 4161, however, does deal with aggregating sentences for purposes of good time allowances, and 18 U.S.C. 4205(a) provides in effect for aggregation of sentences for purposes of determining the date of parole eligibility.

[51] See, e.g., *Pereira* v. *United States*, 347 U.S. 1 (1954), sustaining the imposition of consecutive sentences for conspiracy to commit mail fraud and that substantive offense.

[52] See *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969).

[53] See *Subas* v. *Hudspeth*, 122 F.2d 85 (10th Cir. 1941).

[54] See *United States* v. *Harrison*, 156 F. Supp. 756 (D.N.J. 1957).

The National Commission also specified that terms should not be consecutive in two other situations: that in which one offense is a lesser included offense of the other, and that in which one offense prohibits the same conduct as the other, while one statute describes the conduct generally and another statute describes the conduct specifically. The Committee has not included the first of these provisions since it considers conviction for an offense and a lesser included offense to be constitutionally improper. The second situation is covered in new 28 U.S.C. 994(u) in the form of guidance to the Sentencing Commission in promulgating policy statements for sentencing.

Section 2304(a) also codifies the rule that, if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently unless a statute requires that they be consecutive.[56] If, on the other hand, multiple terms of imprisonment are imposed at different times without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise. This carries forward current law where both sentences are for Federal offenses, but changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense.

Subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether a sentence is consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee intends that the courts attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively. Ordinarily, under the guidelines system, if the court is sentencing for multiple offenses at the same time, the guidelines will specify an incremental penalty by which some portion of the sentence for the first offense is added to the sentence for each similar offense.[57] Thus, for example, if the term of imprisonment recommended in the guidelines for one offense under a given section of the Code is two years, the guidelines might recommend a sentence of two and a half or three years if the defendant was convicted of three or four such offenses. On the other hand, if the defendant was being sentenced at one time for two entirely different offenses committed at different times, the judge might think that adding the guidelines sentences for each offense together was appropriate, and specify consecutive sentences. Similarly, if the defendant was convicted of one offense that was committed in the course of another offense (for example, murder committed in the course of a civil rights violation), the judge might wish to assure that there was at least some additional sentence over what the sentence would have been for only one of the offenses—or the sentencing guidelines or policy statements might recommend adding the two sentences together in order to assure an appropriate sentence for all the criminal conduct of the defendant.

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[55] See Final Report § 3204(2)(b). Section 2304(a) in S. 1722, 96th Cong., also contained a bar to imposition of consecutive sentences for an offense described in section 1002 (Criminal Conspiracy) or 1003 (Criminal Solicitation) and another offense that was the sole objective of the conspiracy or solicitation. This provision has been replaced by a directive to the Sentencing Commission in proposed 28 U.S.C. 994(k), as contained in section 126 of the bill, that the guidelines reflect the "general inappropriateness" of such consecutive sentences.

[56] See sections 1811(b) and 1823.

[57] Section 994(k) of title 28, United States Code, as proposed by section 126 of the bill, as reported.

Subsection (b) provides that in evaluating whether the sentences should run concurrently or consecutively, the court must consider the nature and circumstances of the offense and the history and characteristics of the offender, the need for just punishment, deterrence, incapacitation, and rehabilitation, and the sentencing guidelines and any pertinent policy statements of the Sentencing Commission. It is anticipated that in certain situations a purpose of incapacitation alone might warrant imposition of consecutive terms of imprisonment, while in other situations other purposes of sentencing might mandate the imposition of concurrent terms. Correspondingly, although similar offenses committed in the course of a single criminal episode would ordinarily be appropriate subjects for concurrent sentences, there will be instances in which the just punishment purpose of sentencing might require the imposition of distinct, separately identifiable sentences for each of the particular offenses the defendant is found to have committed. More frequently, perhaps, multiple offenses will result in a base sentence for the first offense being added to an incremental sentence for each subsequent offense. The subsection simply serves to call attention to the fact that in this sentencing determination, as in any other sentencing determination, the principal focus should be upon the purposes to be served by the sentence, and that the sentence should be structured accordingly.[58]

Subsection (c) provides that consecutive terms of imprisonment shall be treated as an aggregate for administrative purposes, thus simplifying administration.

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[58] The problem of determining whether to impose concurrent or consecutive terms of imprisonment under current law is made even more acute by the fact that a period of criminal conduct on the part of an individual often may be dissected into a number of Federal offenses as different jurisdictional bases provide authority for charges filed under separate statutes. For example, under current law the mailing of fifty letters to effect a scheme to defraud technically constitutes the commission of fifty offenses for which separate charges could be brought and separate consecutive sentences imposed. Under the jurisdictional approach of the Code, however, the same conduct would constitute one offense—the violation of section 1734—with the fifty mailings constituting a multiplicitous satisfaction of the jurisdictional base for the single offense. Therefore, under the Code approach the possibility of the imposition of unwarranted consecutive sentences is materially lessened by the very manner in which the descriptions of the offenses are drafted in part II. The provisions of this section may thus be considered only one of two means by which more rationality may be brought by the Code to the subject of multiple sentences.

SECTION 2305. CALCULATION OF A TERM OF IMPRISONMENT

1. In General

This section provides the method of calculating the onset of a term of imprisonment and contains provisions for crediting an offender for prior custody.

2. Present Federal Law

Current Federal law on these subjects is contained in 18 U.S.C. 3568. That section provides that the term of imprisonment commences on the date that the offender is received at an institution for the service of his sentence or on the date he is taken into custody awaiting transportation to the place he is to serve his sentence. It further provides that the offender will receive credit for any time spent in custody in connection with the offense or acts for which the sentence was imposed.

3. Provisions of the Bill, as Reported

Subsection (a) of section 2305 provides that the sentence commences on the date that the defendant is received in custody awaiting transportation to the facility in which he is to serve his sentence, or arrives voluntarily at such facility.[59] Current law language differs from subsection (a) by stating that a sentence begins from the date of receipt at a facility for transportation to the place where sentence will be served if the defendant is committed to the facility where he will await transportation. The Committee does not intend a different result by not specifically requiring that the defendant be committed to the facility from which he will be transported.

Subsection (b) provides credit towards the sentence of imprisonment for any time the defendant has spent in official custody prior to the date the sentence was imposed where the custody was a result of the same offense for which the sentence was imposed or was a result of a separate charge for which he was arrested after the commission of the current offense. No credit would be given if such time had already been credited toward the service of another sentence.

SECTION 2306. IMPLEMENTATION OF A SENTENCE OF IMPRISONMENT

This section calls attention to the imprisonment provisions in subchapter C of chapter 38, and to provisions in subchapter A of chapter 38 relating to terms of supervised release, to facilitate appropriate reference to the portions of the Code that control the general administration of imprisonment and release matters.

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[59] This provision is based upon a recommendation of the Judicial Conference of the United States. See Hearings, Part XVI, p. 11929.

PART IV.—ADMINISTRATION AND PROCEDURE

Part IV of the Criminal Code sets forth the sections of the new title 18 that deal with procedure and administration. The nine chapters contained in this part deal with investigative and law enforcement authority; ancillary investigative authority; rendition and extradition; jurisdiction and venue; appointment of counsel for indigent offenders; release and confinement pending judicial proceedings; disposition of juvenile or incompetent offenders; pretrial and trial procedure, evidence, and appellate review; and post-sentence administration.

The provisions contained in Part IV of the Code in large measure correspond to those sections of existing title 18 that appear in Parts II through V of that title (18 U.S.C. 3001 *et seq*). The Committee has not attempted the comprehensive revision of this part of existing law that has been undertaken for Parts I through III of the new Criminal Code. Instead, with certain exceptions, the Committee has maintained the basic sections of current law while restructuring and repositioning them in a more logical order, removing or rewriting archaic language, deleting outdated sections, conforming the language used to the basic Code style, and incorporating the general definitions set forth in section 111.

The Committee believes that a total and comprehensive review and revision of all of the procedural and administrative sections of the Criminal Code is a worthwhile and necessary project which should be undertaken. It is the Committee's opinion that the scope of the present bill is so large and complex that an additional effort at full procedural reform is presently not warranted in terms of the time and effort that would be required and the extended delay that such an effort would engender. It is hoped that the Congress, the Department of Justice, and the bench and bar can turn their attention to a more fundamental review of Federal criminal procedure soon after enactment of the Code.

Despite the fact that the Committee did not undertake a fundamental revision of the procedural area, major innovations in several areas are contained in Part IV. These include such matters as a revision of the extradition laws, [1] a significant revision of the Bail Reform Act of 1966, [2] a comprehensive series of statutes on the determination and effect of insanity at all stages of the criminal justice process, [3] a new procedure for the collection of criminal fines, [4] and a new series of statutes dealing with the date of release from prison.[5] These innovative provisions will be discussed in some detail in the following portions of this Report.

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[1] Subchapter B of chapter 32.

[2] Subchapter A of chapter 35.

[3] Subchapter B of chapter 36.

[4] Subchapter B of chapter 38.

The bulk of the sections contained in Part IV are, as noted, drawn largely from existing law. While major language changes have been made in many of these sections, these changes are primarily designed to conform the text of the statutes to the rest of the Code and to eliminate inconsistent and redundant phrases and wording. For this reason, the Committee has not prepared as detailed a report on these provisions as was prepared for the sections contained in Parts I, II, and III, and is, instead, relying on existing legislative and judicial history to provide the necessary meaning and content. Changes other than those of a minor nature, however, will be noted.

In preparing Part IV of the Code, the Committee is particularly indebted to the former Subcommittee on Penitentiaries and Corrections for its work on the subject of prison administration, and to the Subcommittee on Juvenile Justice and the former Subcommittee on Juvenile Delinquency for the work on juvenile delinquency procedures. Much of the efforts of these Subcommittees and their staffs are reflected in the provisions of Part IV of the Criminal Code covering those subjects.[6]

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[5] Subchapter C of chapter 38.

[6] Subchapter A (Juvenile Delinquency) of chapter 36 and subchapter C (Imprisonment) of chapter 38. The work of the former Subcommittee on Penitentiaries and Corrections is also reflected directly in the extensive provisions concerning the Bureau of Prisons and the Federal Prisons Industries that are contained in section 122 adding two new chapters to title 28 of the United States Code.

CHAPTER 30.—INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY

Chapter 30 contains four subchapters. The first designates the Federal investigatory agencies that are to have primary responsibility for detecting and investigating the commission of the various Federal offenses. The second and third specify the basic law enforcement duties and authority of the Federal agencies which conduct the investigation of the most common Federal offenses, including virtually all of those contained in the new title 18. One of these subchapters covers law enforcement components of the Department of Justice. The other relates to law enforcement components located in the several Executive Branch departments and to one in the Judicial Branch. The fourth subchapter covers general law enforcement arrest authority on Federal lands.

SUBCHAPTER A.—INVESTIGATIVE AUTHORITY

(Sections 3001-3002)

This subchapter designates the investigative agencies that are to have the responsibility for detecting and investigating particular offenses within the new title 18 as well as those offenses located in the other titles of the United States Code. The Committee has concluded that it is the responsibility of the Congress to designate, at least in a general manner, the Federal investigative agency that is to have primary jurisdiction over each offense the Congress has defined.

This subchapter is necessary because of the very nature of the codification effort. As offenses were simplified and consolidated, and as jurisdictional factors were separated from the basic elements of the offenses and stated separately, all of the existing designations of investigatory authority became attenuated, and a full redesignation became necessary. To the greatest extent possible, the Committee has attempted to follow the existing investigatory jurisdictional lines. Sometimes, however, this could not be achieved. The Committee, therefore, has provided for a redesignation authority in sections 3001(b) and 3002(b) to permit a workable and flexible means of refining the necessarily broad dictates of sections 3001(a) and 3002(a). As with current law, not all offenses are assigned to specific agencies. All offenses not specifically assigned are reserved to the Attorney General in paragraph (16) for appropriate assignment.

The Committee is also aware that there are a number of agreements among investigative agencies dividing investigative jurisdiction among them. The Committee does not intend to affect such agreements except where the provisions of the new Code require their amendment. All of the agreements insofar as they rely on statutory references to title 18 will have to be rewritten. To the extent that the provisions of section 3001 apply, the agreements should conform to these provisions except to the extent that redesignations are agreed upon. In the absence of any clear cut designations, the Committee suggests that the existing agreements be rewritten to continue current practices and that the designations made by the Attorney General also reflect to the greatest extent possible the existing investigative jurisdiction arrangements.

The Committee wishes to stress the fact that it has carefully chosen to use both the terms "detection" and "investigation." Clearly the existing Federal investigatory agencies have the obligation not only to investigate offenses that are brought to their attention, but also actively to detect the fact that an offense has been or is being committed even if it has not yet come to light.

There are any number of sections scattered throughout title 18 and other titles of the United States Code under which specific investigatory authority for designated offenses is lodged in individual agencies. For instance, the Secret Service's investigative authority is contained in 18 U.S.C. 3056, that of the postal inspectors in 18 U.S.C. 3061, that of the Immigration and Naturalization Services in 8 U.S.C. 1324(b), and the general investigatory authority of the Federal Bureau of Investigation in 28 U.S.C. 533 and 534. Under section 3001 these sections are combined so that all major investigatory and detection authority is set forth in one place.

SECTION 3001. INVESTIGATIVE AUTHORITY OVER OFFENSES WITHIN THIS TITLE

Section 3001(a) sets forth in sixteen paragraphs the basic breakdown of the investigative jurisdiction for the various offenses contained in the new Code.

It should be noted that section 3001(a) refers to the "primary" responsibility for detecting and investigating the commission of offenses. This word is used to highlight the fact that all Federal investigators, in the exercise of their duties, have the responsibility to investigate and detect the commission of any Federal offense of which they become aware. It may be that, in the course of an investigation of an offense over which an investigator's agency has primary responsibility, the case may turn into the investigation of a wholly unrelated offense that falls within the purview of another agency. In such an event, the first investigator has authority to continue his investigation until a reference of the case to the primary agency can be accomplished. However, it is intended that wherever possible, and as soon as it is feasible, investigations should be conducted by the agency with primary responsibility.

In dividing investigative jurisdiction among the major Federal investigative agencies, in addition to specifically designating the offenses that fall within the jurisdiction of each agency, the Committee has also used in several paragraphs a more generic statement referring to "offenses arising from the administration or enforcement of the laws relating to" the basic statutes over which the agency in question exercises jurisdiction. For instance, paragraph (1) of subsection (a) uses the quoted language in relation to immigration and nationality offenses when describing the investigative jurisdiction of the Immigration and Naturalization Service, and paragraph (2) uses the quoted language to refer to offenses relating to the internal revenue laws in describing the investigative jurisdiction of officers of the Department of the Treasury. The quoted language, which appears in seven of the first eight paragraphs of subsection (a), is intended to cover situations where a crime otherwise in the jurisdiction of another agency, such as obstruction of a government function, obstruction of justice, or making a false statement, is committed that relates closely to the laws the specific agent or agency is charged with enforcing. Other examples of situations intended to be covered include cases in which, in the course of his duties as an agent, the agent is assaulted, bribed, or made the subject of a bribery attempt. Bribery and assault of Federal officers generally are within the investigative jurisdiction of the Federal Bureau of Investigation assigned such responsibility by statute or pursuant to regulations issued by the Attorney General. However, bribery of an internal revenue officer is currently investigated by personnel of the Department of the Treasury; similarly, assault on a postal employee is investigated by agents of the Postal Service. The Committee intends that the existing investigative jurisdiction for the basic Federal investigative agencies for these kinds of offenses continue to be exercised in this fashion, and the above quoted language was drafted with that result in mind. Here, too, the phrase "primary responsibility" has an intended meaning. The investigative responsibility for such related offenses is designated as primary with the assigned investigative agency. A secondary responsibility would always exist for other agencies who discover such offenses in the course of their investigations, and, most importantly, the F.B.I. would retain secondary responsibility which would be available in the unlikely situation of a major Federal agency becoming corrupted to the extent that it could not clean its own house. The Committee believes that this latter use of the concept of "primary" and "secondary" investigative responsibility by the F.B.I. should be used only on rare occasions, with circumspection, and only at the direction of the Attorney General. Those paragraphs that do not have this language concern generally minor investigative agencies with authority over limited statutes or the F.B.I. or Attorney General where such additional jurisdiction for investigation is clearly present.

Paragraph (1) concerns offenses defined in sections 1211–1214 of the proposed Code. These are immigration offenses and the investigative authority for these specific offenses and for other offenses arising from the administration or enforcement of the laws relating to immigration and nationality is assigned to the Immigration and Naturalization Service as in current law.

Paragraph (2) assigns the investigative authority over offenses set forth in subchapter A of chapter 14 (Internal Revenue Offenses), theft offenses involving theft from an interstate shipment of ammunition, a firearm, or a destructive device, theft offenses where the property is ammunition or a firearm that is moved across a State boundary, certain explosive offenses set forth in title 15, United States Code, and cross-referenced to section 1821(a)(2), and the firearms offenses set forth in section 1822, as well as those offenses arising from the administration and enforcement of the laws relating to the internal revenue and the other enumerated offenses, to the Secretary of the Treasury. The Committee assumes that the chapter 14 offenses, as under current law, will be assigned to the Internal Revenue Service and the chapter 18 offenses to the Alcohol, Tobacco, and Firearms Bureau of the Department of the Treasury, as is the case under current law.

Paragraph (3) deals with investigative jurisdiction over certain property destruction and explosives offenses for which, as is the case in current law, there is concurrent jurisdiction vested in two investigative agencies. Thus, if the offense involves property destruction caused by a destructive device that damages either property used in an activity affecting interstate commerce or property used by an organization receiving Federal financial assistance, involves explosive offenses set forth in section 1821 (a)(1) or (a)(4), or involves using a weapon in the course of a crime (section 1823), there is concurrent investigative jurisdiction lodged in the Federal Bureau of Investigation and the Secretary of the Treasury. As with paragraph (2), the Committee expects that the Secretary of the Treasury will assign his investigative jurisdiction under this paragraph to the Alcohol, Tobacco, and Firearms Bureau.

Paragraph (4) assigns investigative responsibility over offenses contained in subchapter (B) of chapter 14, dealing with customs offenses and offenses arising from the administration or enforcement of the laws relating to customs, to the Customs Service. This conforms to current law.

Paragraph (5) lists two specific jurisdictional bases set forth in the theft series of offenses (sections 1731 (Theft), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property)) and assigns investigative jurisdiction to the Secretary of Agriculture. Theft in these cases deals with matters peculiarly within the jurisdiction of agriculture inspectors.[1] In addition, under paragraph (5), offenses described in section 1851 (Fraud in a Health Related Industry), other than subsection 1851(a)(4), and those described in section 1852 (Distributing Adulterated Food), as well as offenses arising from the administration or enforcement of the laws relating to agriculture, are similarly made the investigatory responsibility of the Secretary of Agriculture. Finally, the Committee has added to paragraph (5) language to cover offenses committed on or related to the National Forest System and other lands under the care, custody, or control of the Forest Service. The provision is intended to carry forward current law.[2]

Paragraph (6) sets forth the investigative jurisdiction of the United States Secret Service. The major area of investigative jurisdiction for the Secret Service relates to counterfeiting and forgery. An effort has been made to delineate the confines of the existing grant of jurisdiction set forth in 18 U.S.C. 3056 and to duplicate it as much as possible. Thus, the Secret Service may investigate any of the counterfeiting or forgery offenses set forth in sections 1741 through 1745 if the offense involves a security made, issued, or guaranteed by the United States (with one exception) or made or issued by a foreign government. The term security is carefully defined in section 1747(f) and as the counterfeiting subchapter is referenced in paragraph (6) the definition is intended to apply here as well. The exception concerns a money order made or issued by the United States Postal Service. Such a security is clearly within the investigative purview of the Postal Service.

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[1] Section 1731(c)(25) offenses involving food stamp coupons, and section 1731(c)(26) offenses involving agricultural products stored in licensed warehouses.

[2] See, e.g., 16 U.S.C. 551, 551a, 559.

A problem arises in current law over investigative jurisdiction over other securities issued by the United States Postal Service, especially concerning stamps. Under 18 U.S.C. 3056 the Secret Service investigates offenses relating to obligations and securities of the United States. Under 18 U.S.C. 8 the term "obligation or other security of the United States" includes stamps. On the other hand, under 39 U.S.C. 404(a)(7) the Postal Service is granted the power to "investigate postal offenses . . . relating to the Postal Service." [3] Both agencies can and do investigate counterfeiting and forgery of such items as stamps. The Committee intends that this form of concurrent jurisdiction be continued as a matter of practicality. As the Committee understands it, under present practice if a counterfeit stamp operation is uncovered in the course of a Secret Service investigation of counterfeit money, the Secret Service conducts the entire investigation. Similarly, the Postal Service, because of new mechanized detection equipment, can locate counterfeit stamps during the processing of mail at its own facilities. In such case the investigation is undertaken by the Postal Service. The Committee endorses this practice and generally supports the view that the agency that uncovers the offense or to whom it is first reported should investigate as to these concurrent jurisdiction offenses. In the event of a conflict between the two agencies over a specific case, it is contemplated that the Attorney General through the procedures of the Department of Justice will make the investigative decision. Postal money orders are carved out for investigative jurisdiction by the Postal Service because they are not within the definition of obligation or other security of the United States in 18 U.S.C. 8. Other securities for which concurrent investigative jurisdiction will lie include the counterfeiting or forgery of such items as postage meter stamps, preprinted and stamped envelopes, and corporate bonds issued by the Postal Service.

The Secret Service is also granted investigative jurisdiction, under paragraph (6), over the new offense of trafficking in a stolen interest bearing obligation of the United States. Federal jurisdiction for this offense is set forth in section 1732(c)(2).

In addition, the Secret Service is granted investigative jurisdiction, as it has in current law under 18 U.S.C. 3056, for offenses under section 1357(a)(2) involving threats against the President or a potential successor to the Presidency.

Section 3021(c) specifies the persons to be afforded protection by the Secret Service. [4] However, if an assault on a protected person occurs, jurisdiction under current law is vested in the F.B.I. either by direct statutory authority [5] or by written agreement between the agencies. Section 3001(a)(6), by not designating the Secret Service to investigate those offenses, recodifies the existing law and practice.

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[3] Similar authority can be derived from 18 U.S.C. 3061 and 28 U.S.C. 535(c)(2).

[4] E.g., United States officials, official guests, and foreign officials.

[5] E.g., 18 U.S.C. 1751(i) (assault on the President); 18 U.S.C. 351(g) (assault on a Congressman).

The Committee intends that the investigation of offenses committed in violation of section 1746 (Trafficking in a Counterfeit Label for a Sound Recording or Motion Picture) will be investigated by the Federal Bureau of Investigation pursuant to regulations issued by the Attorney General under paragraph (16).

Paragraph (7) assigns the investigation of offenses covered by subchapter B of chapter 18 (Drug Offenses) and offenses arising from the administration or enforcement of the laws relating to controlled substances to the Drug Enforcement Agency; this too conforms to current law.

Paragraph (8) assigns the investigation of offenses in which the subject of the offense is the mail or property owned by, or under the care, custody, or control, of the United States Postal Service, as well as offenses arising from the administration or enforcement of the laws relating to mail, to the Postal Service; this carries forward existing 18 U.S.C. 3061. The term "subject of the offense is mail" is intended by the Committee to mean such offenses as theft of the mail itself or its destruction. Investigation of an offense for which the use of mail is only involved as a predicate for jurisdiction would not generally lie with the Postal Service. Thus, use of the mails to commit an extortion offense would be investigated by the F.B.I., as in current law. The only exception to this basic rule is for the continued Federal offense of mail fraud which the Postal Service has traditionally investigated. Paragraph (8) thus vests primary investigative jurisdiction for the offense of executing a scheme to defraud in the Postal Service if the use of the mail is the jurisdictional predicate.[6]

As noted in the discussion of paragraph (6) dealing with the Secret Service, the Postal Service under paragraph (8) has concurrent investigative jurisdiction with the Secret Service over counterfeiting and forgery offenses set forth in sections 1741 through 1745 if the subject of the offense is a security made or issued by or under the authority of, or guaranteed by, the United States Postal Service, or its predecessor. Since paragraph (6) specifically excepts postal money orders from the investigative jurisdiction of the Secret Service, counterfeiting and forgery of such items, which are securities under the definition of that term in section 1747(f), is vested solely in the Postal Service. The term "or its predecessors" is included because postal money orders, to name one security, are issued for long periods of validity. Thus, money orders issued prior to the Postal Service's reorganization are still in widespread use. Concurrent investigative jurisdiction will exist with the Secret Service on such items as postage meter stamps, preprinted and stamped envelopes, and corporate bonds issued by the Postal Service.

Paragraph (9) assigns the responsibility for offenses committed within the national park system, other than those that are within the designated primary responsibility of another Federal agency, to the Department of the Interior. The exclusion of those offenses within the "designated primary responsibility" of another Federal agency is intended to give the Department of the Interior the same type of primary residual investigative responsibility for Federal offenses committed within the national parks as would pertain to the agencies designated by the Attorney General under paragraph (16) if the offense were to be committed outside of a national park. Thus, assaults under chapter 16 committed within the national park system would be investigated by the Park Police or other officers specified by the Secretary of the Interior. On the other hand, a designated offense such as an offense dealing with internal revenue under the subchapter A of chapter 14 given to the Department of the Treasury, or a drug offense under subchapter B of chapter 18 given to the Drug Enforcement Agency, would remain within the province of those agencies. However, a Park Policeman discovering an apparent drug law violation would always retain secondary authority to investigate the offense and execute an arrest.

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[6] For similar reasons of experience the Postal Service is granted investigatory jurisdiction for fraud involving a pyramid sales scheme (section 1734(a)(2)) if the mails are used.

Paragraph (10) assigns primary investigative responsibility for a theft offense involving jurisdiction base 1731(c)(19) (which concerns the Commodity Exchange Act) and for a violation of section 1763 (Commodities Exchange Offenses) to the officers and employees of the Commodity Futures Trading Commission assigned such responsibility by the Commission. This carries forward the intended scheme of Public Law 93-463, approved October 23, 1974.

Paragraph (11) assigns primary responsibility for investigation of an offense involving misuse of a formula acquired under the Insecticide, Fungicide, and Rodenticide Act to the Environmental Protection Agency. This follows the general scheme of that Act.[7]

Paragraph (12) assigns primary investigative jurisdiction over the offenses defined in section 1762 dealing with monetary offenses to the officers of the Department of the Treasury or of the Securities and Exchange Commission assigned that responsibility by the Secretary of the Treasury. This carries forward the general thrust of existing law as to these offenses.[8]

Paragraph (13) assigns primary investigative authority for the offenses under the Food, Drug, and Cosmetic Act relating to adulterated or misbranded food and drugs to the designated employees of the Department of Health and Human Services. This carries forward the present thrust of 21 U.S.C. 372. Under that statute, the Secretary of Health and Human Services is also authorized to conduct investigations for violations of the Food, Drug, and Cosmetic Act through State or local health, food, and drug officers. The Committee does not intend to interfere with or limit that existing investigatory jurisdiction in any manner.

Paragraph (14) grants investigatory jurisdiction over theft involving property of a labor organization, where the crime is committed by an officer or employee of the union, to officers or employees of the Department of Labor assigned such responsibility by the Secretary of Labor. This carries forward the existing provisions of 29 U.S.C. 521.

Paragraph (15) reconstructs in Code format the specific existing grants of investigative jurisdiction now vested in the Federal Bureau of Investigation. These include such things as investigation of murder and assault committed against the President or Members of Congress (United States officials), basic kidnapping investigative jurisdiction, and general offenses committed within the special aircraft jurisdiction. This specific listing of assigned statutes is in no way intended to limit the Bureau's investigative authority derived from the Attorney General under 28 U.S.C. § 533 or under paragraph (16) of this subsection.

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[7] Public Law 92-516.

[8] See 12 U.S.C. 1958 and 31 C.F.R. § 103.46.

Finally, paragraph (16) vests the authority to assign all investigative responsibility, not otherwise specifically assigned, to the Attorney General by means of regulations, rules, or orders, that he is to issue. This accords with his current authority under 28 U.S.C. 533.[9] The Committee expects that in exercising this authority the Attorney General, with due regard for effective law enforcement, will, to the greatest extent possible, continue the existing agreements between agencies dividing investigative authority.

An exception to the Attorney General's assignment authority under paragraph (16) is provided for those offenses incorporated into title 18 by reference. These offenses will remain the responsibility of the agency to which they are assigned, if any, by the incorporated statute. An example of this provision is section 1821(a)(3)(A), which incorporates the provisions of 46 U.S.C. 170(14) dealing with shipment of explosives on vessels. Pursuant to 46 U.S.C. 170(12), enforcement of that section is vested in the Coast Guard. Paragraph (16) is intended to continue such provisions unchanged.[10]

Subsection (b) of section 3001 allows the transfer of responsibility to another law enforcement agency of investigative jurisdiction upon the written consent of the head of both agencies involved and of the Attorney General. This is the method provided by the Committee for the various agencies to sort out and refine the broad grants of investigative jurisdiction made under section 3001(a). The Committee does not contemplate the wholesale trading and redesignation of investigative authority for entire subchapters or even that of individual sections, especially in title 18. Instead, it is contemplated that there will be redesignation of investigative authority by means of reference to individual jurisdictional bases within separate sections.

SECTION 3002. INVESTIGATIVE AUTHORITY OVER OFFENSES OUTSIDE THIS TITLE

This section provides that the primary responsibility for detecting and investigating offenses located outside of title 18 is to be vested in the law enforcement agency to which such responsibility has been specifically assigned by law, or to the agency designated by the Attorney General in a rule, regulation, or order issued by him, if no other agency has been specifically designated such responsibility. This should generally continue existing law. Redesignation authority similar to that under section 3001(b) is also provided under section 3002 (b).[11]

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[9] Implemented by 28 C.F.R. 0.85(a).

[10] Similarly section 1821(a)(3)(C) refers to the offense set forth in 49 U.S.C. 1809(b). Authority to investigate that offense currently rests with, and will remain with, the Secretary of Transportation. (See 49 U.S.C. 1808(a)).

[11] S. 1630 as introduced included a section 3002 which would have permitted the armed forces to be used outside the United States to assist a law enforcement agency in the investigation of offenses. The Committee deleted this section in light of the recent passage of a more limited approach in Public Law 97-86, effective December 1, 1981, which contains amendments to title 10, United States Code, specifically authorizing certain forms of military assistance to law enforcement efforts, primarily narcotics, customs, and immigration offenses. In addition, the Com-

SUBCHAPTER B.—LAW ENFORCEMENT AUTHORITY OF THE DEPARTMENT OF JUSTICE

(Section 3011-3015)

This subchapter coupled with subchapter C sets forth the specific authority of eleven Federal law enforcement agencies to do such things as carry firearms, make arrests, serve process, and offer and pay rewards. Not all Federal law enforcement agencies are included in these subchapters; only those whose responsibilities touch the new Code more than tangentially are included. Nothing contained in this subchapter in any way derogates from the statutory authority of other investigative agencies set forth in other titles of the United States Code. For instance, the authority of General Services Administration employees to perform certain law enforcement duties similar to those set forth in these subchapters are codified in 40 U.S.C. 318d. Such statutes are unaffected by these subchapters. Moreover, the specific inclusion of an agency in these subchapters is not intended to deprive it of any other law enforcement authority it may have pursuant to a statute outside of title 18. All of the agencies listed in these subchapters are granted much the same authority and powers as they are under current law. However, the Committee has concluded that uniformity should be stressed wherever possible. Thus, most of the agencies listed are granted the authority to offer and pay rewards, although only the Secret Service [1] and, to a limited extent, the F.B.I.[2] currently have such authority.

Subchapter B deals with those law enforcement agencies that are included within the Department of Justice, the lead Federal law enforcement agency. Subchapter C covers law enforcement agencies located in the other Executive Branch departments. It also contains a new provision authorizing the Attorney General to delegate to interstate railroad common carriers certain limited law enforcement functions in connection with railroad operations.

SECTION 3011. FEDERAL BUREAU OF INVESTIGATION

Section 3011 (Federal Bureau of Investigation) provides in subsection (a) that, subject to the direction of the Attorney General, an agent of the F.B.I. may carry a firearm; execute an order, warrant, subpoena, or other Federal process; make an arrest without a warrant for an offense committed in his presence, or for a felony if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; offer and pay rewards; assist in the investigation of a State or local offense involving the death of, or serious bodily injury caused by use of a dangerous weapon to, a State or local law enforcement officer, if the appropriate authority requests such assistance in writing; and perform any other law enforcement duty that the Attorney General may designate. Section 3011 carries forward current 18 U.S.C. 3052 without substantive change, except that the authority to assist in State or

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mittee has included an amendment to section 807 of title 10 in section 362 of the bill to permit the armed forces to be used outside the United States, in essence to help enforce those offenses, by Federal public servants or by persons accompanying the military forces, as to which the Code, in section 204(i), asserts extraterritorial jurisdiction.

[1] 18 U.S.C. 3056(a).

[2] 28 U.S.C. 537; 28 C.F.R. 0.88.

local investigations of certain violent crimes involving law enforcement officers is new. The section generally implements the policy inherent in 28 U.S.C. 533 which permits the Attorney General to appoint officers to investigate designated official matters. The newly enacted authority to assist in investigating crimes against law enforcement officers is a codification of a practice of the F.B.I. until recent years that was ended because of the absence of clear statutory authority. The Committee believes the F.B.I. can play an important role in these investigations when asked to do so by State or local authorities and has added the language of paragraph (5) to accomplish this result. Subsection (b) defines the term "agent of the Federal Bureau of Investigation" to include the Director, Associate and Assistant Director, and others. This definition is drawn to parallel the reach of existing 18 U.S.C. 3052.

Section 3011 is generally a reiteration of authority for the Federal Bureau of Investigation consisting, for the most part, of those basic powers that any Federal law enforcement agency should possess. Only two brief comments are in order. First, here, as in succeeding sections, authority is granted to offer and pay rewards for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender. The Committee does not contemplate outlays of the sort that are authorized in the general reward statute, section 3131 of the Code. Instead, the Committee anticipates regular or special payments that may be made to undercover or underworld sources, informants, and tipsters for their assistance. These payments, of necessity, will be small. Second, the Committee has authorized the Bureau to perform such other law enforcement duties as the Attorney General may direct. This is intended to give the Attorney General the necessary flexibility to meet future circumstances and needs as they arise. The same result is reached under current law.[3] Similar authority has been provided to Department heads for other law enforcement agencies whose duties and authority are enumerated in this subchapter.

SECTION 3012. DRUG ENFORCEMENT ADMINISTRATION

Section 3012 authorizes an officer or employee of the Drug Enforcement Administration, subject to the direction of the Attorney General, to carry a firearm; execute an order, warrant, administrative inspection warrant, subpoena, or other Federal process; make an arrest without a warrant for an offense committed in his presence, or for a felony if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; offer and pay rewards; seize property pursuant to the provisions of the Controlled Substances Act (21 U.S.C. 801 *et seq.*); and perform any other law enforcement duty that the Attorney General may designate. The section continues without substantive change the provisions of 21 U.S.C. 878. Although the powers of agents of the Drug Enforcement Agency are not presently included in title 18, the Committee believes that the authority of such agents should be included in the same subchapter with the authority of similar law enforcement officials. This facilitates reference to these provisions and permits uniformity of statement especially as many of the title 21 drug offenses are now contained in the Code.[4]

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[3] 28 U.S.C. 533.

Subsections (a), (c), (d), and (f) of section 3012 are identical to subsections (a)(1), (a)(3), (a)(4), and (a)(6) of section 3011 detailing the authority of the F.B.I. Subsection (b) of section 3012, dealing with the execution of warrants or other process, provides for the execution of an "administrative inspection warrant." This is in conformity with the current provisions of 21 U.S.C. 878(2) and subsection (d), dealing with payments for information about an offense, is drawn in part from 21 U.S.C. 886(a).

Subsection (e) of section 3012 carries forward the provisions of 21 U.S.C. 878(4) relating to the seizure of property under the provisions of the Controlled Substances Act and authorizes D.E.A. agents to make such seizures.

SECTION 3013. UNITED STATES MARSHALS SERVICE

Section 3013 states the authority of United States marshals. Subsection (a) provides authority, subject to the direction of the Attorney General, for a marshal to carry a firearm, execute an order, warrant, subpoena, or other Federal process, make an arrest without a warrant for certain offenses, offer and pay rewards, and perform any other law enforcement duty designated by the Attorney General. These provisions are similar to those for other agencies covered by this subchapter.

The authority of United States marshals to carry firearms and make arrests without a warrant is presently provided for in 18 U.S.C. 3053. Subsections (a)(1) and (a)(3) of section 3013 follow 18 U.S.C. 3053 without substantive change. Subsection (a)(2) authorizes marshals to "execute an order, warrant, subpoena, or other process issued under authority of the United States." Marshals are presently authorized to "execute all lawful writes, process and orders issued under authority of the United States." [5] Additionally, the current Federal Rules of Criminal Procedure authorize marshals to execute or serve warrants or summonses for the government and for criminal defendants.[6]

Section 3013 generally follows these current law provisions without substantive change, though the statement of the authority conforms to that employed elsewhere in the subchapter.

Subsection (b) requires marshals to provide for the safekeeping of a person who is arrested, held pending commitment to an official detention facility, removed from a Federal official detention facility to comply with an order or writ issued from a court of competent jurisdiction, or held under an order of transfer to a community correction facility for care and treatment.

Subsections (b)(1) and (b)(2) of section 3013 are derived from 18 U.S.C. 4086, which provides that United States marshals shall provide for the safekeeping of any person arrested or held under authority of any enactment of Congress pending commitment to an institution. Subsections (b)(3) and (b)(4) are included to make it clear that safekeeping of prisoners by the marshal is to include the release of a prisoner under a subpoena to testify or upon a writ of habeas corpus, or the transfer of a prisoner to a community facility for care and treatment. The Committee notes that the Attorney General has assigned the implementation of the witness relocation program authorized under current law and continued in this Code by subchapter D of chapter 31 to the marshals. The Attorney General may, in his discretion, continue to have the marshals implement the program as a law enforcement duty that he may assign to them pursuant to section 3013(a)(5).

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[4] Subchapter B of chapter 18.

[5] See 28 U.S.C. 569.

[6] See Fed. R. Crim. P. 4(d)(1), 9(c), 17(d) (carried forward as Rule 17(e) in this bill), and 41 (c).

SECTION 3014. BUREAU OF PRISONS

Section 3014 empowers an officer or employee of the Bureau of Prisons, subject to the direction of the Attorney General, to carry a firearm, make an arrest without a warrant in the case of certain offenses, and without fee to administer an oath and take an acknowledgment of an officer, employee, or inmate of a Federal detention facility.

Employees of the Bureau of Prisons are currently authorized to carry arms,[7] and section 3014 would continue this power. The power of employees of the Bureau of Prisons to make an arrest without a warrant is extended under subsection (b) to those offenses likely to occur in a prison setting—section 1313 dealing with escape, section 1314 dealing with contraband, and sections 1831 through 1833 dealing with riots. Current law authorizes arrest without a warrant for similar offenses.[8] In addition, specific authority is granted to employees of the Bureau of Prisons to make an arrest for any other offense described in the new title 18 if it is committed on the premises or reservation of a Bureau institution.

Subsection (c) on administering oaths continues without substantive change the provisions of 18 U.S.C. 4004.

SECTION 3015. IMMIGRATION AND NATURALIZATION SERVICE

Section 3015 authorizes an officer or employee of the Immigration and Naturalization Service, subject to the direction of the Attorney General, to carry a firearm, execute a warrant or other Federal process, make arrests without a warrant, offer and pay rewards, and perform other law enforcement duties designated by the Attorney General.

Current law gives officers and employees of the Immigration and Naturalization Service designated by the Attorney General authority to arrest for violations of offenses that would be covered in sections 1212 (Smuggling an Alien into the United States) and 1213 (Hindering Discovery of an Alien Unlawfully in the United States),[9] and to arrest for felonies under the laws of the United States regulating the admission, exclusion, or expulsion of aliens, if the arresting officer has reason to believe the person arrested is guilty of the felony and there is a likelihood that the person will escape before a warrant can be obtained for his arrest.[10]

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[7] See 18 U.S.C. 3050.

[8] 18 U.S.C. 751 and 752, concerning escape; 18 U.S.C. 1791, concerning riots; 18 U.S.C. 1792, concerning contraband.

[9] 8 U.S.C. 1324(b).

[10] 8 U.S.C. 1358(a)(4).

Section 3015 combines and expands the two existing provisions to grant Immigration and Naturalization officers the same basic authority and powers accorded to other Federal investigatory agents. Most of 8 U.S.C. 1357 has been retained in title 8 as it applies to such matters as arrests for deportation purposes not necessarily connected with criminal prosecutions.

SUBCHAPTER C.—LAW ENFORCEMENT AUTHORITY OF OTHER FEDERAL AGENCIES

(Sections 3021–3027)

This subchapter sets forth the specific authority of six Federal law enforcement agencies, five located in the Executive Branch outside the Department of Justice and one in the Judicial Branch (United States Probation System). In addition, law enforcement authority is granted under certain circumstances to common carrier railroad police. These provisions parallel many of the features discussed in subchapter B for the Department of Justice law enforcement components. The introductory comments to subchapter B apply equally to this subchapter.

SECTION 3021. DEPARTMENT OF THE TREASURY

Subsection (a) of section 3021 identifies the classes of officers and investigators under the Secretary of the Treasury who will exercise law enforcement authority under the Code, and subsection (b) enumerates the functions and duties of each, subject to the direction of the Secretary of the Treasury.

Subsection (a) reaches all of the major investigative agents of the Treasury Department including (1) an agent of the United States Secret Service currently covered by 18 U.S.C. 3056; (2) an officer of the Customs, as defined in 19 U.S.C. 1401(i);[1] (3) "an agent of the Bureau of Alcohol, Tobacco, and Firearms whom the Secretary of the Treasury has charged with the duty of enforcing any criminal, seizure, or forfeiture provision of the laws relating to internal revenue;"[2] and (4) a criminal investigator of the Internal Revenue Service whom the Secretary has charged with the duty of enforcement of criminal provisions of the internal revenue laws or other criminal provisions of law which may be investigated by the Internal Revenue Service in connection with the administration and enforcement of the laws relating to the internal revenue. It should be noted that the language of subsection (a) is merely descriptive of the investigative agencies involved, and is not a limitation on their functions but rather is a description of the agency as set forth in statute. As is currently the case, the Secretary of the Treasury, under section 3021(b)(5), may assign other law enforcement duties to a subagency of the Department that usually concentrates in other areas, e.g., to an officer of the Internal Revenue Service duties reaching other criminal and forfeiture laws that do not involve internal revenue.

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[1] 19 U.S.C. 1401(i) defines the term "officer of the customs" and "customs officer" to mean: "an officer of the Bureau of Customs of the Treasury Department (also hereinafter referred to as the 'Customs Service') or any commissioned warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service."

[2] 26 U.S.C. 7608(a). Subtitle E of the title 26 concerns alcohol, tobacco, and certain other excise taxes.

Under subsection (b) of section 3021, an agent, officer, or investigator described in subsection (a) is granted the authority to carry a firearm, execute warrants and other Federal process, make arrests for certain offenses without a warrant, offer and pay rewards, and perform other law enforcement duties designated by the Secretary of the Treasury. These powers are identical to the powers granted to the Federal Bureau of Investigation (section 3011), Drug Enforcement Agency officers (section 3013), employees of the Postal Service (section 3025), and United States marshals (section 3015). This is appropriate, first, because the Committee wishes to achieve uniformity among the major Federal law enforcement agents as to their basic authority and powers and, second, because the Committee has been informed that internal revenue criminal investigators are required in the course of their duties to enter dangerous areas and are occasionally asked to assist in the protection of officials both national and foreign. In such circumstances, authority to effect arrest and carry firearms is necessary and such general authority has been granted. The functions and duties set out in subsection (b) are largely derived from 18 U.S.C. 3056 and 26 U.S.C. 7608.[3]

Section 3021 omits the provisions currently set forth in 18 U.S.C. 3056, providing that monies expended from Secret Service appropriations for the purchase of counterfeit currency, and subsequently recovered, shall be reimbursed to appropriations current at the time of deposit, and authorizing the payment of expenses for unforseen emergencies of a confidential nature under the direction of the Secretary of the Treasury. Both of these essentially housekeeping provisions are retained in title 18 Appendix, United States Code. Section 3021 also omits the special provision on obstructing and resisting agents contained in 18 U.S.C. 3056 as that offense will be covered by subchapter A of chapter 13.

Section 3021(c) continues the current law provision that, subject to the direction of the Secretary of the Treasury, the Secret Service is to protect the persons who are listed in paragraphs (1) through (12). The persons included are almost the same as those protected under current law; the only change has been the addition of the members of the immediate family of the Vice President and the immediate family of the person next in the order of succession to the Presidency. The only other changes made are those necessary to conform the existing law to Code style and definitions.

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[3] While Federal statutes today frequently grant officers arrest authority for specific offenses, the statutes do not preclude common law arrest authority for other offenses. The case law makes clear that, even without specific statutory authority, a Federal law enforcement officer may arrest for any offense committed outside his presence if he has probable cause to believe the person arrested has committed or is committing the felony. See, e.g., *United States* v. *Cangelose*, 230 F. Supp. 544, 550 (N.D. Iowa 1964); *United States* v. *Viale*, 312 F.2d 595 (2d Cir. 1963).

Section 3021(d) defines the term "agent of the United States Secret Service" to include the Director, Deputy Director, and others. This definition is drawn to parallel the reach of existing 18 U.S.C. 3056.

SECTION 3022. DEPARTMENT OF THE INTERIOR

Section 3022 authorizes an officer or employee of the Department of the Interior charged with law enforcement responsibilities, subject to the direction of the Secretary of the Interior, to carry a firearm, execute a warrant or other Federal process, make an arrest without a warrant, and to offer and pay a reward for services and information. In addition, subsection (e) provides that such employees of the Department of the Interior may perform other law enforcement duties that the Secretary of the Interior may designate.

At present, the Department of the Interior has various agencies which have law enforcement responsibilities. Among these are the National Park Service and the Fish and Wildlife Service. These agencies have been granted statutory authority to enforce certain selected provisions under current law.[4] While section 3022 does not specifically limit Park Service employees and other Department of the Interior employees engaged in law enforcement to the enforcement of these limited provisions, it is expected that, as a practical matter, pursuant to instructions from the Secretary of the Interior, these employees will be engaged in the enforcement of the same provisions as under existing law. Under certain circumstances, however, it may be necessary for such law enforcement personnel to make arrests for violations of other provisions and section 3022 has been drafted to give them this authority.

Employees of the Department of the Interior assigned to law enforcement duties, like other Federal law enforcement personnel, on occasion must be armed in order to properly carry out their assigned duties and, thus, section 3022 empowers such employees to carry firearms subject to the direction of the Secretary of the Interior. Section 3022 also authorizes law enforcement personnel of the Department of the Interior to offer and pay rewards for information and services in connection with the investigation or apprehension of an offender. This and the other powers granted by section 3022 parallel the powers granted to other Federal law enforcement agents.

SECTION 3023. DEPARTMENT OF AGRICULTURE

Section 3023 authorizes an officer or employee of the Department of Agriculture who is charged with law enforcement responsibilities, subject to the direction of the Secretary of Agriculture, to carry a firearm, execute a warrant or other Federal process, make arrests without a warrant, offer and pay rewards, and perform other law enforcement duties designated by the Secretary of Agriculture.

Current law does not confer general criminal law enforcement authority on investigative personnel of the Department of Agriculture. Authority to make arrests for offenses committed within the

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[4] See 18 U.S.C. 3054, and 16 U.S.C. 10, 668cc-4, 772d, 776d, and 785.

National Forest System is conferred on the Forest Service by 16 U.S.C. 559.

This gap in law enforcement powers is largely attributable to the fact that, until recent years, the investigative and enforcement activity in the Department of Agriculture was primarily of a compliance nature centering on violations in the various price support and land conservation programs. The steady increase in food, nutrition, and rural development programs has resulted in expanded criminal law enforcement activities requiring the same authority available to other criminal investigative agencies. Special agents of the Department of Agriculture regularly conduct criminal investigations into conspiracy and fraud offenses affecting the food stamp, meat inspection and grading, summer feeding, and farm home loan programs. These agents work closely with other Federal law enforcement agencies. Special agents of the Department are now assigned to organized crime strike forces.

For these reasons, the Committee concluded that it was important to the effective enforcement of the laws within the jurisdiction of the Department of Agriculture—which involve multi-billion dollar programs—to provide its law enforcement personnel the same basic authority and powers accorded to other Federal investigative agents.

The Committee does note that a bill, S. 884, has passed both Houses of Congress and is awaiting the President's signature that would, among other things, authorize the Inspector General of the Department of Agriculture to designate persons who conduct felony investigations under the Food Stamp Act of 1977, or other statutes administered by the Department of Agriculture, to make arrests without a warrant for such felonies based on probable cause, to execute arrest and search warrants with respect to such felonies, and to carry a firearm. The Attorney General may disapprove a designation made by the Inspector General.

SECTION 3024. DEPARTMENT OF LABOR

Section 3024 authorizes an officer or employee of the Office of Inspector General of the Department of Labor who is charged with law enforcement responsibilities, subject to the direction of the Secretary of Labor, to carry a firearm, execute a warrant or other Federal process, make arrests without a warrant, offer and pay rewards and perform other law enforcement duties designated by the Secretary of Labor.

Under current law, officers and employees of the Department of Labor do not possess these general law enforcement powers because the Department, until recently, has not engaged in the type of investigative activity that would justify such authority. However, the Committee has been informed that employees of the Inspector General's office in the Department of Labor are often assigned to serve as Department of Labor representatives on the organized crime strike forces maintained in several metropolitan areas by the Department of Justice. They are the only agency representatives currently serving on these strikes forces who do not possess such basic law enforcement authority as the right to carry firearms and to make arrests. In their capacity as representatives of the Department of Labor to the strike forces, these officers from time to time find themselves in life endangering situations as well as situations where crimes are committed in their presence. In addition, pursuant to section 3001(a)(14), officers and employees of the Department of Labor have been assigned primary responsibility for investigating theft offenses when the victim is a designated labor organization. For these reasons the Committee has decided to extend the general law enforcement authority to the designated Department of Labor officers.

It should be noted that this grant of authority, like that granted to other agencies, is not automatic but is made subject to the direction of the Secretary of Labor. The Committee expects that the grant of this authority to officers of the Department of Labor's Inspector General will be exercised sparingly by the Secretary and only upon good cause being established.

SECTION 3025. POSTAL SERVICE

Section 3025 provides that, subject to the direction of the Board of Directors of the Postal Service, an officer or employee of the Postal Service who is performing a duty related to the inspection of a postal matter or enforcing a law regarding property of the Postal Service or property in the care, custody, or control, of the Postal Service, related to the use of the mails, or related to an offense arising from the administration or enforcement of the laws relating to the mails, may carry a firearm, execute a warrant or other Federal process, make arrests without a warrant, offer and pay rewards, and perform other law enforcement duties designated by the Board of Governors of the Postal Service. The language "related to an offense arising from the administration or enforcement" etc. conforms this section to accord with the investigatory jurisdiction granted the Postal Service in section 3001.

Section 3025 is derived from 18 U.S.C. 3061 with little change in substance and specifically includes the right to make an arrest without a warrant based on probable cause. The Supreme Court recently reviewed a similar provision in 18 U.S.C. 3061 and specifically upheld against constitutional attack the right of Congress to permit a law enforcement officer to make an arrest without a warrant based on probable cause even if there had been enough time to obtain a warrant. An exigent circumstance test to justify lack of a warrant was rejected. Section 3025, unlike 18 U.S.C. 3061, will specifically authorize postal inspectors to carry firearms. The Committee has been informed that postal inspectors presently carry firearms, deriving the authority to do so from the general language of 18 U.S.C. 3061. The Committee believes that such authority is necessary and it is clearly spelled out in section 3025. The authority of postal inspectors to serve warrants is broadly stated in 18 U.S.C. 3061, whereas section 3025 is more detailed and employs the same language used throughout this subchapter to authorize service of process. This should result in little change in current warrant execution procedures for Postal Service agents.

SECTION 3026. UNITED STATES PROBATION SYSTEM

Section 3026 sets forth the authority of officers of the United States Probation System to make an arrest of a probationer or a person subject to supervised release, and for the removal of a probationer or a person subject to supervised release from the district of arrest to the district having supervisory jurisdiction over such person.

Subsection (a) authorizes an officer of the United States Probation System to carry a firearm pursuant to standards issued by the Judicial Conference of the United States. Although no such statutory authority exists at present, the Committee has been informed that occasionally district courts have authorized probation officers to carry firearms for their protection when entering dangerous areas and that the Judicial Conference has recently issued standards to carefully limit and regulate this practice. The Committee agrees that in some situations probation officers should be permitted to carry firearms. This subsection grants that authority subject to the direction of the Judicial Conference of the United States pursuant to standards similar to those it has already issued in its supervisory role over the activities of probation officers.

Subsection (b) authorizes a probation officer to execute a warrant for arrest of a probationer or a person subject to supervised release in the district in which he was appointed or in any district if the warrant was issued in the district of his appointment.

Subsection (c) authorizes the officer to arrest without a warrant a probationer or a person subject to supervised release in his district of appointment when he has cause to believe that the person arrested has violated a condition of his probation or supervised release.

A probation officer may presently arrest a probationer or a person subject to supervised release without a warrant for cause.[5]

SECTION 3027. RAILROAD POLICE

The new section 3027 would authorize the Attorney General to delegate to interstate railroad common carriers certain Federal investigative or law enforcement functions relating to the protection of railroad employees, passengers or patrons, or property, equipment or facilities owned or operated or maintained by railroads. This provision is a companion to two other amendments which the Committee adopted in the 96th Congress which federalize certain crimes including murder and aggravated assault committed on railroad vehicles. The delegation under this section would be subject to regulations which the Attorney General would prescribe.

This provision is designed to counteract the growing problem of serious property and personal offenses committed against railroads or their passengers. It also recognizes that current Federal law enforcement resources are spread quite thinly and would not be sufficient without some kind of augmentation to effectively police railroad jurisdiction or property.

It is expected that the Attorney General will give careful consideration to the delegation of authority under this section and to the drafting of regulations concerning such delegations. There is ample precedent for such regulations in the work of the Private Security Task Force of the Law Enforcement Assistance Administration and the Report of the Task Force on Private Security of the National Advisory Committee on Criminal Justice Standards and Goals.

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[5] 18 U.S.C. 3653.

It is not the intent of this provision to federalize railroad police but simply to provide them with sufficient authority to carry firearms across State lines, to make investigations and arrests, and to perform other functions to assist in the enforcement of Federal statutes pertaining to the security of railroad employees, passengers, property, equipment and facilities, and property being transported in interstate or foreign commerce. Their status would be quite similar to the deputizing of citizens to serve as U.S. Marshals, a practice commonly used over many decades. It is not the Committee's intent that this new authority expose the Federal Government to any tort or other liability for the misconduct or inattention to duty of any of the railroad police officers. Such liability would remain the sole responsibility of the railroads who employ, train, equip, and supervise these police.

SUBCHAPTER D.—GENERAL LAW ENFORCEMENT AUTHORITY ON FEDERAL LANDS

(Section 3031)

This subchapter contains two sections. The first provides general arrest authority for Federal law enforcement officers permitting them, upon State or local authorization, to make arrests for State and local offenses committed on federally owned or controlled lands. The second provides authority to law enforcement officers to make arrests of persons released under chapter 35 for violating specified conditions of release.

SECTION 3031. GENERAL ARREST AUTHORITY ON FEDERAL LANDS

The United States Government owns and administers approximately one-third of all the land in the United States. Much of this land is utilized for recreational purposes and in recent years the number of citizens taking advantage of the many recreational opportunities has increased dramatically. Unfortunately, with the increase in usage, the incidence of crime occurring on these lands has also grown. The purpose of section 3031 is to enable the Federal agencies which administer these lands, and the States in whose boundaries these lands are contained, to provide more effective law enforcement services on such lands.

Of the over 700 million acres of land owned by the United States, the United States holds only a proprietorial interest in about ninety percent of them. Thus the States in whose boundaries this land is contained have complete law enforcement responsibility over such land. Due to a lack of resources and in some cases because of the vast expanse of land involved, it is often difficult for the States to furnish adequate law enforcement services on these lands. In order that the Federal agencies involved can supplement the law enforcement services provided by the States, section 3031 authorizes the law enforcement personnel of the several agencies which administer Federal land to make arrests for the violation of State laws. Under present law, Federal law enforcement personnel have only the same authority to make arrests for the violation of State laws as does an ordinary citizen. This lack of authority discourages Federal law enforcement personnel from making such arrests because of the possibility that they may be liable for false imprisonment. Under section 3031, Federal law enforcement personnel will be able to make arrests for the violations of State laws.

In order to assure that this arrest authority is exercised only by trained and competent Federal law enforcement personnel, and under limited circumstances, the provision requires first, that the Federal officer be subject to the direction of the head of the government for whom he works, and, second, that the State or locality in which the offense occurs has authorized the making of arrests by such Federal officers. As this authority is largely aimed at supplementing and being in aid of the several States, it is an important predicate that the States or localities involved should affirmatively authorize that activity on the part of Federal law enforcement officers.

Subsection (b) parallels the arrest authority in subchapters A and B for the general Federal law enforcement agencies as to arrests for offenses committed in their presence as well as for felonies committed outside their presence if the requisite reasonable grounds of belief are present. As these are State and local offenses, the section goes on to direct the arresting officer to take the arrested person before the nearest State or local judge without unnecessary delay.

SECTION 3032. GENERAL ARREST AUTHORITY FOR VIOLATION OF RELEASE CONDITIONS

Section 3032 is new. It grants to a law enforcement officer who is authorized to make arrests for offenses committed in his presence the authority to arrest a person released under chapter 35 (Release and Detention Pending Judicial Proceedings) if the officer has reasonable grounds to believe the person is violating in his presence a condition of release imposed on the person under subsection (c)(2)(D) (relating to restrictions on personal associations, place of abode, or travel), subsection (c)(2)(E) (relating to avoidance of contact with the alleged victims of the crime and potential witnesses), subsection (c)(2)(H) (relating to possession of a firearm, destructive device, or other dangerous weapon), subsection (c)(2)(I) (relating to refraining from excessive use of alcohol or illegal use of narcotics or other controlled substances), or subsection (c)(2)(L) (relating to part-time custody) of section 3502 (Release or Detention of a Defendant Pending Trial). While, as a technical matter, a defendant who violates any condition of his release is guilty of contempt under section 1331 (Criminal Contempt) and 1335 (Disobeying a Judicial Order) because he has violated a court order, the Committee has added this provision to assure that law enforcement officers with arrest authority for offenses committed in their presence are made especially aware of the importance of arresting a person on release who is subject to one of the conditions that is aimed primarily at preventing further crimes of the defendant and assuring against harm to victims and witnesses.

CHAPTER 31.—ANCILLARY INVESTIGATIVE AUTHORITY

Chapter 31 contains four subchapters. Subchapter A sets forth the circumstances and procedures for the interception of private oral communications. Subchapter B concerns the compulsion of testimony of a witness appearing in an official proceeding before a court or grand jury of the United States, any agency of the United States, or before Congress or either House of Congress, after the witness refuses to testify or produce evidence on the basis of the privilege against self-incrimination. Subchapter C authorizes the Attorney General to provide for the relocation of government witnesses and their immediate families where it is likely that such witnesses may be the subject of retaliation because of their giving testimony. Subchapter D authorizes the Attorney General to pay an amount, not exceeding $100,000, as a reward for the capture of, or for information leading to the arrest or conviction of, a person charged with a Federal or State offense. For the most part, the subchapters within chapter 31 closely adhere to the similar procedural sections in current law.

SUBCHAPTER A.—INTERCEPTION OF COMMUNICATIONS

(Sections 3101-3109)

This subchapter restates the procedural requirements for governmental interception of private oral communications [1] now set forth in 18 U.S.C. 2510 and 2515-2520. This is done with few substantive changes from current law, and with a purpose of simplifying the language of the provisions now in effect.

1. Present Federal Law

The existing procedural requirements were enacted as title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] A principal purpose of title III was to prohibit all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation of specified types of major crimes.[3] Utilization of wiretapping and electronic surveillance by the Federal government under that Act required authorization of an application by the Attorney General or by a specially designated Assistant Attorney General, and the granting by a Federal judge of an order authorizing or approving the interception.[4] The procedural requirements were thus carefully designed to meet constitutional standards,[5] and, in fact, to go beyond such standards. The major purpose of protecting Fourth Amendment rights was served and strict administrative controls were applied.

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[1] This subchapter covers procedural matters only; offenses involving private communication are set forth in subchapter C of chapter 15.

[2] P.L. 90-351, 82 Stat. 197.

Title III of the Omnibus Crime Control and Safe Streets Act featured the following basic elements: (1) a grant of authority to the Attorney General, or a specially designated Assistant Attorney General, to authorize an application for an order to a Federal judge where interception of a private communication might provide evidence of certain major Federal crimes; and a grant of authority to State and local prosecutors to apply for an intercept order in States having legislation to govern interceptions of private communications; [6] (2) a detailed list of the terms required to be set forth in an application for a court order to achieve narrowness of application, specificity, and a showing of probable cause; and likewise, a detailed description of what the judge must find and include in his order granting permission for the government to intercept a communication; [7] (3) provisions for dealing with emergency situations; [8] (4) time limits on the interceptions; [9] (5) a procedure to be followed to ensure the integrity of the contents; [10] (6) authority for disclosure and use of contents of properly intercepted communications; [11] (7) reporting requirements concerning intercepted communications to insure that Congress will have the necessary information to determine whether abuses are occurring; [12] (8) remedies, including a civil remedy where improper interceptions have occurred; [13] (9) provisions for motions to suppress illegally obtained evidence; [14] and (10) certain prohibitions against the use of intercepted communications.[15]

The title does not generally apply to the monitoring of private conversations with the consent of one or more of the participants to the conversation.[16] No constitutional prohibition is involved in such monitoring since no right of privacy is infringed.[17] By the same token, consistent with the interpretation under title III, none of the provisions of this subchapter is meant to inhibit or otherwise be applicable to consensual monitoring.

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[3] See 18 U.S.C. 2511–2514. Exceptions also were written into the law to protect employees of communications facilities and personnel of the Federal Communications Commission in the normal course of their employment and to exempt eavesdropping with the consent of a party to the conversation. 18 U.S.C. 2511 (c) and (d).

[4] See 18 U.S.C. 2516–2518.

[5] See *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

[6] 18 U.S.C. 2516.

[7] 18 U.S.C. 2518.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] 18 U.S.C. 2517.

[12] 18 U.S.C. 2519.

[13] 18 U.S.C. 2520.

[14] 18 U.S.C. 2518(10)

[15] 18 U.S.C. 2515; 2517.

[16] 18 U.S.C. 2511 (c) and (d).

[17] *United States* v. *White*, 401 U.S. 745 (1971).

The discussion below of the individual sections of this subchapter will not be prefaced by any statement of the existing law, since, in general, the sections continue existing law under a modified format. Changes, most of which are not considered to be of major significance, will be noted and explained.

SECTION 3101. AUTHORIZATION FOR INTERCEPTION

1. In General

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was predicated upon findings that, among other things, demonstrated the impracticality of recognizing interstate and intrastate distinctions in governing the interceptions and the proper evidentiary uses that may be made of the contents of interceptions.[18] Title III legislated for all levels of government. It prescribed the circumstances and conditions under which interceptions of wire or oral communications may be carried out lawfully by officials of the Federal government, as well as the separate circumstances and conditions under which such interceptions may be carried out lawfully by officials of State governments. This section continues that comprehensive approach.

2. Provisions of the Bill, as Reported

A. Federal Government Interception

Under subsection (a) of section 3101, a court of competent jurisdiction[19] in aid of a Federal investigation may, by order issued pursuant to the provisions of section 3103, authorize or approve the interception of a private oral communication.[20] under the specified conditions set out in the section. These conditions provide that, first, the filing of an application for an order must be authorized by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General specially designated by the Attorney General. Second, an application meeting the requirements of section 3102 must be filed by a law enforcement officer of a government agency having responsibility for the investigation of the offense concerning which the application is made.

Third, there must be probable cause to believe that the interception will provide evidence of the commission of an offense described in one of the offenses specified in section 3101(a)(3). This list generally tracks as closely as the Committee has found possible the corresponding offenses for which an order to intercept a private oral communication can be authorized under Title III of the 1968 Act.[21] Nevertheless, the redefinition and consolidation of existing related offenses in the Code inevitably result in some changes. This expansion or contraction of authority to issue an order for an intercept for particular conduct is an incidental effect of the structure of the new Code. Moreover, the Committee has added one offense, fraud committed through the use of an interstate wire facility (section 1734), to the current enumeration, deeming inclusion of wiretap authority for this crime to be clearly appropriate.

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[18] See *People* v. *Kaiser*, 21 N.Y.2d 85, 233 N.E.2d 818 (1967), aff'd, 394 U.S. 280 (1969).

[19] As defined in section 3109(d).

[20] "Intercept" is defined in section 3109(f) and means to acquire, through the use of an eavesdropping device, the contents of a communication in the course of its transmission to a party to the communication, and includes the acquisition of such contents by simultaneous transmission or by recording. "Contents" has the same meaning here as in subchapter C of chapter 15. The discussion of the terms "intercept" and "contents" in the part of this report dealing with that subchapter applies here as well, to the extent that it relates to oral communications. "Private oral communication" is defined in section 3109(g) to have the meaning set forth in 1526. The distinction currently made between "wire" and "oral" communications is not observed in this subchapter.

[21] 18 U.S.C. 2516(1).

Under present law, the filing of an application to a court for authorization to intercept requires the initial approval of the Attorney General or an Assistant Attorney General specially designated by him.[22] Section 3101 adds as authorizing officials the Deputy Attorney General and the Associate Attorney General. This does not affect the basic purpose of the requirement to center responsibility for the making of such judgments in a high level official within the Department of Justice, but removes an anomaly in that Assistant Attorneys General are included as authorizing officials but not the Deputy Attorney General and Associate Attorney General who supervise such Assistants as the Department's second and third ranking officials.

B. State Governmental Interception

Subsection (b) of section 3101 provides that, to the extent permitted by a State statute, the interception of a private oral communication may be authorized or approved by order of a court of competent jurisdiction under specified conditions. First, an application for such an order must be filed, pursuant to the provisions of applicable State law and in substantial compliance with the provisions of section 3102, by the principal prosecuting attorney of the State or locality acting on behalf of a government agency having responsibility for the investigation of the offense concerning which the application is made. Second, it must be shown that the interception might provide or has provided evidence of the commission of an offense involving: (1) bribery, murder, kidnapping, robbery, extortion, trafficking in a drug that is a controlled substance as defined in section 102 of the Controlled Substances Act or in illicit or untaxpaid liquor or cigarettes, or gambling; (2) theft, trafficking in stolen property, fraud, or a crime of violence that is a felony which is designated in an applicable State statute as an offense for which interception may be ordered; or (3) conspiracy or solicitation if an object of the conspiracy or solicitation is any of the foregoing offenses.

The subsection follows as closely as possible the provisions of current law.[23] Only minor changes have been made. One purpose for which interception may be authorized under current law is in aid of an investigation of a crime "dangerous to life, limb, or property," punishable as a felony and designated in the State's authorizing statute. This subsection uses the term "crime of violence"[24] in the broad sense as comprehending the present language. A State is thus authorized to use interceptions with regard to such crimes. State interest with regard to murder, kidnapping, and the other named offenses in the subsection is so obvious that interception may be authorized as permitted under State law without any designation in the applicable statute.[25]

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[22] The intention was to condition the use of intercept procedures upon the judgment of a senior official of the Department of Justice that the situation warranted such use. This authority to give or withhold pre-application approval was meant to be personal to the specified officials and not delegable to any other official. See S. Rept. 90–1097, p. 97: see also *United States* v. *Giordano*, 416 U.S. 505 (1974). This same intention underlies the provisions of this section, and the Committee specifically endorses the Court's decision in *Giordano*.

[23] 18 U.S.C. 2516(2).

[24] "Crime of violence" is defined in section 111 of the Code.

SECTION 3102. APPLICATION FOR AN ORDER FOR INTERCEPTION

1. In General

This section concerns the content required in an application to a court for an order to authorize or approve the interception of a private oral communication. The section utilizes the wording of current 18 U.S.C. 2518(1) and (2), with some alterations.

2. Provisions of the Bill, as Reported

Under section 3102 it is required that an application for an order (or for an extension of an order) authorizing or approving the interception of a private oral communication be made in writing, under oath, to a court of competent jurisdiction. The application would include, among other things, the following information: (1) the identity of the law enforcement officer making the application and of the officer authorizing it; (2) the applicant's authority to make the application; (3) a complete statement of the facts relied upon to justify belief that an order should be issued, including details as to the offense, the identity of the persons involved, if known, and a description of the facilities involved at which the communication is to be intercepted; (4) a complete statement of other investigative procedures that have been tried in the investigation and that have failed, or that appear unlikely to succeed; (5) a statement of the period of time for which the interception is required to be maintained; (6) a statement whether surreptitious entry is required to effect the interception, and, if such entry is stated to be required, a statement why other means of effecting the interception reasonably appear to be unlikely to succeed, to be too dangerous, or otherwise to be impracticable; (7) a complete statement concerning all previous applications known to the applicant that have been made involving any of the same persons, facilities, or places specified in the application; and (8) if the extension of an order is being requested, a statement of the results thus far achieved from the interception, or a reasonable explanation of the failure to obtain such results. The section specifically provides that the court may require still further testimony or additional documentary evidence in support of the application.

The overriding purpose of this section is, of course, to meet the constitutional standards set down by the Supreme Court primarily in *Berger* v. *New York* [26] and *Katz* v. *United States.*[27] However, the detailed enunciation of the various requirements for drafting an application for an interception order also serves an administrative purpose; the section is a checklist. The applicant is forced to thoroughly consider what he is doing, where his authority comes from, and what he expects to achieve. Once the applicant has thought the matter through thoroughly and stated it in his application, the court should not ordinarily have need of any further testimony or documentation. Close observance of the requirements of the section is necessary to meet legal criteria for interception and will also facilitate decisions by the courts.

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[25] State wiretapping legislation enacted prior to the enactment of title III of the Omnibus Crime Control and Safe Streets Act is not necessarily affected by title III or by this legislation since compliance with the provisions of sections 3102 and 3103 is all that is required. It would, of course, be most helpful, particularly for prosecutors and judges, for States to review pertinent legislation and bring it into conformity with the Federal law. States in authorizing interceptions of private communications may make the requirements more restrictive than Federal law, but not less demanding. *State* v. *Siegel*, 13 Md. App. 444, 285 A.2d 671 (1971). By conformity is not meant identity of provisions. A State law containing derivations which do not result in material changes is to be viewed as meeting the requirement of compliance.

The Committee notes that the authority to intercept communications under this subchapter is not limited to conversations between a person named in the application for the order and other persons. An application can properly be made under subdivision (a)(3) of this section whether all or none of the persons involved in the offense are named. If one or more of the persons involved is identifiable, but not all are, an application may also properly be made upon that basis. The applicant is under no requirement to discover as many as possible of the persons involved before making the application; he need only name a person in the application if he has probable cause to believe that the person named is involved in the commission of the offense in relation to which the interception is contemplated. Legally intercepted conversations of persons not named in the application stand on the same footing as the legally intercepted conversations of persons named in the application.[28]

The government is required to list the names of all persons as to whom there is probable cause to believe that they are engaged in the criminal activity under investigation and whose conversations it expects will be intercepted over the target telephone; merely to identify the principal target of the wiretap application is insufficient under such circumstances. In defining this requirement of the existing statute, the Supreme Court in *United States* v. *Donovan* [29] went on to hold that the failure to meet this requirement did not warrant the remedy of suppression because the identification in an application for an order of interception of all those likely to be overhead in incriminating conversations does not play a substantive role with respect to judicial authorization of intercept orders and thus does not impose a limitation on the use of intercept procedures. If the basic preconditions to judicial authorization are present—probable cause to believe that an individual is engaged in criminal activity, that particular communications concerning the offense will be obtained through interception, and that the target facilities are being used in connection with the specified criminal activity—then the fact that the judge was unaware that additional persons might be overhead engaging in criminal conversations does not make the interception unlawful because the application provided sufficient information to enable the court to determine that the statutory preconditions were satisfied. The Committee endorses the Court's interpretation in *Donovan* of both the need to list all known persons for whom the requisite probable cause exists and the holding that the failure to list all known persons does not warrant suppression if the basic requirements for the application are otherwise met.

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[26] *Supra* note 5.

[27] *Ibid.*

[28] *United States* v. *Kahn*, 415 U.S. 143 (1974).

[29] 429 U.S. 413 (1977).

Paragraph (6), requiring the government to state whether a surreptitious entry will be needed to effect the interception, and, if so, why other means of effecting the interception are not feasible, is new. This provision, in conjunction with others appearing elsewhere in this subchapter, e.g., sections 3103(a)(5), (b)(1)(F), and (d), 3105(b), and 3109(h), is designed to require that a court be notified of and issue a specific authorization for, such surreptitious entries to intercept a communication. Under current statutory provisions in Title III, the Supreme Court has held in *Dalia* v. *United States,*[30] that no separate court authorization for a surreptitious entry is legally required, since it is implicit in the authorization to conduct wiretapping that, whatever form of entry is necessary to accomplish it, may also be performed. A general judicial authorization to conduct electronic surveillance was sufficient to "approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances." [31] Nevertheless, the Court noted that the "preferable approach" in applications for "bugging authorizations" was for government agents to inform the court that surreptitious entry would be needed to effect the interception, and it cited with approval current Department of Justice policy requiring this and requesting the court to issue a separate order authorizing surreptitious entry for the purpose of installing and removing the electronic device.[32]

The provisions on this subject that are contained in this subchapter are intended to reflect this prevailing Departmental policy. These provisions are largely drawn from a bill (S. 1717) in the 96th Congress, which was supported by the Department of Justice and which passed the Senate on June 9, 1980. [33] A similar bill, S. 1640, has been introduced this Congress by Senator Thurmond.

Paragraph (6) in essence requires the court to be notified in the government's application whenever it believes a surreptitious entry to effect the interception will be required. By the use of the term "required," the Committee does not mean to impose a burden necessitating any detailed explanation; a relatively conclusory statement as to the impracticality or dangerousness should suffice for the purposes of paragraph (6), and a determination that the statement was made in good faith should suffice for the related purposes of section 3103(a)(5). Certainly it would be undesirable to require such detail that such a statement could serve as an instructional guide to those who would benefit from making other means of surveillance impracticable.

The term "surreptitious entry" is defined in section 3109(h) to mean a surreptitious physical entry upon private premises, and to include entry effected by means of a ruse or subterfuge. Thus, if a law enforcement officer plans to gain access to private premises in order to plant a "bug" by clandestine means or by representing himself to the occupant as a repairman, both such techniques would be deemed a "surreptitious entry" triggering the additional requirements of this subchapter.

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[30] 441 U.S. 238 (1979)

[31] *Id.* at .

[32] *Id.* at 259 n. 22.

[33] S. 1717 also provided for enlarging emergency wiretap authority to include life-threatening situations, an aspect reflected in this bill in section 3105(b)(2). For further explanation of the various provisions of S. 1717, the legislative history of the bill should be consulted. See S. Rept. No. 96-788, 96th Cong., 2d Sess.

SECTION 3103. ISSUANCE OF AN ORDER FOR INTERCEPTION

1. In General

This subsection reenacts, inter alia, the provisions of 18 U.S.C. 2518 (3), (4), (5), and (6). The section is concerned with: (1) the judicial findings that must be made to support issuance of an order for interception; (2) the content required to be present in the order; (3) the period of time during which interception is authorized; and (4) the periodic reports that must be made. The section also contains provisions implementing the Committee's decision (discussed in connection with the previous section) to establish procedures for specific court authorization of surreptitious entries to effect interception.

2. Provisions of the Bill, as Reported

Under subsection (a) of this section, in acting upon an application made under section 3102, a court may, as requested in the application or as found to be warranted by the court, issue an ex parte order authorizing or approving the interception of a private oral communication within the geographic jurisdiction of the court, if it determines on the basis of the facts submitted by the applicant that: (1) there is probable cause to believe that a person is committing, has committed, or is about to commit a particular offense set forth in section 3101; (2) there is probable cause to believe that a particular communication concerning the offense will be obtained through such interception; (3) other investigative procedures were tried in the investigation and failed, or appeared to be unlikely to succeed or to be too dangerous; (4) there is probable cause to believe that the facilities from which, or the place at which, the communication is to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are in the name of, or commonly used by a person who is committing, has committed, or is about to commit the offense; and (5), if the order is to authorize or approve a surreptitious entry, such entry is required to effect the interception because other means of doing so reasonably appear to be unlikely to succeed, to be too dangerous, or otherwise to be impracticable. The term "surreptitious entry" is defined in section 3109(h).

Subsection (b) requires that an order issued under this section specify, *inter alia:* (1) the identity, if known, of the person whose communication is to be intercepted; (2) the character and location of the facilities from which, or the place at which the communication is to be intercepted; (3) a particular description of the kind of communication sought to be intercepted and a statement of the particular offense to which it relates; (4) the identity of the government agency authorized to intercept the communication and of the person authorizing the application; (5) the period of time during which the interception is authorized, and whether the interception must automatically terminate when the described communication has been first obtained; and (6), whether the surreptitious entry is authorized or approved to effect the interception, and, if it is, the identity of the agency authorized to make the surreptitious entry. This satisfies the most fundamental objective of the series of provisions dealing with surreptitious entries in this subchapter—to require that the court specifically approve such entries.

Under subsection (c) of section 3103, the order may properly authorize or approve the interception of a private oral communication either for the period necessary to achieve the objectives of the authorization, or for thirty days, whichever is less. Extensions of time may be granted, upon application made under section 3102(a), if findings are made in accordance with the provisions of subsection (a) of this section. An extension may be for the period necessary to achieve the objectives for which it was granted or for thirty days, whichever is less.

Subsection (d) requires that, with respect to an order which authorizes a surreptitious entry, in any case in which more than one entry is necessary to repair, reposition, replace, or remove the interception device, written notice of the reasons for the reentry be given to the court beforehand if practicable, or, if prior notice is not practicable, within forty-eight hours thereafter.

Subsection (e) of this section authorizes the court to require that periodic reports be furnished the court as to the progress made toward achievement of the authorized objective and the need for continued interception.

The court authorization required under this section (with the exception of that called for under subsection (b)(6)) [34] is constitutionally mandated, and the provisions of section 3103 fulfill that mandate. Carrying out a lawful interception order, however, will often require the cooperation of private parties, such as communications carriers, landlords, and others. Accordingly, under section 3103(b)(2), authority is provided for courts to issue orders at the request of the government directed at such private parties to facilitate the actual interception with provisions for the protection of the private parties lending assistance. These provisions are derived from 18 U.S.C. 2518(4) without significant change.

SECTION 3104. ASSISTANCE IN INTERCEPTION

1. In General

This section carries forward the provisions of section 201 of Public Law 95–511, the Foreign Intelligence Surveillance Act of 1978. That section of the Act amended chapter 119 of title 18, the current law provision on electronic surveillance, to authorize assistance in the execution of authorized electronic surveillance from such groups as communication common carriers, landlords, and custodians. This section reiterates the provisions of that section of the Foreign Intelligence Surveillance Act of 1978 with the sole changes being those required to set the section forth in the Code style. The reach and import of that section of the Act is intended to be unchanged. One provision, on compensation of those affording assistance, is taken from existing 18 U.S.C. 2518(4) prior to the enactment of the Foreign Intelligence Surveillance Act of 1978.

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[34] See *Dalia* v. *United States*, *supra* note 30.

2. Provisions of the Bill, as Reported

Subsection (a) of section 3104 states that a law enforcement officer may request information, facilities, or technical assistance from a communication common carrier, landlord, custodian, or other person when such assistance is necessary to intercept a private oral communication unobtrusively. The request may be made first, if the law enforcement officer is authorized to intercept a private oral communication or to conduct electronic surveillance, as that latter term is defined in the Foreign Intelligence Surveillance Act of 1978; and, second, if the officer provides to the person who is requested to afford assistance an order directing such assistance as provided in section 3103(b)(2), or a written certificate signed by an appropriate Justice Department or State prosecuting official stating that no warrant is necessary, stating that all statutory requirements have been met, and specifying the assistance to be provided. Such written certificate is to specify the information, facilities, or technical assistance that is required and the period of time during which the assistance is to be provided.

Subsection (b) states that notwithstanding any other law the person receiving a copy of a court order or a certificate pursuant to subsection (a) may provide the assistance required. The subsection goes on to provide that no cause of action is to lie in any court against any communication common carrier, landlord, custodian, or other person for providing assistance as specified in the order or certificate.

Under subsection (c) the carrier or other person who provides the assistance is required to be compensated at the prevailing rates for providing that assistance. The compensation provision is taken directly from current 18 U.S.C. 2518(4).

Finally, subsection (d) provides that a communication common carrier, landlord, custodian, or other person provided with a copy of a court order or a written certificate authorizing the affording of assistance is not to disclose the existence of the interception or surveillance or of a device utilized to accomplish the interception or surveillance unless required to do so by legal process and until prior notice has been given to the Attorney General or the State or local prosecutor who authorized the application for the order or who issued the written certificate.

SECTION 3105. INTERCEPTION WITHOUT PRIOR AUTHORIZATION

1. In General

This section recognizes two separate situations in which the usual procedure need not be followed with regard to the interception of private oral communications.

2. Provisions of the Bill, as Reported

Subsection (a) of section 3105 provides that, when a law enforcement officer engaged in the authorized interception of a private oral communication intercepts a private oral communication that relates to an offense other than one specified in the order and does not also relate to an offense specified in the order, the attorney for the government desiring to disclose or use its contents, or evidence derived from its contents, during testimony in an official proceeding may make a motion for an order approving such interception. This differs in a minor respect from current 18 U.S.C. 2517(5) by making the matter one for determination on motion at the time the evidence is sought to be used rather than upon "application [to a judge] * * * as soon as practicable." This change reflects the realities of the investigative process in analyzing and determining the significance of evidence and the orderly preparation of a case. At the same time, it carries forward the safeguard of judicial decision on the ultimate issue of whether the evidence was obtained in a lawful manner. An unrelated offense that is the subject of a motion under this subsection can be any offense and is not limited to the offenses set forth in section 3101. The motion is made to permit the disclosure or use of its contents (or any derivative evidence) during testimony in an official proceeding. The court is directed to enter an order in accordance with the motion if the court finds that the communication was otherwise intercepted in accordance with the provisions of this subchapter.

Under subsection (b) of this section, notwithstanding any other provision of the subchapter, a law enforcement officer is authorized to intercept a private oral communication, and may make any surreptitious entry required to effect such interception, without court order if he is specially designated to do so by the Attorney General, or by the principal prosecuting attorney of a State or locality acting pursuant to a statute of that State, and he reasonably determines that an emergency situation exists.

The statute enumerates the type of emergency situations contemplated. Existing law reaches conspiratorial activities threatening the national security or characteristic of an organized crime enterprise which occur in a situation requiring that the interception be made before an order of authorization can, with due diligence, be obtained. The Department of Justice has informed the Committee that emergency authorizations have been used infrequently, and then almost always in situations that involve a risk of death. Accordingly, the Committee has eliminated the vague and expansive terms "conspiratorial activities threatening the national security interest" and "conspiratorial activities characteristic of organized crime" and has replaced them with precise provisions permitting emergency wiretaps if the emergency situation exists with respect to the three most serious national security offenses (sections 1101 (Treason), 1111 (Sabotage), and 1121 (Espionage)), with respect to an offense under section 1802 (Racketeering), or with respect to an offense that involves a risk of death. This limits the potential reach of the emergency provision to clear instances of danger to national security or organized criminal activities and to life threatening situations. In any of these situations, as with current law, the section requires that grounds for the issuance of an order must exist. Moreover, an application for an order must be made as soon as practicable and, in any event, within forty-eight hours after the interception.

The allowance made in subsection (b) for emergency interceptions and surreptitious entries without court order follows provisions of 18 U.S.C. 2518(7), amended as noted above.[35] These are extremely important provisions, applicable only under limited circumstances. It should be noted, however, that law enforcement officers may not invoke the provisions of this section without special governmental designation.

SECTION 3106. RECORDS AND NOTICE OF INTERCEPTION

1. In General

This section regulates the keeping of records concerning the contents of the private oral communications intercepted under this subchapter. Provision is also made for the serving of a notice of an interception, under certain conditions, upon the parties to the intercepted communication.

2. Provisions of the Bill, as Reported

Subsection (a) of this section provides that the contents of a private oral communication intercepted by any means authorized by law are, unless impracticable, to be recorded on a sound recording device in such manner as will protect the recording from editing or other alteration. As soon as practicable after the expiration of an order, the recording is to be delivered to the custody of the court and sealed under its direction. The recording may not be destroyed for a period of ten years, and then only by order of the court. A duplicate recording may be made for use or disclosure to the extent that such use or disclosure is appropriate to the proper performance of official duties. Old applications and orders made or issued under this subchapter are also to be sealed by the court issuing the order, and to be placed in such custody as the court may direct. They may only be disclosed upon a showing of good cause. The applications and orders also may not be destroyed for a period of ten years, and then only by order of the court.

Subsection (b) of this section provides that, within a reasonable time, but not less than 90 days, after the termination of the period for which an interception is authorized by an order, or after the filing of an application that is subsequently denied for an order of approval under section 3105(b), the court must order that a notice be served on the person named in the order or application, and on any other party to an intercepted private oral communication as the court may determine to be in the interest of justice. The notice is to include the fact and date of the issuance of the order or of the filing and denial of the application, the period of the authorized, approved, or disapproved interception, and the fact that during the period a private oral communication was or was not intercepted. However, upon ex parte showing of good cause to the court, the serving of the notice may be postponed. Subsection (b) provides further that, on motion of a person to whom notice has been served, the court may make available, for inspection by such person or his counsel, such portions of the contents of intercepted communications, evidence derived therefrom, applications, or orders, as the court determines to be in the interest of justice. It should be noted that an otherwise valid interception is not converted into an unlawful interception subject to suppression when parties to overheard incriminating conversations fail to receive discretionary notice of the interception due to inadvertence.[36]

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[35] The amendments are consistent with the provisions of a separate bill (S. 1717) passed by the Senate in the 96th Congress. See S. Rept. No. 96-788. Senator Thurmond has introduced a similar bill (S. 1640) this Congress.

The provisions of this section follow closely the provisions of 18 U.S.C. 2518(8) (a), (b), and (d), with only a few minor language changes. Discretion is vested in the courts to delay the serving of a notice beyond ninety days, upon an ex parte showing, in order to avoid any interference with an ongoing investigation, or for any other purpose deemed sufficient by the court.

SECTION 3107. USE OF INFORMATION OBTAINED FROM AN INTERCEPTION

1. In General

This section governs the disclosure and the use that may be made of information obtained from an interception of a private oral communication, and the suppression of evidence unlawfully obtained.

2. Provisions of the Bill, as Reported

Under subsection (a) of section 3107, a law enforcement officer who, in accordance with the provisions of this subchapter, has obtained knowledge of the contents of a private oral communication, or evidence derived from such contents, is authorized to disclose or use such contents to the extent appropriate to the proper performance of his official duties. Furthermore, the subsection authorizes any person who, in accordance with the provisions of this subchapter, has received information concerning the contents of a private oral communication, or evidence derived from such contents, to disclose or use such contents while giving testimony under oath or affirmation in an official proceeding.

Under section 3107(a)(1) an FBI agent who, during an authorized interception of a communication, obtains information concerning such things as a previously unreported cash flow to a person could turn over such information to Internal Revenue agents, whether civil or criminal, who could then use such information as appropriate to the discharge of their duties. Such a disclosure by the FBI agent to IRS personnel is an example of what is intended to be encompassed by the phrase "appropriate to the proper performance of his official duties." Recipients of such information may also make appropriate intraagency disclosures as required by the performance of their duties, and could, additionally, under section 3107(a)(2), publicly disclose the information while giving testimony under oath at an official proceeding.

In addition, under section 3107(a)(3) it is provided that a privileged communication does not lose its privileged character if it is intercepted as part of a private oral communication either pursuant to the provisions of this subchapter or in violation of its provisions.

Under subsection (b), the presence of the seal provided for by section 3106(a), or a satisfactory explanation for the absence of such seal, is a prerequisite to the use or disclosure of the contents of an intercepted private oral communication, or evidence derived from such contents, in an official proceeding.

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[36] *United States* v. *Donovan, supra* note 29.

Subsection (c) makes the giving of pretrial notice regarding an interception to an "aggrieved person" a prerequisite if an evidentiary use of the interception is to be made.

Subsection (d) of this section governs the suppression of evidence. An aggrieved person who is a party in a proceeding may move to suppress the contents of an intercepted private oral communication, or evidence derived from such contents, on the ground that: (1) the communication was unlawfully intercepted; (2) the order of authorization or approval under which it was intercepted is insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or approval. If the motion alleges that the evidence sought to be suppressed has been derived from the contents of an unlawfully intercepted private oral communication, and if the aggrieved person has not been served with notice of such an interception as provided by section 3106(b), the opponent of the allegation is to affirm or deny the occurrence of the alleged unlawful interception, but no such motion is to be considered by the court if the alleged unlawful interception took place more than five years before the event to which the evidence relates.

It is required under subsection (d) that motions to suppress must be made prior to the official proceeding unless there was no opportunity to make the motion or unless the aggrieved person was not aware of the grounds for the motion.

Upon the filing of a motion by an aggrieved person, a court of competent jurisdiction may make available for inspection by the aggrieved person or his counsel such portions of the contents of an intercepted private oral communication, or evidence derived from such contents, as the court determines to be in the interest of justice.

Subsection (d) also provides that, if the motion to suppress is granted, the contents of the intercepted communication, and evidence derived from such contents, may not be received in evidence in an official proceeding before a government agency of the United States, a State, or a locality.

The various provisions of this section are essentially the same as provisions found currently in 18 U.S.C. 2517(1), (2), (3), and (4); in 18 U.S.C. 2518 (9) and (10)(a); [37] and in 18 U.S.C. 3504.

The provision in subsection (a) allowing disclosure and use [38] of the contents of communications intercepted under this subchapter "to the extent appropriate to the proper performance" of official duties should be given a reasonable, broad construction. Proper performance of law enforcement duties includes the exchange of intelligence between Federal agents and between a Federal agent and State or local police officials. As pointed out in *United States* v. *Cox*, [39] it would be irrational to hold that law enforcement agents engaged in authorized interceptions in aid of a narcotics trafficking investigation could not, upon hearing incidentally of plans for a bank robbery, act to thwart the bank robbery. Whether the contents are of an unrelated interception, of an emergency interception, or of a regular interception pursuant to the provisions of this subchapter, the uses made of the contents in the exercise of professional judgment should generally be accepted as appropriate in the performance of official duty.

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[37] A provision presently in 18 U.S.C. 2518(10)(b), enabling the government to appeal from the granting of a motion to suppress, is continued in this title in section 3724(b).

[38] "Disclosure and use" is intended to have a broad meaning.

[39] 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

The last sentence in subsection (d)(1), unlike the other provisions of the section which have their origin in the Omnibus Crime Control and Safe Street Act of 1968, is based upon title VII of the Organized Crime Control Act of 1970.[40] Title VII was meant to govern suppression hearings in respect to alleged electronic and mechanical surveillances that occurred prior to June 19, 1968, the date after which the Omnibus Crime Control and Safe Street Act of 1968 controlled. Title VII of the 1970 Act was meant in part to codify the government's policy of responding to the merits of a motion to suppress by searching its records and disclosing the occurrence of an overhearing upon the issue being raised by a defendant,[41] a provision carried forward by part of the last sentence of subsection (d)(1). In its most important aspect, however, title VII was designed to save the criminal justice system the wasteful procedures attending motions to suppress evidence of a crime as having been derived from an unlawful overhearing alleged to have taken place not only before the crime was even committed, but more than five years before the crime.[42] This provision, now appearing in section 3504(a)(3) of present title 18, is also continued in the last sentence of subsection (d)(1).[43]

SECTION 3108. REPORT OF INTERCEPTION

1. In General

This section requires certain reports to be made with respect to interceptions, not for the benefit of any individual, but entirely for governmental purposes.

2. Provisions of the Bill, as Reported

Subsection (a) of section 3108 concerns judicial reports. Within thirty days after the expiration of the period of interception authorized in an order or after the denial of an application for an order approving an interception, the court is required to report to the Administrative Office of the United States Courts such information as the fact that an order or extension was applied for; the identity of the law enforcement officer and the government agency making the application and the person authorizing the application; the offense specified in the application for the order or extension; and the period of interception authorized by the order. The Administrative Office of the United States Courts is authorized through the issuance of regulations to require that the report include any other related information.

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[40] 18 U.S.C. 3504(a).

[41] The general policy was announced by the Solicitor General in November 1966 in a supplemental brief filed in the Supreme Court in *Schipani* v. *United States*, 362 F.2d 825 (2d Cir.), cert. denied, 385 U.S. 934 (1966). The requirement of the statute is predicated, however, on there being at least some factual possibility that the alleged unlawful overhearing could have tainted the government's evidence in the case. See *In Re Dellinger*, 357 F. Supp. 949, 958–960 (N.D. Ill. 1973).

[42] See S. Rept. No. 91–617, 91st Cong., 1st Sess., pp. 33, 62–70, 135–140 (1969); H. Rept. No. 91–1549, 91st Cong., 2d Sess., pp. 34, 50–52, 80–83 (1970).

[43] The remaining provision of title VII, governing the disclosure to the movant of the contents of the communication alleged to have been intercepted unlawfully before June 19, 1968, is subsumed by the codification in section 3107(d)(3) of the similar provision, heretofore limited to post-June 19, 1968, proceedings, that appears in section 2518(10)(a) of the present title 18.

Subsection (b) concerns prosecutive reports. During January of each year, the Attorney General, and the principal prosecuting attorney of a State or locality, is required to report to the Administrative Office of the United States Courts such information as that required by subsection (a) with respect to each application for an order, or extension of an order, made during the preceding calendar year; a general description of the interceptions made under such orders; the approximate number of persons whose communications were intercepted; the approximate number of surreptitious entries made to effect the interception of communications; and the approximate nature, amount, and cost of the manpower and other resources used in making the interceptions. In addition, the report is to include such items as the number of arrests resulting from the interceptions, the number of trials resulting from the interceptions, the number of motions to suppress made with respect to the interceptions, and the number of convictions resulting from the interceptions. Any related information that the Administrative Office of the United States Courts may by regulation require is also to be reported.

Subsection (c) concerns Administrative Office reports. In April of each year, the Director of the Administrative Office of the United States Courts is directed to transmit to the Congress a complete report concerning the number of applications made for orders authorizing or approving the interception of private oral communications and the number of such orders granted or denied during the preceding calendar year. The report is to include a summary and analysis of the data required to be filed with the Administrative Office under this section.

It is provided in subsection (d) that the Director of the Administrative Office of the United States Courts is authorized to issue regulations dealing with the content and form of the reports required to be filed pursuant to subsection (a) and (b) of this section.

These provisions are taken nearly intact from 18 U.S.C. 2519. In requiring that these various reports be made, a foundation is laid for future evaluation of the effects of this subchapter. The reports should serve to facilitate the making of any changes in the law that may become warranted but, in any event, to allow for a comprehensive understanding of the extent and value of authorized interceptions in Federal and State law enforcement. [44]

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[44] It should be noted that the Foreign Intelligence Surveillance Act of 1978 (P.L. 95-511) repealed 18 U.S.C. 2511(3)—the so-called national security disclaimer—which stated that nothing contained in this or other specified statutes limits the power of the President under the Constitution to take necessary steps to protect the nation by using electronic surveillance. It is clear from the legislative history of the disclaimer that it was not and never purported to be a recognition of an inherent power in, or a grant of statutory power to, the President to conduct national security electronic surveillance, but was merely a legislative statement that title III of the Omnibus Crime Control and Safe Streets Act of 1968 was not intended to deal with the subject. *United States* v. *United States District Court,* 407 U.S. 297 (1972).

SECTION 3109. DEFINITIONS FOR SUBCHAPTER A

A number of the terms employed in this subchapter are defined in section 3109 by reference to definitions appearing elsewhere.[45] It should be noted that "private oral communication" is defined in section 1526(f) of the Code to mean "speech uttered by a person exhibiting an expectation, under circumstances reasonably justifying the expectation, that such speech is not subject to overhearing." The distinction utilized in present law between wire and oral communications is considered to have such minimal utility that the distinction is not maintained in this subchapter.

SUBCHAPTER B. USE OF CALL REGISTERS

(Sections 3111–3116)

This subchapter is new to this year's Criminal Code revision bill, and creates procedures governing the use of a call register,[1] a law enforcement investigative technique that consists of placing a device on a telephone line that monitors electrical impulses caused when the dial or push buttons on the telephone are used. A call register enables a person to learn the numbers that are dialed on a telephone, but does not indicate whether or not the call was completed, and does not involve interception of the contents of the call.

Currently, there is no legal requirement that a court order be obtained in order for a law enforcement officer to install a call register. The Supreme Court has determined[2] that a call register, since it does not "intercept" communication, is not covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the provisions of which are carried forward in the preceding subchapter), and that the use of a call register does not violate the Fourth Amendment.[3] The reason for the latter holding is that a person is not deemed to have a reasonable expectation of privacy regarding the numbers dialed from his telephone inasmuch as most people are aware that a telephone company can, and routinely does, record such information for billing purposes.

Although a court order is not legally required to use a call register, the Department of Justice has for some years followed a practice of obtaining such an order. A number of considerations support this practice. Most call register installations require the assistance of the telephone company, yet telephone companies are understandably reluctant to furnish such assistance in the absence of a court order, given the possibility of civil liability or of customer hostility. Moreover, from the government's standpoint, if a telephone company or other person whose assistance in installing the device may be needed (e.g., a landlord) is unwilling to furnish such assistance, a court order may serve the function of compelling such assistance to be rendered.[4]

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[45] Section 1526 of the Code; 47 U.S.C. 153(h).

[1] Such devices are often referred to as "pen registers," although oscillographs are seldom, if ever, still employed for this purpose.

[2] *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977).

[3] *Smith* v. *Maryland*, 442 U.S. 735 (1979).

The Department of Justice and the American Telephone and Telegraph Company, pursuant to the prevailing policies of both entities, have mutually developed a model order that today is employed to obtain court approval of the use by the government of a call register.[5] It is the Committee's understanding that the provisions of this subchapter essentially reflect the terms of this model order and of current Department of Justice practices.

SECTION 3111. AUTHORIZATION FOR A CALL REGISTER

1. In General

This section states the general rule that a court order must be obtained to install or use a call register, and specifies the class of persons (i.e., law enforcement officers) who may seek such an order.

2. Provisions of the Bill, as Reported

Subsection (a) provides that the installation or use of a call register may be authorized or approved by a court of competent jurisdiction pursuant to the provisions of section 3113 upon an application filed pursuant to the provisions of section 3112 by a federal law enforcement officer of a government agency having responsibility for a criminal investigation. Subsection (b) states that, except as provided in subsection (a) or in section 3114, no federal public servant may install or use a call register.

The principal feature of this section is the requirement, the reasons for which have been previously discussed, that a court order be obtained to authorize a federal government employee to install or use a call register. The exception for situations covered by section 3114 relates to emergency circumstances in which a prior court order need not be obtained. The terms "law enforcement officer" and "government agency" are defined in section 111. The former includes both investigators, such as F.B.I. agents, and prosecutors. Although criminal investigators are encompassed within the definition, the Committee anticipates and intends that applications for a court order to install or use a call register ordinarily will require the approval of an attorney for the government.[6]

The term "call register" is defined in section 3116(1) to mean a device that identifies, decodes, or records electronic or other impulses that are used to direct a telephone call to a particular telephone instrument. The device itself may be installed at or on the line from which the call originates or to which it is directed, or may be installed at any other point.

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[4] *United States* v. *New York Telephone Co., supra* note 2 at 172.

[5] The model order invokes the powers of the court under Rule 57(b), F.R. Crim. P., to "proceed in any lawful manner not inconsistent with" the rules of criminal procedure, if no procedure is specifically prescribed. See *United States* v. *New York Telephone Co., supra* note 2.

[6] The same policy is followed with respect to applications for search warrants under Rule 41, F.R. Crim. P. Although the Rule permits investigative agents to file applications, in practice, and pursuant to Department of Justice regulation, 28 CFR § 60.1, such applications may not be made without the concurrence of a federal prosecutor except in an emergency situation.

The term "court of competent jurisdiction" is defined in section 3116(3) to mean a district court of the United States or a United States court of appeals. Thus applications may be filed in either court, although they would normally be filed with the district court.

While subsection (b) prohibits the installation or use of a call register except as provided in this subchapter, the Committee does not intend that an exclusionary rule be applied to evidence or leads developed from the use of a call register if such use was not authorized by this subchapter. Unlike the previous subchapter dealing with wiretapping, which contains a specific suppression provision in section 3107, this subchapter contains no statutory suppression remedy, in view of the Supreme Court's holdings that call registers do not infringe upon Fourth Amendment interests. The Committee believes that other remedies available for a violation of this subchapter in appropriate cases—i.e., (1) administrative disciplinary action, (2) civil damage and proceedings and (3) contempt of court (if the violation involved a knowing breach of the scope of a court order)—are adequate to vindicate any interest of a person aggrieved by the improper installation of a call register. It is not, however, the Committee's purpose in enacting these procedures to authorize the drastic remedy of suppression or exclusion of otherwise admissible evidence bearing upon guilt or innocence or the outcome of other litigation.

The Committee also does not intend that the prohibition in subsection (b) be construed to preclude the otherwise proper use of a call register pursuant to the provisions of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.) in an investigation subject to the provisions of that statute.

SECTION 3112. APPLICATION FOR AN ORDER FOR A CALL REGISTER

1. In General

This section describes the nature and content of an application to a court for an order approving the installation or use of a call register.

2. Provisions of the Bill, as Reported

This section requires that an application for a court order, or an extension of an order, authorizing the installation or use of a call register be made in writing and under oath or equivalent affirmation, and include (1) the identity of the law enforcement officer making the application, and (2) a statement of the facts relied upon by the officer to justify his belief that the information likely to be obtained from the call register is relevant to a lawful criminal investigation.

These provisions are self-explanatory. The term "law enforcement officer" and "court of competent jurisdiction" are defined in sections 111 and 3116, respectively.

SECTION 3113. ISSUANCE OF AN ORDER FOR A CALL REGISTER

1. In General

This section sets forth the standard for the issuance of a court order authorizing the installation or use of a call register, and deals with other matters relating to the nature and contents of such an order.

2. Provisions of the Bill, as Reported

Subsection (a) provides that, upon an application pursuant to section 3112, the court shall enter an *ex parte* order, as requested or as found warranted by the court, authorizing or approving the installation and use of a call register within the geographic jurisdiction of the court if the court determines on the basis of the facts submitted by the applicant that "there is reason for the belief that the information likely to be obtained by the call register is relevant to a lawful criminal investigation." This is essentially the standard in force today with respect to such order under Rule 57(b), F.R. Crim. P. It should be noted that the court may issue the order only pursuant to a showing that the information likely to be obtained from the call register is relevant to a criminal investigation. Orders for use of call registers designed to further non-criminal proceedings are not permitted. Inasmuch as no federal law or constitutional provision currently restricts the use of call registers, this is a cutback on the scope of present law. However, the Committee has been informed that the use of a call register in connection with a civil investigation is very rare or unknown. If and when a need is demonstrated to permit the use of this investigative device in certain civil investigations, the Committee is prepared to reassess the limitation. Of course, this limitation does not mean that evidence or leads developed from the installation in a criminal investigation may not be used in civil proceedings.[7]

Subsection (b) provides that an order issued under this section shall specify various, enumerated matters such as the identity, if known, of the person who is the subject of the investigation, the nature of the investigation, and the period of time during which the use of the call register is authorized. The subsection also provides that an order issued under this section shall direct, upon the request of the applicant, that a communications common carrier, landlord, custodian, or other specified person furnish forthright to the applicant all information, facilities, and technical assistance necessary to accomplish the installation and use of the call register unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or other person is according the person whose calls are to be registered. This is identical to the comparable provision in the preceding subchapter dealing with wiretaps (section 3103(b)(2)), and is consistent with the model order employed by the Department of Justice under Rule 57(b) with respect to call register court authorization orders today. The term "communications common carrier" is defined in section 3116.

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[7] See, e.g., *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) (evidence developed by a grand jury for use in a criminal investigation may be used in a civil proceeding).

Subsection (c) essentially provides that orders issued under the section may not exceed 30 days and shall be limited to the time necessary to achieve the objective of the authorization. The subsection further provides that extensions may be sought and granted on the same basis as the original order.

SECTION 3114. EMERGENCY USE OF A CALL REGISTER WITHOUT PRIOR AUTHORIZATION

1. In General

This section authorizes the use of a call register in certain emergency situations, notwithstanding the lack of a prior court order. The provision is patterned after the comparable section in the preceding subchapter dealing with wiretaps (section 3105(b)).

2. Provisions of the Bill, as Reported

This section provides that a law enforcement officer may install and use a call register without a court order if he is specifically authorized to do so by the Attorney General, and the officer reasonably determines that (1) an emergency situation exists with respect to an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1802 (Racketeering), or an offense that involves a risk of death; (2) the emergency requires the installation and use of a call register before an order authorizing such installation and use can, with due diligence, be obtained; and (3) an application for a court order approving the installation and use is made in accordance with section 3112 as soon as practicable and not later than forty-eight hours after the call register is installed. The section also states that the use of the call register shall terminate, in the absence of an order approving it, immediately when the information sought is obtained or when the application is denied, whichever is earlier. As noted, this provision is very similar to that in section 3105(b) and the discussion there should be consulted. The Committee is of the view that exceptions to the general rule of prior court authorization for the use of a call register are justified, as is the case under present law with respect to wiretaps, 18 U.S.C. 2518(7), in emergency situations involving offenses affecting the national security, organized crime, or any offense posing a risk of death, in which a prior court order could not be secured.

SECTION 3115. ASSISTANCE IN INSTALLATION AND USE OF A CALL REGISTER

1. In General

This section deals with various aspects relating to assistance of a communications common carrier or other person in the installation and use of a call register. It is modeled upon section 3104 of the preceding subchapter.

2. Provisions of the Bill, as Reported

Subsection (a) provides that a law enforcement officer may request that a communications common carrier, landlord, custodian, or other person provide information, facilities, and technical assistance necessary to accomplish the installation and use of a call register unobtrusively, if the officer provides the person to whom the request is made with either (1) a court order directing such assistance, as provided in section 3113, or (2) a written certificate stating that emergency installation and use of the call register is authorized under section 3114, relating to emergency use without a court order.

Subsection (b) authorizes the communications common carrier, or other person whose assistance is solicited in installing or using a call register, to perform the assistance, and specifically insulates such carrier or other person from being sued for providing assistance in accordance with the terms of a court order or certificate as described in subsection (a).

Subsection (c) provides that a communications common carrier or other person furnishing assistance pursuant to this subchapter is entitled to be compensated therefor at prevailing rates.

Subsection (d) mandates that a communications common carrier or other person who has been supplied with a court order or certificate pursuant to subsection (a) not disclose the existence of the call register unless he is required to do so by legal process, and unless he has given prior notification to the Attorney General. This is designed to safeguard criminal investigations from premature disclosure to the subjects thereof.

SECTION 3116. DEFINITIONS FOR SUBCHAPTER B

Section 3116 contains definitions of terms used throughout the subchapter. These definitions have been discussed in connection with the appropriate substantive provisions.

SUBCHAPTER C. COMPULSION OF TESTIMONY AFTER A CLAIM OF SELF-INCRIMINATION

(Sections 3121–3125)

This subchapter carries forward the present law provisions of the Organized Crime Control Act of 1970,[1] Part V of title 18, dealing with the compulsion of testimony after a refusal to testify on the ground of self-incrimination, often referred to as the granting of immunity.[2] Only minor changes have been made in that enactment, and none of these modifications are substantive in nature. The Committee specifically endorses the use of such compulsion of testimony in appropriate circumstances as a useful and necessary tool of law enforcement. The Committee also notes that the Supreme Court has specifically upheld the constitutionality of the current statute [3] upon which this subchapter is based.

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[1] P.L. 91-452, 84 Stat. 922.

[2] 18 U.S.C. 6001-6005.

SECTION 3121. COMPULSION OF TESTIMONY AFTER REFUSAL ON BASIS OF PRIVILEGE AGAINST SELF-INCRIMINATION

1. In General

Section 3121 provides that a person who asserts his privilege against self-incrimination in an official proceeding conducted under authority of a Federal court or grand jury, or a Federal agency, or of Congress or either House of Congress, and who is ordered to testify or produce information in accordance with sections 3122, 3123, or 3124, may not refuse to obey the order on the basis of his privilege against self-incrimination. The section further provides that no testimony or information produced in compliance with the order, or any information directly or indirectly derived from the compelled testimony or production, may be used against the person so compelled in a criminal case against him, except in a prosecution for perjury, false swearing, or making a false statement in the course of the testimony or production compelled under the order, or for otherwise failing to comply with the order.

2. Present Federal Law

18 U.S.C. 6002 contains substantially the same provisions as does section 3121. It provides that a witness who refuses to testify or provide information on the basis of his privilege against self-incrimination in a proceeding before or ancillary to a Federal court or grand jury, a Federal agency, or either House of Congress, or a committee, a subcommittee or joint committee of Congress, and who is ordered to testify or provide information, may not refuse to comply with the order on the basis of his privilege against self-incrimination. In addition, it provides that no testimony or information compelled under the order, or any information directly or indirectly derived therefrom, may be used against the witness, except in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

3. Provisions of the Bill, as Reported

Only minor changes in current law are effected by section 3121. The language "under the authority of" is substituted for "before or ancillary to" because the Committee believes that phrase to be broader and more encompassing of the proceedings to which the compulsion of testimony provision is intended to apply. Thus, e.g., specific reference to committees of Congress can be eliminated in subparagraph (a)(3) of section 3121.

"[C]ommitted in the course of the testimony or production" is added in subsection (b)(1) for the purpose of clarifying that the exception to immunity from prosecution applies only to perjury or false statements committed in response to an order compelling testimony or the production of information, and not to such offenses previously committed. This will avoid an ambiguity in the current law which has raised a basis for attacking its constitutionality on the ground that the exception can be interpreted as including perjury or false statements committed prior to the order compelling testimony or information.[4] No change in the purpose or intent of the current law is contemplated by any other modification of the language contained in section 3111 from that set forth in 18 U.S.C. 6002.

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[3] *Kastigar* v. *United States*, 406 U.S. 441 (1972); see also *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977). The *Kastigar* decision and the current statute have received, however, at the hands of some lower courts and commentators, a more grudging interpretation and application than are intended or approved by the Committee. Some of those problems are discussed in Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. Crim. L. & C. 155 (1976).

SECTION 3122. COURT OR GRAND JURY PROCEEDINGS

1. In General

Section 3122 sets out the procedures to be followed in applying for, and in the issuance of, an order described in section 3121 in relation to court and grand jury proceedings. Such an order is to be issued by the district court for the judicial district in which the proceeding is to take place, or is taking place, upon the request of the United States Attorney for the district (approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or of any designated Assistant Attorney General having been secured) if, in the judgment of the United States Attorney, the testimony or information may be necessary to the public interest, and the witness has refused or is likely to refuse to testify or to produce the information on the basis of a claim of a privilege against self-incrimination.

2. Present Federal Law

18 U.S.C. 6003 contains substantially the same provisions as those included in section 3112, except the Associate Attorney General is not included in the list of persons who may approve an application for a grant of immunity.

3. Provisions of the Bill, as Reported

Two significant changes in language contained in section 3122 are made. First, the word "subpoenaed" in subparagraph (a) is substituted for "called." The purpose of this change is to more clearly conform section 3122 to the basic intent of current law and to limit the type of proceedings in which the compulsion of testimony can be invoked to those in which a subpoena may be issued. Second, the Associate Attorney General, as the third highest officer in the Department of Justice and as an officer having oversight responsibility for criminal justice matters, is added to the list of persons in subsection (b) with authority to approve a United States Attorney's application for an order to testify or produce evidence. In all other respects section 3122 conforms in substance and intent to 18 U.S.C. 6003. Discretion of the court is limited to verifying that the criteria required by subsection (b) have been met.[5] The United States Attorney, once approval by a designated official has been obtained, is given full authority and discretion to determine if the testimony or information should be compelled or if the witness is likely to assert his privilege. While approval of a responsible official of the Department of Justice is required, no requirement is made as to the form of the approval or that it be in writing. The Committee intends that an application by the United States Attorney to the court setting forth that the statutory criteria have been met is to carry with it the presumption of administrative regularity.

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[4] This strained interpretation was approved in one case, *In re Baldinger*, 356 F. Supp. 153 (C.D. Cal. 1973). It was rejected in other cases. See, e.g., *In re Grand Jury Proceedings*, 509 F.2d 1349 (5th Cir. 1975); *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States* v. *Doe*, 361 F. Supp. 226 (E.D. Pa.), aff'd 485 F.2d 682 (3d Cir. 1973), cert. denied, 415 U.S. 989; *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *Application of the United States Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1282 (D.D.C. 1973).

[5] See *In re Kilgo*, 484 F.2d 1215, 1219 (4th Cir. 1973).

SECTION 3123. ADMINISTRATIVE PROCEEDINGS

1. In General

Section 3113 establishes the procedures to be followed in applying for, and in the issuance of, an order described in section 3121 in proceedings before Federal agencies. Substantially, the procedures follow the same format as in section 3122 except that the agency in question issues the order compelling testimony or the production of information rather than a court. The agency may issue an order when in its judgment the testimony or information may be necessary to the public interest, and the witness has refused or is likely to refuse to testify or produce information. As in section 3122, an order under section 3123 may issue only after approval by one of the specified high-ranking officials of the Department of Justice.

2. Present Federal Law

18 U.S.C. 6004 contains substantially the same provisions as does section 3123. Under section 6004, an agency, as defined in 18 U.S.C. 6001(1) (see section 3125, *infra*), may, with the approval of the Attorney General, issue an order to compel the testimony of witnesses or the production of information when in its judgment the testimony or information may be necessary to the public interest, and the witness has refused or is likely to refuse to testify or provide information on the basis of his privilege against self-incrimination.

3. Provisions of the Bill, as Reported

No significant change in current law is contemplated or intended by section 3123. The word "subpoenaed" in section 3123(a) is substituted for "called" in section 6004(a) only to conform the former to the substance of the current statute which limits the proceedings in which testimonial compulsion can be invoked to those in which a witness may be summoned to appear.

Section 6004 provides for the approval of the Attorney General for the issuance of an order compelling the testimony of a witness or the production of information. This provision, read in the context of the differing language of 18 U.S.C. 6003 creates an ambiguity. If read in the light of the general rules on delegability, the Attorney General's authority under section 6004 can be delegated by him to any other officer, employee, or agency of the Department of Justice pursuant to 28 U.S.C. 510.[6] However, read *in pari materia* with section 6003, it could be held to be a specific limitation precluding delegation. In order to conform the provisions of sections 3122 and 3123, both provide for approval of orders compelling testimony by specified high-ranking officials of the Department of Justice. As under current law, the intent of this provision is to limit the delegation of authority to approve such orders, in proceedings pursuant to both sections, to those officers.

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[6] *December 1968 Grand Jury* v. *United States*, 420 F.2d 1201 (7th Cir.), cert. denied, 397 U.S. 1021 (1970); *Federal Trade Commission* v. *Foucha*, 356 F. Supp. 21 (N.D. Ala. 1973).

SECTION 3124. CONGRESSIONAL PROCEEDINGS

1. In General

Section 3124 sets forth the procedures to be used for the issuance of an order compelling the testimony of witnesses or the production of information in proceedings under the authority of Congress or of either House of Congress. Such an order is to be issued by the district court for the judicial district in which the proceeding is to take place upon the request of a duly authorized representative of the House of Congress or the committee, subcommittee, or joint committee under whose authority or before whom the proceeding is being conducted. In the case of a proceeding before a House of Congress, the request must be approved by an affirmative vote of a majority of its members present in that House. In the case of a committee, a joint committee, or a subcommittee, the request must be approved by an affirmative vote of two-thirds of the members of the full committee. The section provides that the Attorney General must be served with a notice of intent to request the order at least ten days prior to the application to the court. Upon application of the Attorney General, the court is to defer issuance of the order for a period of twenty days from the date on which the application to the court is made.[7]

2. Present Federal Law

18 U.S.C. 6005 contains substantially the same provisions as does section 3124.

3. Provisions of the Bill, as Reported

No change in the substance of current law is contemplated or intended by section 3124. The word "subpoenaed" is substituted for the word "called" in section 6005 as was done in sections 3112 and 3123.

As in both sections 3122 and 3123, and in the current general compulsion of testimony provisions,[8] it is intended that an order compelling testimony can be issued prospectively, that is, before the witness has been called to appear and before he has invoked his privilege against self-incrimination. However, the order will not be effective until the witness has invoked his privilege on Fifth Amendment grounds and has been informed of the order by the officer presiding over the proceeding.

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[7] A discussion of this authority vested in the Attorney General to defer issuance of the order is found in *Application of United States Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270, 1277–1278 (D.C. 1973).

[8] 18 U.S.C. 6001–6005.

SECTION 3125. DEFINITIONS FOR SUBCHAPTER C

1. In General

Section 3125(a) defines a list of the Federal agencies which are intended to be encompassed by the term "agency of the United States" as used in sections 3121(a)(2) and 3123. Substantially the list encompasses the executive and military departments of the government, as defined in 5 U.S.C. 101-102, and the independent regulatory agencies.

Section 3125(b) provides that "court of the United States" includes the Superior Court, and the Court of Appeals, of the District of Columbia, and the United States Court of Military Appeals.

2. Present Federal Law

18 U.S.C. 6001 contains a definition of terms used in the subsequent sections of the general statute on compulsion of testimony. In addition to defining "agency of the United States" and "court of the United States," the section also defines "other information" and "proceeding before an agency of the United States."

3. Provisions of the Bill, as Reported

Section 3125, as supplemented by the general definitions section of the Code,[9] does not make any substantive changes in the current statute. Section 3125(a) adds the National Credit Union Administration, the Commodities Futures Trading Commission and the United States Victim Compensation Board referred to in chapter 41 of the Code and created in title 28 of the United States Code. Public Law 91-468, which established the National Credit Union Administration, authorized that Administration to afford witnesses called before it immunity from prosecution. That Act did not require the Administration to seek approval from the Attorney General before granting immunity. Under the Code the authority of the Administration to grant use immunity is conformed to that of other agencies, including Attorney General approval, by its inclusion in the definition of an "agency of the United States," and by the repeal, in section 301 of this Act, of the immunity provisions of the Act creating the National Credit Union Administration.[10]

"Court of the United States" is generally defined in section 111 of the Code, but does not include the Superior Court or the Court of Appeals of the District of Columbia, or the United States Court of Military Appeals, all of which are included in the definition in 18 U.S.C. 6001(4). The definition in section 3125(b) fills the omission in order to provide for orders compelling testimony in court or grand jury proceedings before those courts. As under current law, an order compelling the testimony of witnesses or the production of information in proceedings before those courts, as in all other courts, may issue only from the District Court for the judicial district in which the proceeding is to take place.

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[9] Section 111.

[10] That Act (12 U.S.C. 1784(c)) provided that the National Credit Union Administration could issue "transactional" immunity instead of "use" immunity. The type of immunity that an agency can grant has been limited to "use" immunity under this subchapter to avoid an anomalous situation.

The definition of "other information"[11] is not required in view of the absence of that term in section 3121 *et seq.*, which substitutes therefor the phrase, "record, document, or other object." That phrase is intended to be synonymous with the term "other information" as defined in 18 U.S.C. 6001(2).

"Proceeding before an agency of the United States" is defined in 18 U.S.C. 6001(3). Since the term "official proceeding" is defined in section 111 of the Code, further definition in section 3125 is not required. The absence of authority to issue subpoenas as an element of the definition of "official proceeding" is accounted for by substituting the word, "subpoenaed" instead of "called" in sections 3122 through 3124, thus conforming the provisions of this subchapter to the intent of 18 U.S.C. sections 6003 through 6005.

SUBCHAPTER D. PROTECTION OF WITNESSES

(Sections 3131-3133)

This subchapter codifies the provisions on relocation of witnesses enacted as title V of the Organized Crime Control Act of 1970. That title was not enacted as part of title 18 and presently appears in headnote fashion in chapter 223 of title 18 just preceding 18 U.S.C. 3481. The Committee has included this subchapter to bring the provisions of title V of the 1970 Act into the title 18 chapter dealing with ancillary investigative authority where it logically belongs. The subchapter continues the basic theory behind title V of the Organized Crime Control Act of 1970—insuring that witnesses in organized crime cases are produced alive and unintimidated before grand juries and at trial. The Committee endorses the statement on title V that appeared in the Senate Report on S. 30, the Senate bill which became the Organized Crime Control Act of 1970,[1] as follows:[2]

> Each step in the evidence gathering process . . . moves toward the production of live testimony, testimony that is necessary to bring criminal sanctions into play in the fight against organized crime. Criminal sanctions, in short, do not enforce themselves. Obtaining testimony, however, is only part of the problem. The Attorney General testified in 1965 that even after cases had been developed, it was necessary to forego prosecution hundreds of times because key witnesses would not testify for fear of being murdered. Tampering with witnesses is one of organized crime's most effective counter weapons. Indeed, the Attorney General indicated that such fear was not unjustified; he testified

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[11] 18 U.S.C. 6001(2).

[1] P.L. 91-452, 84 Stat. 933.

[2] S. Rept. 91-617, 91st Cong., 1st Sess. (1969) pp. 59-60.

that the Department, in its organized crime program, lost more than 25 informants between 1961 and 1965. It was in this context, therefore, that the President's Crime Commission tragically concluded:

> No jurisdiction has made adequate provision for protecting witnesses in organized crime cases from reprisal. In a few instances where guards are provided, resources require their withdrawal shortly after the particular trial terminates. On a case-to-case basis, governments have helped witnesses find jobs in other sections of the country or have even helped them to emigrate. The difficulty of obtaining witnesses because of the fear of reprisal could be countered somewhat if governments had established systems for protecting cooperative witnesses.
>
> The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation.
>
> After trial, the witness should be permitted to remain at the facility so long as he needs to be protected.

The Committee has concluded that eleven years of experience with witness protection under the 1970 act has amply proven both the necessity and utility of such provisions. It is a recognized fact that testifying in organized crime or narcotics cases involves a real danger of violent retaliation. Protection by means of relocation to a safe environment is often necessary in such cases. Indeed, the ability to offer protection to witnesses is virtually an absolute requirement to an effective campaign against organized crime. In addition, the Committee has concluded that in appropriate situations protection should be provided in cases that do not involve organized crime activity but do involve serious criminal violations and a very real presence of danger to witnesses and informants.

The Committee has concluded that the language used in title V of the 1970 Act may be inadequate to describe what is necessary to effectively relocate endangered witnesses and to ensure their security. Under the current language of title V to provide "protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses," the Attorney General has been called upon to develop special procedures and techniques of protection and relocation. These techniques and procedures are given greater statutory recognition in section 3121 of this bill. The Committee, however, believes that setting out these techniques and procedures in the Code is not a new grant of authority, but is rather a recognition of the current program and a reaffirmation that these techniques and procedures are fully justified and well within the contemplation of title V of the 1970 Act.

SECTION 3131. WITNESS RELOCATION AND PROTECTION

Section 3131(a) continues the current law authority of the Attorney General to provide protection and security by means of relocation for witnesses and their immediate families in proceedings brought against persons involved in criminal activity. Several changes have been made.

First, under current law the protection may be offered where the proceedings have been instituted against a person alleged to have participated in an "organized crime activity". The Committee feels that the term "organized crime activity" is, on the one hand, too vague in that it fails to give sufficient guidance to the Attorney General in the implementation of this statute, and is, on the other hand, too limiting of the Attorney General's authority to afford protection where it is otherwise warranted. Accordingly, the Committee has substituted a more precise term. Under section 3131, witness protection may be provided in "an official proceeding if the Attorney General determines that . . ." an offense described in section 1323 (Tampering with a Witness, Victim, or an Informant), or a similar State or local offense involving a crime of violence directed at a witness, or 1324 (Retaliating against a Witness or an Informant) is likely to be committed.

The reference to sections 1323 and 1324 insures completeness of coverage. Clearly, the offenses set forth in those sections are precisely the type of conduct against which this subchapter seeks to afford protection for witnesses, potential witnesses, victims, and their immediate families. The Committee intends by reference to these two sections to describe the general kind of conduct which must be protected against. There is no intention to limit the availability of protection to the threat that these specific Federal offenses will be committed. Rather, it is the intent of the Committee that the Attorney General be free to afford whatever protection is necessary in any case in which he believes the conduct described in those offenses is likely to occur. In addition, the section makes clear that there is no intent to limit protection to Federal offenses. The Attorney General can order protection of State or local witnesses on a reimbursable basis. Similarly there is no intent to restrict protection to organized crime activities. There is no reason to deny protection to a witness who is in danger of retaliation, simply because the nexus between the offense and organized criminal activity is lacking. For instance, a rape victim fearing retaliation from her assailant may not be willing to testify unless relocation or protection is made available. That a further assault will subject the attacker to further prosecution is cold comfort in such a situation. Protection or relocation should be available in such a circumstance. Extending witness protection in this manner should not create a burden on the Department or the witness relocation program, first, because any State victims are to be protected subject to reimbursement of the Federal government by the State, and, second, because the Attorney General retains discretion as to any individual victim being afforded protection.

The Committee also has substituted the term "official proceeding," which is defined in section 111, for the current law term "legal proceedings." This change is intended to make the generally defined Code term applicable to this statute and is in no way intended to limit the reach of the current language. In particular, the Committee intends that the statute remain applicable in civil and administrative proceedings, where warranted, as well as in criminal proceedings. The term "official proceeding" is intended to achieve this result. In addition the word "involving" is used instead of the more limited word "instituted" to make it clear that relocation is possible prior to formal charges being brought against a specific defendant. The definition of "official proceeding" would indicate the same result.

In addition, relocation and protection may be offered not only to the witness or a potential witness and to the immediate family of such witness but "to a person otherwise closely associated" with the witness. Experience has shown that the danger of retaliation is not always confined solely to the witness and his immediate family. Protection has to be afforded occasionally to the fiance of a witness, to children of the fiance, and to others closely associated with the witness. The phrase "a person otherwise closely associated" is intended to recognize this need. The standard that must be applied before protection and relocation will be afforded to a family member or a person closely associated with the witness is that such person may also be endangered.

Section 3131(b) is new and spells out in more detail the protective measures that the Attorney General may take to ensure witness protection or relocation. The general concept is that protection of the witness will be achieved either through relocation and the establishment of a new identity or through whatever means the Attorney General deems necessary and adequate short of relocation. This can mean as little as putting someone in a motel outside of town until the trial is over, or it could include the full panoply of procedures listed in section 3131(b).

The procedures developed by the Attorney General to implement section 3131(b) must be designed to protect the health, safety, and welfare of the person to be protected from bodily danger. The Attorney General is afforded wide latitude in taking any action he deems necessary to achieve this result, and he can continue such action for so long as, in his judgment, the danger continues. To guide the exercise of his discretion, the Committee has outlined six measures that may be involved in any relocation. The list in section 3131(b), however, is not intended to be all-inclusive and for the most part reflects procedures already developed to implement the current statute.

First, the Attorney General is authorized to provide suitable official documents to enable the person relocated or protected to establish a new identity without having to reveal his prior identity. Such documentation may include such items as birth certificates, drivers licenses, social security cards, military records, school records, medical records, and the like. It is expected that new names will, in most instances, be legitimized ultimately by court approved name changes. The Committee is aware of the cooperation afforded to the existing program by many Federal, State, and local governmental agencies in this regard and urges that such cooperation and assistance be maintained in the future.

Second, the Attorney General is authorized to provide housing for the protected or relocated persons and, third, for transportation of persons and property to the new residence. In this regard the Attorney General may assist in the selection and location of a new residence and the payment of moving expenses, and may render such other assistance as may be necessary to effect the relocation.

Fourth, the Attorney General is granted authority to provide a tax free subsistence payment in a sum to be established by him in regulations. This provision is in recognition of the need to provide funds for living expenses to a witness and his family who are suddenly removed from their existing life and employment. The subsistence amount and length of payment will vary from witness to witness, but it is not intended that it be paid for a great length of time. It is a stop-gap measure until the relocated family can become established and self-sufficient. There is no requirement that the Attorney General continue such payments beyond the length of time he deems sufficient in the individual case for the relocated witness to be able to fully support himself. This payment is in no way to be a substitute welfare system. In this regard, the Committee notes with approval the existing Department of Justice efforts to limit the duration of such payments. This payment is also not intended to relieve the investigative agencies of any authority or responsibility that they may have to pay informants from time to time.

Fifth, the Attorney General is authorized to assist the person relocated in procuring employment. Here the obligation is to assist in finding job opportunities; however, the primary obligation in finding new employment rests with the relocated witness. Accordingly, there is no guarantee of a job contemplated and the responsibility does not hold for finding future employment in later years.

Sixth, the Attorney General is authorized, in his discretion, to refuse to disclose to anyone the identity, location, or any other matter concerning the person relocated or protected or the program. Obviously, the success of a witness protection and relocation program depends on assured security as to its details. There is no point in relocating a witness with a new identity if that identity will be made public. In exercising his discretion to maintain the secrecy of the program, the Attorney General is to be guided by certain factors. These are the danger to the life and safety of the person relocated or protected, the security of the program itself, and the benefit that would accrue from such disclosure to the public or to the person seeking the disclosure.[5]

Subsection (c) was added in the form of a floor amendment to S. 1437 in the 95th Congress by Senator Huddleston. The Committee has retained this amendment in the reported bill. It deals with the occasional but vexing problem of a citizen who has a civil cause of action against a protected person who is stymied in his efforts to litigate because he cannot learn the new identity or whereabouts of the potential defendant. Under subsection (b)(6) disclosure of such information for the purpose of serving process would generally be forbidden. It is not the intent of the witness relocation and protection program to deprive otherwise innocent persons of their right to litigate civil claims for damages; however, a balance must be struck to ensure protection of the witness. Subsection (c) seeks to strike such a balance. It authorizes the Attorney General to accept the service of process on a protected person named as a defendant in a civil cause of action ensuing prior to the person's relocation. The Attorney General is required to make reasonable efforts to serve a copy of the process on the relocated person at his last known address. If a judgment is entered against the relocated person the Attorney General must determine if the person has made reasonable efforts to comply with the provisions of the judgment, and, if the person can still be located, the Attorney General is required to take affirmative steps to urge compliance by the protected person with the judgment. If the Attorney General determines that the person has failed to make reasonable efforts to comply with the judgment, he is granted discretion to reveal to the plaintiff, after giving appropriate weight to the danger to the protected person that will be caused, the identity and location of the person. Such disclosure to the plaintiff must be made upon the express condition that the plaintiff will not use that information for any purpose other than for disclosures that are essential for recovery under the judgment. Finally, the subsection provides that any disclosure or nondisclosure of the identity or location of the protected person by the Attorney General is not to subject the government to liability in any action based on the consequences of such disclosure.

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[5] As drafted section 3131(b)(6) should be read as a statute permitting the denial of information under 5 U.S.C. 552(b)(3), as amended, of the Freedom of Information Act. Other exemptions under that Act may apply as well.

SECTION 3132. REIMBURSEMENT OF EXPENSES

This section continues the existing authority of the Attorney General to provide transportation, housing, subsistence, or other assistance for a witness or other person pursuant to section 3131 to State or local governments conditioned, in his discretion, upon reimbursement of all or part of the costs involved.

SECTION 3133. DEFINITION FOR SUBCHAPTER D

This section contains a definition of "government" for subchapter D. It is defined to make it clear that the term includes both a State and local government as well as the Federal government. This definition conforms to that contained in current law.

SUBCHAPTER E.—PAYMENT OF REWARDS

(Section 3141)

Present Federal Law

Current title 18 provides for the offering and paying of rewards for the apprehension of offenders under two separate statutes. 18 U.S.C. 3059 is a general statute permitting the Attorney General to offer a $25,000 reward for the capture of a person charged with any Federal or State felony and a like amount for information leading to such person's arrest. 18 U.S.C. 1751, the statute dealing with Presidential assassination, kidnapping, and assault, has in subsection (g) a provision authorizing the Attorney General to pay an amount up to $100,000 for information and services concerning a violation of that section.

SECTION 3141. REWARDS FOR APPREHENDING OFFENDERS

Although rewards for assistance in apprehending offenders are apparently rarely used,[1] the Committee has concluded that they can serve a useful function in aiding law enforcement efforts. This can be especially true in highly publicized cases where an easily identifiable person is a fugitive from justice.

Section 3141 is an amalgam of the provisions of 18 U.S.C. 1751 and 3059. The Committee decided that it was anomalous to have two separate reward sections in the Code, one dealing with all felonies and the second concerning one specific felony. The Committee has chosen the higher figure of $100,000, now contained in the specific statute, 18 U.S.C. 1751, as the applicable maximum for rewards in all cases. This higher sum was chosen in recognition of the personal danger that must occasionally be risked when a citizen comes forward to identify a wanted criminal. The sum of $100,000 is, of course, a maximum and thus will enable the Attorney General to choose an appropriate amount up to the maximum depending on the nature of the offense and the offender.

As is the case under 18 U.S.C. 3059, the Attorney General is authorized to offer a reward if the offense arises under State as well as Federal law. Although Federal rewards in State cases will be rare occurrences, the Committee feels that the authority to offer such rewards should exist for the infrequent case where one is warranted, and as an expression of a major goal of all Federal criminal law—the affording of assistance to State officials in law enforcement matters.

The section sets out the basis for the offering of the reward with more specificity than does current law. For instance, 18 U.S.C. 1751 refers to rewards for information and services concerning a violation of the section and 18 U.S.C. 3059 permits the offering of rewards for the capture of a wanted person or for information leading to such person's arrest. Section 3141 combines both these approaches by permitting rewards for the capture of an offender as well as for information leading to his arrest and conviction. The latter phrase would permit a reward to be paid to a citizen who came forward with information after the initial arrest of the offender which could be used at the subsequent trial. This latter coverage, while arguably present under current 18 U.S.C. 1751, is clearly not possible under 18 U.S.C. 3059.

The Committee intends that the phrase "the Attorney General may offer and pay" be interpreted to permit the payment in appropriate cases of a reward after a citizen has acted to assist law enforcement even though no offer was made in advance.

The provision of 18 U.S.C. 1751 that bars payment of a reward to a public servant who gave information or participated in the apprehension of a wanted person while engaging in the performance of his official duties has been included in section 3141. The purpose of such rewards is to encourage the citizenry in the exercise of their duties as citizens for which no other compensation is paid; it is not intended as a bonus to public servants for performing their duties.

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[1] The Committee has been informed that the last time a reward was authorized under 18 U.S.C. 3059 was in 1961 when Attorney General Kennedy authorized a $10,000 reward "for information leading to the arrest or conviction of anyone for violating any federal statute in any actual, attempted, or planned hijacking of aircraft."

The Committee has also retained the provision contained in 18 U.S.C. 3059 providing for payments of all or part of the reward even if the person being apprehended is killed during the arrest. The purpose of the reward may well be fully accomplished by the providing of information that led to the attempted arrest.

The Committee has also authorized various investigatory agencies to offer rewards for services and information that assist in the detection or investigation of an offense or in the apprehension of an offender.[2] The rewards to be offered by those agencies will be much smaller in size and will generally be in the form of payments to regular underworld informants, contacts, and the like. Such expenditures are a necessary and important method of conducting an efficient program of law enforcement. Such payments, both in size, frequency, and purpose, are totally distinct from the rewards that can be offered and paid under section 3141.

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[2] Subchapters B and C of chapter 30.

CHAPTER 32.—RENDITION AND EXTRADITION

Chapter 32 consists of two subchapters. The first subchapter concerns rendition of fugitives, and it essentially reenacts current law. The second subchapter sets forth the procedure applicable in extradition cases. The laws pertaining to extradition are substantially changed in an effort to streamline and clarify extradition procedure.

SUBCHAPTER A.—RENDITION

(Sections 3201–3203)

1. In General

This subchapter deals with the subject of rendition—covering the obtaining of custody for trial of a person incarcerated by a different jurisdiction and the arrest and return of a fugitive. Section 3201 reenacts the provisions of Public Law 91-538, the Interstate Agreement on Detainers, with certain modifications which will be highlighted. Section 3202 reenacts the basic existing Federal law on the procedure for returning a fugitive from the State where he is found to the State from which he fled. Section 3203 brings forward definitional material and certain general provisions.

2. Present Federal Law

The Interstate Agreement on Detainers is designed to facilitate the securing of defendants incarcerated in other jurisdictions for purposes of prosecution. It also enables defendants incarcerated in one jurisdiction to compel prompt disposition of State charges pending against them in other jurisdictions. Advance Congressional consent was given the States to enter into this type of agreement by the Act of June 6, 1934.[1] The purpose of the Interstate Agreement on Detainers, when enacted by Congress in 1970, was to make the United States a party so that States could obtain Federal prisoners. The District of Columbia also desired to become a party to the Agreement.[2]

At the present time 45 States, not including the Federal Government or the District of Columbia, have become parties to the

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[1] 4 U.S.C. 112(a) (44 Stat. 909).

[2] H. Rept. 91-1018, 91st Cong., 2d Sess. (1970); S. Rept. 91-1356, 91st Cong., 2d Sess. (1970).

Agreement. This subchapter reasserts the commitment of the Congress to the purposes of the Agreement.

SECTION 3201. INTERSTATE AGREEMENT ON DETAINERS

Subsection (a) of section 3201, which is the enabling act of the Agreement and which is currently set forth in section 2 of Public Law 91-538, has been amended to express the intent of the Congress by providing that the Federal Government is a full participant in the Agreement only in the capacity of a "sending state."[3] Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

Unlike the existing Federal statute, however, the State statutes do not provide a writ of *habeas corpus ad prosequendum* with nationwide territorial effect beyond the boundaries of the issuing State. Consequently, since the Agreement is only effective between member States, the Federal Government, at the urging of the Council of State Governments, became a member State so that the other member States might use the Agreement to reach Federal prisoners against whom State detainers have been lodged who are incarcerated outside the lodging State's territorial boundaries, and to permit Federal prisoners to compel prompt disposition of pending State charges.

Amendment of the enabling act is necessary to overcome recent Federal case law that holds that the Agreement exclusively controls procedures for the transfer of a State prisoner to, and prosecution by, the United States once a detainer has been filed, notwithstanding the fact that the transfer was in obedience to a writ of *habeas corpus ad prosequendum* under 28 U.S.C. 2241.[4]

Subsection (b) reenacts verbatim the Interstate Agreement on Detainers, Public Law 91-538.

SECTION 3202. RENDITION OF A FUGITIVE

Section 3202 reenacts without significant change the provisions of 18 U.S.C. 3182. This section sets forth the measures to be taken by one State in demanding the delivery of a fugitive from justice from another State and the obligations of the State in which the fugitive is found upon the receipt of such a demand. The Constitution provides that: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the

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[3] The right to amend the Agreement was specifically reserved in section 7 of the Interstate Agreement on Detainers Act (Public Law 91-538). The history of the Agreement indicates that the sole method of amendment is by a limiting statement in the enabling act. See Summary of Meeting on the Agreement on Detainers, The Council of State Governments, September 1966, p. 3.

[4] *United States* v. *Mauro*, 436 U.S. 340 (1978).

State having jurisdiction of the crime."[5] This provision has been held not to be self-executing and accordingly requires legislation in the form presently enacted as 18 U.S.C. 3182 and carried forward by section 3202. Prototype legislation has been held constitutionally valid.[6] Rendition to or from territories of the United States has been held valid under this section although the Constitution is silent on that matter.[7]

Section 3202 uses the term "crime" instead of the phrase "treason, felony, or other crime" which appears in 18 U.S.C. 3182 and which is taken from the Constitution. The term "crime" as defined in section 111 is broad enough to cover the reach of existing law. As defined, the term "crime" includes a misdemeanor. The current statute has been held applicable to misdemeanors,[8] even those punishable only by a fine.[9] The Committee believes that this interpretation should be continued, and using the term "crime" reaches that result.

The general definition of "state" in section 111 also includes territories and districts, thereby eliminating the necessity of specifying them as does 18 U.S.C. 3182.

The last sentence of section 3202, concerning the transportation of a fugitive by the agent of the demanding State, reenacts 18 U.S.C. 3194.

SECTION 3203. GENERAL PROVISIONS FOR SUBCHAPTER A

This section carries forward the definitions and general provisions applicable to the Interstate Agreement on Detainers from current law. Subsections (a)(1) and (b) have been changed to reflect the fact that the Mayor of the District of Columbia, rather than the Commissioner, is now the responsible officer under the Agreement.

SUBCHAPTER B—EXTRADITION

(Sections 3211-3218)

This subchapter deals with the subject of international extradition, which is the process by which a person located in one nation is arrested and turned over to another nation for trial or punishment. Sections 3211-3216 deal primarily with requests made to the United States by foreign governments, and set forth the procedure for determining whether a person located in this country should be delivered up to a foreign power. Section 3217 deals with the return of a fugitive extradited to the United States from a foreign nation. Section 3218 contains definitions and a provision on payment of the expenses incident to extradition. The proposed subchapter replaces 18 U.S.C. 3181 and 3184–3195.[1] The essence of other Federal statutes relating to extradition, which include 18 U.S.C. 751, 752, and 1502, are carried forward in sections 401, 1001, 1311, and 1313.

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[5] Art. IV, section 2, clause 2. It has been held that the Constitution forbids the courts of the asylum State from inquiring into the basis of the demanding State's determination of the adequacy of the charge. *Michigan* v. *Doran*, 439 U.S. 282 (1978).

[6] *Roberts* v. *Reilly*, 116 U.S. 80 (1885).

[7] *Cutting* v. *Geer*, 135 Colo. 503, 313 P.2d 314 (1957).

[8] *Ex parte Reggel*, 114 U.S. 642 (1885).

[9] *Morton* v. *Skinner*, 48 Ind. 123 (1874).

The provisions of the proposed subchapter substantially alter the present statutory law for several reasons.

First, many of the statutes on extradition have been in force without major alteration since 1882. Several have not been significantly changed since 1848. These antiquated provisions have proven increasingly inadequate in dealing with the modern problems in the international control of crime.

Second, there has been a marked increase in the number of extradition requests received and made by the United States in recent years.[2] Those requests have revealed problems in the extradition process. Moreover, these requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. The judicial interpretation of the law contained in these court decisions fills important gaps in the present statutory law, and should be reflected in any new extradition legislation.

Third, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to fully implement some of the provisions of the new treaties, and therefore impedes fulfillment by the United States of its international obligations.

SECTION 3211. EXTRADITION AUTHORITY IN GENERAL

1. Present Federal Law

18 U.S.C. 3181 states that the present Federal laws authorizing the extradition of persons from the United States shall continue in force only if there is a treaty in force with the foreign nation requesting extradition. 18 U.S.C. 3184 requires that an extradition treaty be in force before any court can conclude that a person may lawfully be extradited to the foreign country involved. In addition, 18 U.S.C. 3186 by implication requires that a court find that the person sought is extraditable before the Secretary of State may order surrender to the foreign state. These provisions, read together, permit the United States to surrender a person to a foreign country only in accordance with an applicable treaty in force between the United States and the foreign country involved.[3] This

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[1] The provisions of this subchapter are substantively identical to similar bills, S. 1639 and S. 1940 introduced by Senator Thurmond in the 96th Congress. The provisions of these measures were strongly supported by the Departments of State and Justice and other witnesses. See, Extradition Act of 1981, Hearings before the Committee on the Judiciary, U. S. Senate, 97th Cong., 1st Sess. (1981) (statement of Daniel McGovern, Department of State, Michael Abbell, Department of Justice, and William M. Hannay, Attorney, Chicago, Illinois) (hearing hereinafter cited as 1981 Extradition Hearing).

[2] *Ibid.*

[3] *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento* v. *Horn*, 241, F.2d 258, 259 (6th Cir. 1957), cert. denied, 355 U.S. 818 (1957); *Ivancevic* v. *Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954), cert. denied, 348 U.S. 818 (1954); Evans, *Legal Basis for Extradition in the United States*, 16 New York Law Forum 525, 529–530 (1980); 6 Whiteman, Digest of International Law 727 (1968).

principle has become a settled aspect of United States practice in international extradition.

2. Provisions of the Bill, as Reported

Section 3211 of the proposed subchapter on extradition carries forward the basic principle of the present law. The provision specifies that the United States may extradite a person in this country only if there is a treaty concerning extradition in force with the country requesting extradition, and only if the request falls within the terms of that treaty. This section refers to a treaty "concerning extradition" rather than an "extradition treaty" because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties.[4] However, the limitation established by this section applies only to the surrender of fugitives pursuant to the subchapter, and does not apply to any other legal process which may result in a person facing trial or punishment in another country. Thus, the surrender of a United States serviceman to foreign authorities for trial in accordance with the reciprocal criminal jurisdiction provisions of a Status of Forces Agreement,[5] or the deportation of an alien who happens to face criminal charges abroad,[6] remain governed by the treaty provisions and statutes relating to those processes, and not by this subchapter.

SECTION 3212. INITIAL PROCEDURE

This section sets forth the steps to be followed in instituting court proceedings necessary for extradition.

1. Present Federal Law

Extradition proceedings under 18 U.S.C. 3184 commence when a complaint is filed, under oath, charging that a person has committed, within the jurisdiction of a foreign government, any of the crimes for which extradition is provided under the treaty on extradition in force between the United States and that foreign government. There is no requirement under present law that a formal diplomatic request for extradition be made before the complaint is filed.

18 U.S.C. 3184 permits any Federal judge or justice, or duly authorized Federal magistrate, or any judge of a State court of record of general jurisdiction to receive complaints and issue warrants of arrest in international extradition matters. In practice, however, such cases are almost invariably filed in the Federal courts.

The present statutory scheme does not specify by whom a complaint may be filed in extradition matters. The rule developed by the courts appears to be that any person acting under the authority of the demanding government may file a complaint for extradition.[7] Thus, international extradition cases have been instituted by foreign diplomatic or consular representatives,[8] foreign police officers,[9] and even private citizens who claim to be acting on behalf of a foreign government.[10] This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.[11] However, in recent years, the United States Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition,[12] or pursuant to an informal international agreement for reciprocal legal representation.

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[4] See e.g., Art. 14, Amending Protocol to the 1961 Single Convention on Narcotic Drugs, done at Geneva, March 24, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975); Art. 8, Convention on Suppression of Unlawful Seizures of Aircraft; done at The Hague, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192 (entered into force for the United States October 14, 1971); Art. 8, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, December 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (entered into force for the United States February 20, 1977).

[5] See, e.g., *Holmes* v. *Laird*, 459 F.2d 1211, 148 U.S. App. D.C. 187 (D.C. Cir. 1972), cert. denied, 409 U.S. 869 (1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), cert. denied, 405 U.S. 926 (1972).

[6] See, e.g., *Kalatijis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

The complaint must be filed in a Federal or State court in whose jurisdiction the fugitive may be found. Unfortunately, in many cases the international fugitive's location in the United States is unknown. Therefore, no complaint can be filed and no arrest warrant can be issued. The ability of United States law enforcement agencies to locate and apprehend international fugitives is greatly hampered by the lack of an outstanding arrest warrant or other judicial process in such cases. [13]

The present statutory scheme contains no provision for the release of an alleged fugitive on bail pending the extradition hearing. [14] However, the courts have claimed the inherent right to release an alleged fugitive on bail pending the extradition hearing in cases where "special circumstances" require such release. [15] The standard for release on bail in extradition cases is more demanding than in ordinary cases, and a clear presumption against bail is recognized. [16]

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[7] 6 Whiteman, *supra* note 3 at 935.

[8] *United States ex rel Caputo* v. *Kelley*, 92 F.2d 603 (2nd Cir. 1937), cert. denied, 303 U.S. 635 (1938); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Castro* v. *DeUrierte*, 12 Fed. 250 (S.D. N.Y. 1882). See, generally, 6 Whiteman, *supra* note 3, at 935; Note, *United States Extradition Proceedings*, 16 New York Law Forum 420, 432 (1980).

[9] 1 Moore, a Treatise on Extradition and Interstate Rendition 410–415, (1891).

[10] See, e.g., *Schoenbrun* v. *Drieband*, 268 F. Supp. 332 (E.D. N.Y. 1967).

[11] See, e.g., *United States ex rel. Caputo* v. *Kelley*, *supra* note 8.

[12] *In re David*, 395 F. Supp. 803, 807 (E.D. Ill. 1975); *United States ex rel. Petruschansky* v. *Marasco*, 215 F. Supp. 953, 957 (E.D. N.Y. 1963) *aff'd* 325 F.2d 562 (2nd Cir. 1963), cert. denied, 376 U.S. 952 (1964).

[13] For example, many Federal, State, and local law enforcement agencies rely on the FBI's National Crime Information Center—"NCIC"—in determining whether an individual is wanted for arrest in another jurisdiction. Since no complaint for extradition can be filed against a fugitive whose location is unknown, there can be no Federal arrest warrant issued, and no information on the person will appear in NCIC. Thus, law enforcement officers may have no way to learn that a particular person is an international fugitive sought for extradition.

[14] In *Wright* v. *Henkel*, 190 U.S. 40 (1903), the Supreme Court reviewed former section 596 of title 18 (now 18 U.S.C. 3141) in conjunction with former section 591 (now 18 U.S.C. 3041), and concluded that there was no statute providing for admission to bail in cases of foreign extradition. The Bail Reform Act (which amended Sections 3041, 3141–3143, and 3568, and enacted 18 U.S.C. 3147–3152) did not alter this result. The Act liberalized access to bail in those cases to which the bail statutes apply, but did not broaden the availability of bail generally. Both the previous sections of the law and the provisions of the Bail Reform Act apply only to "person(s) charged with an offense," and the term "offense" is expressly defined in 18 U.S.C. 3156 as "any federal criminal offense which is in violation of any act of Congress and is triable by a court established by act of Congress . . .". Since fugitives facing extradition to a foreign country are not accused of any Federal criminal offense, and will not be tried in any Federal court, the bail statute's provisions do not apply to them. *Cf. Kelley* v. *Springette*, 527 F.2d 1090, 1093 (9th Cir. 1975); *Beaulieu* v. *Comm'r of Massachusetts*, 382 F.2d 290 (1st Cir. 1967).

[15] *United States* v. *Williams*, 611 F.2d 914 (1st Cir. 1979); *Beaulieu* v. *Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Wright* v. *Henkel*, *supra* note 14.

[16] *Hu Yan-Leung* v. *Soscia*, —F.2d ——, No. 80-2356 (2d Cir. May 26, 1981).

2. Provisions of the Bill, as Reported

Subsection (a) permits the Attorney General to file a complaint charging that a fugitive is extraditable in the United States district court for the district in which the fugitive may be found. The subsection also permits a complaint to be filed in the United States District Court for the District of Columbia if the fugitive's location is not known. Under this provision, a complaint could be filed, and an arrest warrant issued, when the whereabouts of the fugitive in the United States are still being ascertained, or when it is believed that the fugitive has not yet entered the United States but may be about to do so. The word "found" is intended to have its usual, nontechnical meaning, and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.[17]

Subsection (b) prescribes the contents of a complaint for extradition. Since all United States extradition treaties specify the documents and quantum of evidence necessary for surrender, paragraph (1) states that an extradition complaint is sufficient if it is accompanied by the evidence specified in the treaty and a copy of the formal request for extradition. Paragraph (2) deals with the documentation necessary to support a "provisional arrest," the process by which a fugitive from justice is arrested to prevent further flight while the foreign government seeking extradition assembles the necessary documents and evidence.[18] Subparagraph (A) of paragraph (2) provides that a complaint will support an arrest under subsection (c) if it contains information sufficient to identify the fugitive, explains the circumstances necessitating provisional arrest,[19] and either indicates that a warrant for the fugitive's arrest is outstanding in the foreign state,[20] or outlines the essential facts indicating that an extraditable crime has been committed and that the fugitive committed it. Since many of the extradition treaties contain articles which expressly set out requirements for obtaining the arrest of fugitives,[21] subparagraph (B) of paragraph (2) also permits the complaint to be filed if it contains the information required by the provisions of the applicable treaty.

Subsection (c) obliges the court to issue a warrant for the arrest of the fugitive upon receipt of the complaint unless the Attorney General requests that a summons to appear at the extradition hearing be issued instead. The subsection requires that the warrant of arrest be executed in accordance with Rule 4(d) of the Federal Rules of Criminal Procedure. This means that the warrant may be executed anywhere in the United States in the same manner as an ordinary Federal warrant of arrest. The subsection also requires that the person arrested be taken without unnecessary delay before the nearest available Federal court [22] for an extradition hearing. The language is similar to that of Rule 5 of the Federal Rules of Criminal Procedure, and is intended to insure that the person arrested under this section is speedily informed by a judicial officer of the reason for the arrest and of his rights to counsel, to cross-examine witnesses, and to introduce evidence on his behalf. It is not intended to require the dismissal of extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the "nearest" one. There is no requirement that the extradition hearing take place in the State in which the fugitive is found,[23] so long as there has been compliance with the provisions of this subchapter.

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[17] See, *In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir. 1973), cert. denied, 414 U.S. 847 (1973); *Vardy* v. *United States*, 529 F.2d 404 (5th Cir. 1976), rehearing denied, 533 F.2d 310 (5th Cir. 1976); *In re David*, 390 F. Supp. 521 and 395 F. Supp. 903 (E.D. Ill. 1975).

[18] Provisional arrest is a well-recognized aspect of international extradition procedure, and is specifically provided for in most of the extradition treaties to which the United States is a party. See, e.g., Art. 11, Extradition Treaty, United States–Canada, signed Dec. 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976). See generally, Reuschlein, *Provisional Arrest and Detention in International Extradition*, 23 Georgetown Law Journal 37 (1934); Note, 16 New York Law Forum 420, 429–430 (1970).

[19] E.g., contains an indication that the fugitive is likely to flee the jurisdiction and be unavailable by the time the extradition documents arrive.

[20] See, 6 Whiteman, *supra* note 3 at 931; *Whitely* v. *Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568 (1970); *United States* v. *McCray*, 468 F.2d 848 (5th Cir. 1967).

[21] See, e.g., *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

Subsection (d)(1) provides that a fugitive arrested for extradition may be released on bail pending the extradition hearing only if he can demonstrate that "special circumstances" warrant his release. The provision continues the approach which has been followed by United States courts [24] in setting the standards for release on bail pending an extradition hearing considerably higher than the standards for release on bail pending trial on Federal charges in the United States. This approach is necessary to assure that the United States continues to carry out its treaty obligation to surrender extraditable fugitives. It is anticipated that the courts will find the "special circumstances" test satisfied "only in the most pressing circumstances and only when the requirements of justice are absolutely peremptory."[25] Such special circumstances might be found, for instance, where the incarceration of the fugitive would seriously damage his health,[26] or would endanger the welfare of a third party who is wholly dependent upon the fugitive for care.[27] It is anticipated that these circumstances would rarely be encountered.

Subsection (d)(3) provides that even if special circumstances are found, the release of the fugitive shall be permitted only upon such conditions as will reasonably assure his appearance at future proceedings, and assure the safety of other persons and the community. Such conditions might include surrender by the fugitive of any passport or travel documents, posting of a substantial bond, and the requirement that the fugitive maintain contact with appropriate Federal agencies, such as the United States Marshals Service.

Subsection (d)(2) gives the court the discretion to release the fugitive provisionally arrested pursuant to this section if the evidence or documents required by the applicable treaty are not received within sixty days of the arrest (unless a longer period of detention is specified in the applicable treaty). The subsection resolves an ambiguity perceived by the courts with respect to the commencement and conclusion of the time period for provisional arrest by providing that this period should be calculated from the date on which the fugitive is taken into custody for extradition[28] to the date on which the documents are received by either the court or the Department of State.[29] If the court is notified that the documents have been received by the Department of State before the expiration of the 60-day period, the court is directed to defer release of the fugitive for a reasonable time pending the prompt transmission of the documents to the court by the Department of State. If a court does release the fugitive from custody due to the non-receipt of the documents within the applicable time period, subsection (d)(3) requires that the court frame conditions of release reasonably calculated to assure that person's appearance for future proceedings and the safety of other persons and the community. Release of the fugitive under subsection (d) does not terminate the proceedings, which can resume once appropriate documentation arrives.[30]

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[22] "Court" is defined in section 3218(a)(2) to mean a United States district court established pursuant to 28 U.S.C. 132, or the District Court of Guam, the Virgin Islands, or the Northern Mariana Islands, or a United States magistrate authorized to conduct an extradition proceeding.

[23] Thus, the section eliminates the arbitrary rule created by the Supreme Court in *Pettit* v. *Walshe,* 194 U.S. 205 (1904). See note 40, *infra,* and accompanying text. This rule is unnecessary in light of proposed section 3194(c)(3).

[24] See notes 15 and 16, *supra.*

[25] *In re Mitchell,* 171 Fed. 289, 290 (S.D. N.Y. 1909).

[26] See, e.g., *In re Kaplan,* Civ. No. 79-2219 RF (C.D. Cal. July 29, 1979).

[27] See, e.g., *In re Itoka,* Misc. No. 79-1536-M (D. N.M. Dec. 17, 1979).

This section does not carry forward the little used authorization in 18 U.S.C. 3184 for extradition proceedings to be commenced before State judges. The section also specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government.[31] These changes reflect the fact that international extradition is strictly a function of the Federal government,[32] and determining when and how to perform that function is properly the business of Federal officials and Federal courts. The United States government has a sufficient interest in the vigorous enforcement of the laws (including the extradition law and treaties) to justify the participation of its legal counsel, the Department of Justice, in all court proceedings aimed at determining whether extradition can take place. Indeed, this is the approach which has been adopted in most foreign countries, many of which do not permit the United States to argue in court during proceedings in connection with a United States extradition request. In addition, United States courts are freed from any need to determine whether a private person is "authorized" by an "appropriate" foreign authority to initiate extradition proceedings. It should also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harrassment, debt collection, or other improper purposes.

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[28] See, *In re Chan Kam-Shu,* 477 F. 2d 333, 339–340 (5th Cir. 1973) cert. denied, 414 U.S. 847 (1973).

[29] *United States* v. *Clarke,* 470 F. Supp. 979 (D. Vermont 1979).

[30] E.g., Art. 13(2), Extradition Treaty, United States–Norway, signed June 9, 1977, — U.S.T.——, T.I.A.S. 9679 (entered into force March 6, 1980).

[31] It is anticipated that in most cases the Attorney General will act through the United States attorney for the district in which the fugitive is located. If the foreign government involved feels the need to participate in the judicial proceedings, it can retain counsel and seek to enter the case as *amicus curie.*

[32] *Valentine* v. *United States ex rel. Neidecker, supra* note 3, at 5, 8; *United States* v. *Rauscher,* 119 U.S. 407, 414 (1886).

SECTION 3213. WAIVER OF EXTRADITION HEARING AND CONSENT TO REMOVAL

1. Present Federal Law

Present Federal law provides no specific procedure by which a person arrested for extradition may waive the formalities and voluntarily return to the foreign country requesting surrender. This is especially unfortunate since a significant number of the fugitives arrested under 18 U.S.C. 3184 choose not to challenge the request for extradition and wish to expedite removal to the foreign country. Moreover, many of the newer extradition treaties to which the United States is a party contain provisions obliging the requested state to expedite the return of a fugitive who has waived a hearing or other procedures.[33]

2. Provisions of the Bill, as Reported

Section 3213 of the proposed extradition subchapter clarifies the method by which the fugitive who does not contest extradition can expedite his surrender. The provisions of this section are based on Federal statutory provisions governing a closely analogous situation: the verification of a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions.[34] The section states that the court which would have handled the extradition proceeding shall verify that the fugitive's consent to be removed to a foreign country has been given voluntarily and with full knowledge of his right to consult with counsel before making a decision in the matter.

Under some circumstances, the foreign government may not be willing to accept custody of a fugitive who has offered to waive extradition.[35] There also may be situations in which the United States government would consider waiver inappropriate.[36] Therefore, the provision does not permit removal of the fugitive if the Attorney General notifies the court that the United States or the foreign state objects to the proposed waiver.

SECTION 3214. EXTRADITION HEARING

1. Present Federal Law

Under 18 U.S.C. 3184, an alleged fugitive is entitled to a hearing at which a judicial officer determines whether extradition is lawful. 18 U.S.C. 3189 specifies that the hearing must be held "on land, publicly, and in a room or office easily accessible to the public".

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[33] See e.g., Art. 10, Extradition Treaty, United States-Japan, signed March 3, 1978,——U.S.T.——, T.I.A.S. 9625 (entered into force March 25, 1980); Art. 18, Extradition Treaty, United States-Mexico, signed May 4, 1978,——U.S.T.——, T.I.A.S. 9656 (entered into force January 24, 1980).

[34] See 18 U.S.C. 4107-4108.

[35] For example, a fugitive might wish to waive extradition on only one of many outstanding charges against him in the requesting state. Under these circumstances, that foreign state might conceivably prefer to have extraditability determined as to all of the charges.

[36] For example, many extradition treaties permit the requested state to postpone extradition until the person sought has been tried and punished for criminal charges outstanding in that state. A person facing criminal charges or imprisonment in this country might well attempt to expedite his extradition to a foreign country where less serious charges are pending, in order to avoid prosecution or punishment here. In such circumstances, it would not be appropriate for the United States to permit expedited surrender, at least not until the charges in this country have been resolved or the sentence served.

At the extradition hearing, the judicial officer must determine whether the offense for which extradition is sought falls within the terms of the treaty. He must also determine whether the acts for which the fugitive is sought by the foreign country would constitute a crime had they been committed in this country. This rule, known as "dual criminality" or "double criminality", is generally considered a basic principle of international extradition law,[37] and is expressly required by many of the extradition treaties to which the United States is a party.[38] The courts have held that the double criminality requirement is satisfied whenever the acts which the fugitive is charged with having committed in the foreign country would be punishable under Federal law, the law of the State where the fugitive is found, or the laws of a majority of the States, had those acts been committed in this country.[39]

A judicial officer must also determine whether there is sufficient proof that an extraditable offense in fact has been committed. Most of the treaties to which the United States is a party require that an extradition request be supported by "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his commitment for trial had the crime or offense been there committed." Many years ago, the courts viewed the words "place where the fugitive shall be found" as requiring the Federal court to determine if the foreign government's evidence is sufficient to justify a trial under the State laws of the State in which the fugitive is apprehended.[40] This approach was a reasonable one eight decades ago, because at that time Federal courts had no uniform rules of criminal procedure and routinely followed the procedural rules of the courts of the State in which they were located. However, the adoption of the Federal Rules of Criminal Procedure has made it generally unnecessary for Federal courts to refer to State law in these matters.[41] Moreover, extradition is a national act,[42] and the quantum of evidence necessary for extradition is precisely the kind of issue which should be determined by uniform national law, rather than by various State laws. For these reasons, all of the more recent extradition treaties contain language essentially requiring that the Federal law standard of commitment for trial—probable cause—be applied in weighing the sufficiency of the evidence for international extradition.[43]

The Federal Rules of Evidence do not apply in extradition proceedings,[44] where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government.[45] It is settled law that hearsay is admissible, and the foreign government usually presents its case by submitting affidavits, depositions, and other written statements in order to satisfy the requirements of the applicable treaty.[46] 18 U.S.C. 3190 provides that originals or copies of depositions, warrants, or other papers are admissible in evidence at the extradition hearing if authenticated so as to be admissible for similar purposes according to the laws of the requesting country. The statute also provides that the certificate of the principle diplomatic or consular officer of the United States resident in the requesting country shall be proof that the documents are authenticated in the manner required. In essence, the documents need only be genuine and authentic—requirements that are deemed fulfilled once it is shown that under similar circumstances the requesting country's own courts would accept them as authentic. The courts have held that extradition documents bearing a certificate which is couched in the language of 18 U.S.C. 3190, and signed by one of the specified officials, are conclusively admissible.[47] As a result of these decisions, foreign governments routinely submit the documentation in support of extradition requests to the appropriate United States embassy abroad for certification and transmission to the United States. This practice imposes undesirable burdens on the United States Foreign Service officers who must fill out the certification.[48]

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[37] Shearer, Extradition in International Law, 137-141 (1971); 6 WHITEMAN, *supra* note 3 at 773-779; *Freeman* v. *United States*, 437 F. Supp. 1252, 1263 (N.D. Ga. 1977).

[38] See, e.g., Art. 2(1), Extradition Treaty, United States-Japan, signed March 3, 1978,——— U.S.T.——, T.I.A.S. 9625 (entered into force March 25, 1980).

[39] *Cucuzella* v. *Keliikaa*, 638 F.2d 105 (9th Cir. 1981); *Branch* v. *Raiche*, 618 F.2d 843 (1st Cir. 1980); *Freedman* v. *United States*, *supra* note 37, at 1252, 1263.

[40] *Pettit* v. *Walshe*, *supra* note 23; see, e.g., *United States ex rel. LoPizzo* v. *Mathews*, 36 F.2d 565 (3d Cir. 1929); *United States ex rel. Rauch* v. *Stockinger*, 170 F. Supp. 506 (E.D. N.Y. 1959), aff'd 269 F.2d 681 (2d Cir. 1959), cert. denied, 371 U.S. 913 (1959); *O'Brien* v. *Rozmann*, 554 F.2d 780 (6th Cir. 1977).

[41] *Greci* v. *Birkness*, 527 F.2d 956, 958, at note 3 (1st Cir. 1976); *Application of D'Amico*, 185 F. Supp. 925, 930, at note 6 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir. 1960), *cert. denied*, 366 U.S. 963 (1962).

[42] 6 Whiteman, *supra* note 3.

[43] *Greci* v. *Birkness*, *supra* note 41; *Sindona* v. *Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978); *Brauch* v. *Raiche*, *supra* note 39.

[44] *Sayne* v. *Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 390 U.S. 903 (1970).

The present statutory scheme offers little guidance with respect to the evidence which can be introduced on behalf of the alleged fugitive in an extradition hearing. Many cases emphasize that whether such evidence should be admitted is a decision for the court, in its discretion, to make.[49] The alleged fugitive is ordinarily permitted to testify on his own behalf[50] or to have witnesses testify for him.[51] However, it is clear from the case law that the alleged fugitive may offer to explain ambiguities in the evidence submitted against him, but may not offer evidence which merely contradicts that submitted by the requesting country, or which poses a question of credibility, or which raises an affirmative defense to conviction on the charges, or which is incompetent by the terms of the extradition treaty under which surrender is sought.[52] This restrictive approach is appropriate because the issue before the court at an extradition hearing is probable cause, not the ultimate guilt or innocence of the accused.

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[45] Rule 1101, Federal Rules of Evidence.

[46] The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to "defeat the whole object of the treaty." *Bingham* v. *Bradley,* 241 U.S. 511, 517 (1916); see also, *Collins* v. *Loisel,* 259 U.S. 309, 317 (1922); *Sayne* v. *Shipley, supra* note 44; *In re David, supra* note 12; *O'Brien* v. *Rozmann, supra* note 40.

[47] *United States* v. *Galanis,* 429 F.2d 1215, 1225–1229 (D. Conn. 1977), *rev'd on other grounds,* 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro* v. *Ferrandina,* 478 F.2d 894, 903 (2d Cir. 1973); *In re Edmonson, et al.* 352 F. Supp. 22, 24 (D. Minn. 1972).

[48] The consular and diplomatic officers who must sign the certificate are usually not lawyers, and it is difficult for them to know whether the documents presented to them are in fact acceptable "for similar purposes" in the courts of the requesting state.

[49] *Freedman* v. *United States, supra* note 37; *U.S. ex rel. Petrushansky* v. *Marasco, supra* note 12.

[50] Coppelman, *Extradition and Rendition: History-Law-Recommendations,* 14 Boston L.R. 591, 614 (1934).

[51] 18 U.S.C. 3191 provides for compulsory process to secure the attendance at extradition hearings of witnesses on behalf of indigent fugitives. However, the statute applies only to witnesses who are resident in the United States. *Merino* v. *United States Marshal,* 326 F.2d 5, 11 (9th Cir. 1964), cert denied, 377 U.S. 997 (1964).

[52] *Matter of Sindona,* 450 F. Supp. 672 (S.D.N.Y. 1978); *Shapiro* v. *Ferrandina, supra* note 47; *Freedman* v. *United States, supra* note 37; *Sayne* v. *Shipley, supra* note 44; *First National City Bank* v. *Aristequieta,* 287 F.2d 219, 226 (2d Cir. 1960); *Desmond* v. *Eggers,* 18 F.2d 503, 505–506 (9th Cir. 1927); *Collins* v. *Loisel, supra* note 46; *Charlton* v. *Kelley,* 229 U.S. 447, 458 (1913).

Finally, the judicial officer must determine whether the treaty contains a defense to extradition which would preclude surrender in the case before him. Extradition treaties frequently bar surrender if a statute of limitations has foreclosed prosecution or punishment for the offense in question,[53] or if the fugitive has been tried or punished in the requested state for the same offense,[54] or if any of several other legal considerations are present.

Virtually every extradition treaty contains a provision barring extradition for a political offense, and many treaties also preclude extradition if the requesting country has political motives for seeking the return of the fugitive. Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense [55] but traditionally have declined to consider whether the requesting country's motives in seeking extradition are political.[56] Since these issues are usually intertwined, the result under current case law has been that the court decides the applicability of the "political offense" exception in some cases, and the Executive branch decides the applicability in other cases.[57] The possibility for inconsistent results is obvious.

If the judicial officer is persuaded that the crime charged falls within the treaty, that the acts involved would constitute an offense in this country, that the evidence submitted is sufficient to sustain the charge under the treaty, and that no legal defense to extradition is applicable, it is his duty to certify these conclusions to the Secretary of State. The judicial officer also must send the Secretary of State a copy of all the oral testimony taken at the hearing. 18 U.S.C. 3184 requires the judicial officer to order the commitment of the accused to jail pending surrender, and there is no provision for release on bail at this stage of the proceedings. If the judicial officer finds that the fugitive is not extraditable, the proceedings are terminated, and the fugitive is released from custody.

2. *Provisions of the Bill, as Reported*

Section 3214(a) requires that a judicial hearing be held to determine whether the person sought is extraditable (unless such as hearing has been waived under section 3213) and sets out the procedure for the hearing.

Section 3214(a) provides that the court does not have jurisdiction to determine whether extradition is sought for a political offense or because of the person's political beliefs, while section 3216(a)(3) specifies that the Secretary of State must decline to order surrender of a person if he is persuaded that the person's extradition is sought for one of these reasons. The provisions taken together provide that the Secretary of State alone shall have jurisdiction to decide the applicability of the "political offense" exception to extradition contained in most extradition treaties. The Committee has concluded that this approach is a desirable one for several reasons.

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[53] See, generally, 6 Whiteman, *supra* note 3, at 859–865; Note, *Statute of Limitations in International Extradition*, 48 Yale L.J. 701 (1939).

[54] See, e.g., *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1978).

[55] *In re Ezeta et al.*, 62 Fed. 972 (N.D. Cal. 1894). Basically, under current case law, some courts have said that there are "pure" political offenses, such as treason or sedition, and "relative" political offenses, such as one "committed in the course of furthering civil war, insurrection or political commotion." *Id.; Karadzole* v. *Artukovic*, 242 F.2d 198 (9th Cir. 1957), rev'd on other grounds, 344 U.S. 393 (1957); *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); see Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Columbia Journal of Transnational Law 381 (1980).

[56] *In re Lincoln*, 228 Fed. 70 (E.D.N.Y. 1915), aff'd *per curium*, 241 U.S. 651 (1917); *In re Gonzalez*, 217 F.2d 717, 722 (S.D.N.Y. 1963); *Garcia-Guillerin* v. *United States*, 450 F.2d 1192 (5th Cir. 1971); *In re Locatelli*, 468 F. Supp. 568, 575 (S.D.N.Y. 1979); *Sindona* v. *Grant*, *supra* note 43.

[57] *Zyad Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied, ——U.S.—— (1981).

First, the most modern United States extradition treaties specify that the executive branch of the requested country shall decide the applicability of the political offense exception.[58] In the absence therefore of specific legislative endorsement of the court developed rule—an unlikely prospect in light of the trend in magistrate extradition decisions noted *infra* note 61—it is inevitable over the long term that the case law rule reserving the political offense decision to the courts will become the exception rather than the rule as the United States continues its ongoing program of negotiating new modern treaties. Moreover, as previously noted, under present case law the courts generally shun deciding whether the foreign government's extradition request is politically motivated, preferring to leave that decision to the executive branch. The policy proposed by this legislation to shift the political offense decision to the Secretary of State is not a radical departure from present law in light of the Secretary's historic role in political asylum decisions and the well established trend in modern United States extradition treaties to reserve such decisions to him. It should also be noted that the political offense decisions are made exclusively by the executive branch of the government in several foreign countries, including Canada and Germany.

Second, the decision to shield a criminal from extradition for an otherwise extraditable offense on the ground that his offense was "political" is not the type of issue which lends itself to resolution through the judicial process.[59] When dealing with a political situation in a foreign country and the relationship of particular conduct to that situation, there are few truly objective criteria by which a comprehensive definition of the term "political offense" can be based.[60] Moreover, a public court proceeding is not the most desirable forum for careful analysis of a friendly foreign state's intentions or political system. Such analysis and decisions are inextricably intertwined with, and require the expertise of those versed in, the conduct of foreign relations. The Committee has concluded that this issue is best left to the Secretary of State along with his traditional responsibilities with respect to political asylum.

Finally, a decision on the political offense exception can have a devastating impact on United States relations with the requesting country. The potentially crippling effect of such decisions on foreign affairs is particularly great where it could compromise United States efforts to combat international terrorism.[61] The present law exacerbates this situation, because frequently the United States government, through the Departments of State and Justice, must take a position on the applicability of the political offense exception while the case is before the court. Moreover, the government must take this position publicly, before all the evidence and arguments are in, and despite the fact that the court or the Secretary of State may subsequently decide against extradition on other grounds. By contrast, the approach taken by the proposed subchapter permits a more informed decision on extradition to be made in a manner less likely to be offensive to the friendly foreign government involved in the case.

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[58] See, e.g., Art. 5(1), Extradition Treaty, United States-Mexico, signed May 4, 1978, —— U.S.T.——, T.I.A.S. 9656 (entered into force January 25, 1980).

[59] For an excellent discussion of the political offense exception to extradition and the impact of recent cases, see 1981 Extradition Hearings, statement of William M. Hannay; Hannay, *supra* note 55.

[60] See, 1981 Extradition Hearings, statements of Daniel McGovern and William M. Hannay; Levy, *Contemporary International Law: A Concise Introduction*, 190 (1979). The courts in various countries differ widely on what kinds of offenses are covered by the term, and legal scholars here and abroad have proposed a host of different—and frequently contradictory—proposals on the topic. See generally, Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 ASILS International Law Journal 1 (1977), Hannay, *supra* note 55.

Subsection (b) supplements present law by expressly providing that the fugitive be informed of his right to be represented by counsel at the extradition hearing. Indigent fugitives will be provided with counsel pursuant to the provisions of section 3401 relating to court-appointed counsel. The provision also requires that the fugitive be informed of his right to introduce evidence in his own behalf on matters within the jurisdiction of the court. The subsection thereby leaves intact the extensive case law on this point.[62]

Subsection (c) deals with evidence in an extradition hearing. Paragraph (1) is designed to clarify the circumstances under which documentary evidence will be admissible on behalf of either party in an extradition hearing.

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[61] Three recent extradition cases graphically illustrate this point. In the *Peter McMullen* case, McMullen was charged with the bombing of a British army installation in England. In the *Desmond Mackin* case, Mackin was charged with an attempt to murder a British soldier dressed in civilian clothes in a Belfast bus station. In the third case, *Abu Eain* v. *Wilkes, supra* note 57, Abu Eain was charged with the bombing murder of several children in an Israeli resort town. In both the *McMullen* and *Mackin* cases the magistrates denied extradition on the grounds that the offenses charged were "political offenses". In the *Abu Eain* case the court of appeals held the political offense exception inapplicable. William Hannay, commenting on this judicial line drawing, observed (1981 Extradition Hearing, Hannay statement at 14):

"In each of these cases, the test set forth in the 19th century English case of *In re Castioni* . . . was accepted as the operative definition of a "relative" political offense. The court in *Castioni* stated that a political offense is a crime which was "incidental to and formed a part of political disturbances" . . . The absurdity and ultimate cruelty of applying this test or any other "test" of a political offense is illustrated by the assertion of the magistrate in *McMullen* who, taking the exception to its insane but logical end, stated: "[e]ven though the offense be deplorable and heinous, the criminal action will be excluded from deportation if the crime is committed under these pre-requisites." . . . Mechanically applying the *Castioni* test, the magistrates in *Mackin* and *McMullen* concluded that extradition was prohibited since "political disturbances" were taking place in Northern Ireland and the attempts by Mackin and McMullen to kill British soldiers were natural incidents of these disturbances."

[With respect to the Seventh Circuit decision in *Abu Eain*] I find shocking the notion that the "political offense" exception is cut so far loose from any ethical mooring that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation struggle," and that the political offense exception prevents extradition for such a crime. It was a sad spectacle to see a former Attorney General of the United States, representing Abu Eain, stand before the Seventh Circuit and utter that bankrupt shibboleth of moral relativism, "one man's terrorist is another man's freedom fighter." Second, the court's application of the [judicial test for a political offense] in *Abu Eain* was ultimately just as mechanical as that in *Mackin* and *McMullen* and left the unmistakable impression that the court would have *denied* extradition if Abu Eain had directed his attacks at Israeli military or governmental officials . . . We should, I suppose, feel some relief that the Seventh Circuit recognized that the killing of children on the streets of a resort town did not constitute a "political offense."

Hannay has raised the issue factually (see Hannay, *supra* note 55 at 382) but has not speculated on the line the Seventh circuit would draw with respect to the bombing assassination of Lord Louis Mountbatten that incidentally killed his grandson, a local youth, and the mother-in-law of his daughter.

[62] See *supra* note 52, and accompanying text.

Many treaties specifically set out the manner in which extradition documents must be authenticated,[63] and subparagraph (A) of paragraph (1) provides that documents so authenticated shall be admissible. It also provides that documents authenticated in accordance with the provisions of United States law shall be deemed appropriate. Thus, documents which comply with the requirements of Article IX of the Federal Rules of Evidence would be admissible in extradition proceedings. However, the provision does not require the exclusion from the hearing of evidence which fails to satisfy the Federal Rules of Evidence. Rather, the subsection merely underscores the common sense proposition that evidence which satisfies the high standards set out in the Rules, and which would be admissible in civil or criminal proceedings in this country, should likewise be acceptable in extradition proceedings.

Subparagraph (B) of paragraph (1) is based on 18 U.S.C. 3190 and provides that a document authenticated in accordance with the applicable laws of the foreign country requesting extradition shall be admissible if it is accompanied by an attestation to this effect from a judge, magistrate, or other appropriate officer of the foreign state. The phrase "other appropriate officer" would include an official of the foreign counterpart of the Department of Justice, or any other government official likely to be familiar with legal matters in the foreign country. It further requires that the signature and position of the person so attesting be certified by a diplomatic or consular officer of the United States posted in the foreign country, or by a diplomatic or consular officer of the foreign state assigned to this country.[64] The provision thus brings the essential requirements of 18 U.S.C. 3190 more into line with Rule 902(3) of the Federal Rules of Evidence.

Subparagraph (C) of paragraph (1) permits the court handling an extradition matter to accept as evidence any documents which it is persuaded are in fact authentic, regardless of compliance with either of the previous two provisions. This rule is similar to Rule 901(a) of the Federal Rules of Evidence, and is in accord with established case law permitting the authenticity of documents presented in extradition proceedings to be established by the testimony from expert witnesses or by other evidence.[65]

Paragraph (2) of subsection (c) provides that a certificate or affidavit by an appropriate State Department official as to the existence or interpretation of a treaty is admissible as evidence of that treaty or its interpretation.

The overwhelming majority of extradition treaties require that the requesting country present such evidence of criminality as would justify commitment for trial had the crime or offense been committed in the place where the fugitive has been found. Under paragraph (2) such a treaty provision may be satisfied by evidence establishing probable cause to believe that a crime was committed and that the person sought committed it. This is the usual standard for commitment for trial in Federal criminal cases.[66] This approach permits the Federal courts to apply the standard for commitment with which they are most familiar, and establishes a single, uniform standard by which the sufficiency of evidence in extradition proceedings may be measured. It is also consistent with the views expressed in several recent court decisions pointing out the advantages of dealing with the quantum of evidence for extradition in a manner consistent with Federal law.[67]

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[63] See, e.g., Art. 10(6), Extradition Treaty, United States-Mexico, signed May 4, 1978, ——U.S.T.——, T.I.A.A. 9656 (entered into force January 25, 1980). The United States will also be a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, October 26, 1960, 527 U.N.T.S. 189 (ratified by the Senate Nov. 28, 1979). This Convention will eliminate a substantial portion of the authentication requirement with respect to extradition documents submitted by one signatory country to another.

[64] It is anticipated that in most cases the foreign state's diplomatic or consular personnel assigned to the United States will make the certification required by the section, thereby relieving U.S. diplomatic and consular officers abroad of this chore.

[65] See, generally, *United States* v. *Galanis*, *supra* note 54.

Paragraphs (1), (2), and (3) of subsection (d) carry forward the requirements of 18 U.S.C. 3184 that instruct the court to find the fugitive extraditable if the evidence presented is sufficient to sustain the complaint under the provisions of the applicable treaty and also requires that the court find probable cause that the person before it is the person sought in the foreign state, and that none of the defenses to extradition which the court is empowered to consider are applicable. Paragraph (4) bars extradition unless the acts for which the fugitive's surrender is requested would constitute a crime punishable under State or Federal law in the United States. Finally, the subsection states that the findings required for extradition may be established by hearsay evidence or certified documents alone. This rule is similar to Rule 5.1 of the Federal Rules of Criminal Procedure, which permits a finding of probable cause to commit for trial to be based on hearsay evidence. It is also in accord with recent court decisions which point out that the kind of evidence necessary for extradition is an issue which should be determined by uniform national law.[68]

Subsection (e) details the procedures that the court must follow at the conclusion of the hearing. If the court finds that the fugitive is extraditable, it must state, in writing, its findings and rationale with respect to each of the offenses for which extradition is sought.[69] These findings must be sent to the Secretary of State, together with a transcript of the hearing.[70] If the court finds that the fugitive is not extraditable, the findings required by the subsection may be accompanied by a report rather than a transcript of the hearing.

SECTION 3215. APPEAL

1. Present Federal Law

Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing.[71] A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus.[72] The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.[73] The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious.

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[66] See Rule 5.1, Federal Rules of Criminal Procedure.

[67] *Greci* v. *Birkness, supra* note 43; *Brauch* v. *Raiche, supra* note 39.

[68] *U.S. ex rel. Sakaguchi* v. *Kaulukukui*, 520 F.2d 726, 728 (9th Cir. 1975); *Shapiro* v. *Ferrandina, supra* note 47.

[69] This requirement is consistent with the practice followed by the courts today. See *Kaplan* v. *Vokes*, —— F.2d ——, No. 79-2662 (9th Cir. July 6, 1981); *Shapiro* v. *Ferrandina, supra* note 47.

[70] Present law (18 U.S.C. 3184) only requires that the court send the Secretary a transcript of the *testimony* taken at the hearing. By providing the executive branch with a fuller record of the proceedings the Secretary of State will be more fully informed in making his decision on extradition.

[71] *Collins* v. *Miller*, 252 U.S. 364, 369 (1920).

2. Provisions of the Bill, as Reported

Section 3215 of the proposed subchapter permits either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision. It is anticipated that review on appeal will be very narrow, and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous.

Subsection (a) specifies that the appeal shall be filed within the time limits set out in Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, i.e., 10 days for the person sought and 30 days for the government. These are the same deadlines for filing a notice of appeal in criminal cases, and while an extradition hearing is not a trial,[74] or even strictly a criminal proceeding,[75] these deadlines adequately balance the competing interests of fairness and expedition. It is anticipated that other aspects of the appeal process (such as the preparation and submission of the record, briefing, argument, and decision) will be governed by the applicable provisions of the Federal Rules of Appellate Procedure.

If the fugitive has been found extraditable, subsection (a) requires that surrender to the foreign government be stayed pending determination of the appeal by the court of appeals.[76] This provision prevents the government from mooting the appeal by spiriting the petitioner out of the country while the matter is *sub judice.* The provision is designed to maintain the *status quo* with respect to the fugitive's custody pending appeal. It is anticipated that the district court will not ordinarily stay or delay any other element of the extradition process, such as the certification of its findings to the Secretary of State under section 3214(e).

Subsection (b) provides that a person found extraditable must remain in official detention pending the appeal unless the court of appeals finds that special circumstances require release. This is a slight amelioration of present law, which does not permit the release of a fugitive on bail after he has been found extraditable.[77] The change is desirable because the same kind of pressing, unusual situation which might require that the person sought be released from custody on bail pending the extradition hearing [78] could conceivably arise after the extradition hearing. However, it is anticipated that this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender . . .".[79]

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[72] See, e.g., *Sindona* v. *Grant, supra* note 43.

[73] *Hooker* v. *Klein,* 573 F.2d 1360 (9th Cir. 1978).

[74] *Glucksman* v. *Henkel,* 221 U.S. 508, 512 (1911).

[75] *United States ex rel. Oppenheim* v. *Hecht,* 16 F.2d 955, 956 (2nd Cir. 1927); *United States ex rel. Klein* v. *Mulligan,* 1 F. Supp. 635, 636 (S.D. N.Y. 1922).

[76] The automatic stay of extradition expires when the court of appeals issues its mandate in the matter. Thus, the automatic stay would not ordinarily protect a fugitive seeking further discretionary review, such as an applicant for a writ of *certiorari* from the Supreme Court. Of course, the fugitive whose case merits further review is free to request the court of appeals or the Supreme Court to stay surrender pending consideration of a petition for a writ of certiorari or other relief.

[77] In fact, 18 U.S.C. 3184 specifically provides that a person found extraditable must be committed "to the proper jail, there to remain until . . . surrender shall be made".

[78] See *supra* notes 23 and 24, and accompanying text.

If the person was found not extraditable, subsection (b)(2) permits the district court to order that the person be released pending an appeal by the government. Release may not be ordered if the government satisfies the district court that the appellee is likely to flee before the appeal is decided, or endanger the safety of any other person or the community.

A major purpose of section 3215 is to simplify, and thereby expedite, the extradition process by providing for a direct appeal from a contested decision on extradition. The direct appeal provided by this section largely eliminates the present need for habeas corpus proceedings in order to obtain judicial review of the initial finding that a person is extraditable. This purpose would be frustrated if a fugitive bent on dilatory tactics were permitted to pursue an appeal under this section, a petition for *certiorari* to the Supreme Court, and then begin one or more rounds of habeas corpus proceedings. Such a course of action would lengthen the extradition process rather than shorten it. Therefore, subsection (c) deprives any court of jurisdiction to review a finding that a fugitive is extraditable under this chapter unless the fugitive has exhausted the appellate remedies available to him by right in this section. It also forecloses an appeal, a petition for habeas corpus, or declaratory judgment action if the validity of the fugitive's commitment for extradition has been ruled upon in prior proceedings, unless grounds are offered which could not have been presented previously.

The resolution of challenges to judicial action in international extradition cases should be especially prompt. Extradition cases are quasi-criminal in nature. Moreover, in such cases our government's willingness to make a timely and ungrudging execution of its solemn treaty obligations to a friendly nation is in question.[80] Therefore, this section requires that courts of appeal decide cases arising under this subchapter expeditiously.

SECTION 3216. SURRENDER OF A PERSON TO A FOREIGN STATE

1. Present Federal Law

Under 18 U.S.C. 3186, the Secretary of State may order that any person found extraditable by a court under 18 U.S.C. 3184 be delivered to an authorized agent of the government seeking extradition. Although it is generally agreed that the Secretary's decision in this matter is discretionary,[81] present law provides no indication of the parameters of the Secretary's discretion.

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[79] *Jimenez* v. *Aristequieta*, 314 F.2d 649 (5th Cir. 1963).

[80] *Magisano* v. *Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976).

[81] See, generally, Note, *Executive Discretion in Extradition*, 62 Columbia Law Review 1313 (1962).

18 U.S.C. 3188 states that if a fugitive found extraditable under 18 U.S.C. 3184 is not removed from the United States within "two calendar months" of the court's commitment order, he may be released from custody unless there is "sufficient cause" why release should not be ordered.[82] The courts have held that if the fugitive institutes litigation challenging his extradition, the two-month period commences when the claims are finally adjudicated rather than when the commitment order was issued.[83]

2. Provisions of the Bill, as Reported

Subsection (a) carries forward the essence of 18 U.S.C. 3186 by providing that the Secretary of State shall make the final decision as to extradition. The subsection requires that the Secretary's decision be made in accordance with the subchapter and the applicable treaty, and lists the actions that the Secretary may take.

Subsection (a)(1) simply permits the Secretary to order the surrender of a person the court has found to be extraditable to a duly appointed agent of the foreign state.

Subsection (a)(2) permits the Secretary to condition the surrender of a fugitive upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice or to effectuate the purposes of the treaty. This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns [84] or questions concerning trial procedures in the requesting state exist.[85] It would also permit the imposition of restrictions expressly contemplated in the provisions of some newer treaties.[86]

Subsection (a)(3) provides that the Secretary of State shall deny extradition where he is persuaded that the foreign state is seeking the person's extradition "for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions." As previously noted, most extradition treaties preclude extradition for an offense of a political character and many treaties also bar extradition where the request is motivated by political considerations. Subsection (a)(3) in conjunction with section 3214(a) has the effect of changing current case law to conform to the provisions of the latest modern extradition treaties of the United States by placing the responsibility for deciding the "political offense" issue on the Secretary of State rather than on the Federal courts. The reasons for this change were addressed in the discussion relating to section 3214 and are not repeated here. It should also be noted that this provision provides that any evidence or arguments the fugitive wishes to present to the Secretary of State with respect to the alleged political nature of extradition shall be in writing. The Secretary is not required to provide a formal hearing on a political offense exception application,[87] but it is expected that the Secretary will utilize the resources of the Department of State for gathering evidence and assessing the fugitive's claim.

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[82] *In re Factor's Extradition,* 75 F.2d 10 (7th Cir. 1934); *In re Normano,* 7 F. Supp. 329 (D. Mass. 1934); 6 WHITEMAN, *supra* note 3, at 1064-69.

[83] *Jimenez* v. *United States District Court for the Southern District of Florida,* 84 S. Ct. 14, 11 L. Ed. 2nd 30 (1963); *Barrett* v. *United States,* 590 F.2d 624 (6th Cir. 1978).

[84] See, e.g., *Peroff* v. *Hylton,* 542 F.2d 1247, 1249 (4th Cir. 1976), *cert.* denied 429 U.S. 1062 (1977); *Sindona* v. *Grant,* supra note 43, at 199, 207; see Note, Columbia Law Review, *supra* note 81.

[85] For example, the Department of State has frequently conditioned surrender of a fugitive convicted in absentia upon a promise by the foreign country involved to permit a retrial. See, 6 WHITEMAN, *supra,* note 3, at 1051, 1117-1122.

[86] For example, some treaties permit the requested state to condition extradition upon satisfactory assurances that the death penalty will not be imposed. See e.g., Art. 6, Extradition Treaty, Canada-United States, signed December 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976).

Finally, subsection (a) expressly authorizes surrender of United States nationals unless surrender is expressly prohibited by the applicable treaty.[88] This provision is necessary in light of the decision in the *Valentine* [89] case in which the Supreme Court held that language contained in many of the older extradition treaties to which the United States is a party does not permit the surrender of United States citizens absent explicit statutory authority for such surrender. The result of the *Neidecker* decision has been to effectively immunize United States citizens from extradition in many cases—a result never intended by the negotiators of the treaties involved. It is the policy of the United States to treat its citizens and aliens within its borders equally in extradition matters,[90] and this subsection permits that policy to operate effectively.

Subsection (b) requires that the Secretary of State notify all interested parties of his decision on extradition.

Subsection (c)(1) provides that the fugitive shall be released from custody if the Secretary of State does not order, or declines to order, the person's surrender within forty-five days after receiving the record of proceedings from the court. Of course, if the Secretary of State decides within forty-five days to refuse to order extradition, the authority for holding the person sought in custody under section 3214(e)(1) immediately expires, and the person should be released from detention at once.

Subsection (c)(2) is based on the provisions of 18 U.S.C. 3188, and provides that when the Secretary of State has ordered a person extradited, the foreign country involved must take custody of the person and remove him from the United States within 30 days. This 30-day time period does not begin until all litigation challenging extradition has been completed. The subsection expressly excludes from consideration the time during which surrender has been stayed pending litigation.

Subsection (c) requires a person found extraditable to give the Secretary of State reasonable notice that he will seek release because of expiration of a time limitation set forth in subsection (c)(1) or (c)(2), and forbids release if good cause is shown for the delay in effecting surrender.

Subsection (d) expressly recognizes that the decisions of the Secretary of State under paragraphs (1), (2), and (3) of subsection (a) of this section are in the nature of post-judicial last step final administrative determinations prior to actually effecting the extradition and, as such, are not subject to judicial review.

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[87] *Peroff v. Hylton*, 563 F.2d 1099, 1102-1103 (4th Cir. 1977).

[88] At present, no extradition treaty to which the United States is a party expressly prohibits surrender of citizens of the requested state.

[89] 299 U.S. 5 (1936), *supra* note 32.

[90] Many foreign countries do not extradite their citizens because those countries can instead prosecute and punish their citizens for crimes committed in another country. As a general rule, the United States has no such ability. *Escobedo and Castillo* v. *Forsch*, 623 F.2d 1098 (5th Cir. 1980); 6 Whiteman, *supra* note 3, at 876–878.

SECTION 3217. RECEIPT OF A PERSON FROM A FOREIGN STATE

1. Present Federal Law

18 U.S.C. 3192 authorizes the President to "take all necessary measures for the transportation and safekeeping" of a person extradited to the United States from a foreign country. At one time the President relied upon this statute to issue a warrant designating an agent to receive custody of a fugitive from a foreign government. 18 U.S.C. 3193 authorizes such an agent to convey the fugitive directly to the place of trial, and grants to the agent "all the powers of a Marshal of the United States, in the several Federal districts through which it may be necessary for him to pass with [the] prisoner . . .". The authority to issue warrants and appoint agents under these sections has now been delegated to the Secretary of State. [91] However, the Department of State wishes to transfer to the Department of Justice the authority to appoint agents and issue warrants in these matters.

2. Provisions of the Bill, as Reported

Section 3217 of the proposed subchapter carries forward the provisions of 18 U.S.C. 3192 and 3193, with minor modifications reflecting present United States practice.

Subsection (a) authorizes the Attorney General to designate an agent to receive custody of a fugitive surrendered by a foreign government and permits the agent to convey the fugitive to the place of trial in the United States. The final sentence of the subsection permits the extradited fugitive to be taken directly to the Federal district or State jurisdiction in which charges are outstanding, without removal proceedings under Rule 40 of the Federal Rules of Criminal Procedure or interstate rendition proceedings.

Section 3217(b) is new, and is designed to implement provisions found in some of the most recent United States extradition treaties. The laws in many foreign countries require that extradition be postponed until the person has satisfied any outstanding criminal charges in that country.[92] Frequently, a person sought by the United States has already been tried and convicted of other charges in the requested country and has a sentence to serve there. If the sentence abroad is a long one, the postponement of surrender could compromise the possibility of a speedy and fair trial in this country.[93] Some extradition treaties contain provisions which deal with this problem by permitting "temporary extradition". Under these treaty provisions, a fugitive convicted abroad would be surrended to the United States solely for the purpose of trial and sentencing here, then returned to the foreign country involved to finish the sentence previously imposed there.[94] This process balances our government's interest in adjudicating the charges while the evidence is fresh with the foreign country's desire to fully enforce its laws. It also works to a fugitive's benefit by enabling him to answer the charges in this country while evidence for his defense is still available and by creating the possibility that the sentence imposed upon conviction in this country could run concurrently with that the fugitive must serve abroad.

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[91] Executive Order 11517, 35 Fed. Reg. 4937 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News, at 6232.

[92] See, e.g., Extradition Act, R.S.C. 1952, c. 322 (Canada); s. 24, Ley de Extradicion (Dec. 29, 1975), Art. 11 (Mexico).

[93] *United States* v. *Rowbotham*, 430 F. Supp. 1254 (D. Mass. 1977); *United States* v. *Dolack*, 484 F.2d 527 (7th Cir. 1973). It is well to remember that both the prosecution and the defense suffer when a criminal trial is delayed too long. Indeed, as the Court of Appeals trenchantly remarked in *United States* v. *Judice*, 457 F.2d 418, 418 (5th Cir. 1972): ". . . all practiced trial lawyers are well aware that attrition from . . . delay is more damaging to the prosecutor's case than to that of the defense. This will be so as long as the prosecution has the burden of proof."

[94] Cf. 6 Whiteman, *supra* note 3, at 1052–1053.

Section 3217(b) provides implementing legislation for treaty provisions of this type. It provides that when a foreign state has delivered a person to the United States on the condition that the person be returned at the conclusion of the criminal trial or sentencing, the Bureau of Prisons shall keep the person in custody until the judicial proceedings are concluded, and thereafter surrender the person to a duly appointed agent of the foreign country. It also provides that the return to the foreign state of the person is not subject to the requirements of the subchapter, such as an extradition hearing or an order of surrender by the Secretary of State.

SECTION 3218. GENERAL PROVISIONS FOR SUBCHAPTER B

1. In General

This section contains the definitions and general provisions applicable to the extradition chapter.

2. Present Federal Law

18 U.S.C. 3198 requires that the foreign government which sought extradition pay all costs and fees resulting from the request. The costs resulting from extradition requests here frequently are so small that it is uneconomical—and diplomatically embarrassing—to attempt to enforce this statute. Moreover, many of the extradition treaties to which the United States is a party contain provisions which modify this statutory rule.[95] Also, the United States has entered into informal arrangements with some countries whereby each country bears most of the cost of the other's extradition request. In short, the present statute does not adequately reflect government policy in extradition matters.

Present statutory law offers no guidance as to who must pay the costs associated with United States requests to foreign countries for the extradition of fugitives. The Department of State requests extradition on behalf of either the State within the United States in which the fugitive is charged, or, if Federal charges are involved, on behalf of the United States. Therefore, the long-standing policy of the Department of State has been that the State jurisdiction which sought the fugitive's return must pay any expenses incurred in connection with the extradition request, and the Department of Justice must pay the expenses incurred in obtaining the extradition of a fugitive Federal offender.

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[95] For example, Art. 21, Extradition Treaty, United States-Mexico, signed May 4, 1978, —— U.S.T.——, T.I.A.S. 9656 (entered into force January 25, 1980) requires that the requested state bear all of the expenses of extradition except those incurred for the translation of the documents or the transportation of the fugitive.

Extradition treaties are considered self-executing, Bassiouni, International Extradition and World Public Order 30–31 (1976), and supercede the provisions of prior inconsistent federal legislation, Restatement (second) of Foreign Relations Law of the United States § 141, Comment (b) at 433 (1965). Therefore, whether 18 U.S.C. 3195 or a differing treaty provision is applicable in a particular extradition case depends on when the treaty entered into force.

3. Provisions of Section 3218

Subsection (a) of section 3218 sets forth definitions for the terms "court", "foreign state", "treaty", and "warrant".

Subsection (b) states that in general a foreign state which has requested the extradition of a fugitive located in the United States must bear all costs and expenses incurred in connection with that request. Since many of the extradition treaties contain provisions specifically dealing with costs in extradition matters, the subsection authorizes the Secretary of State to direct that this matter be handled in accordance with the terms of the applicable treaty or agreement. This subsection also requires that all costs and expenses incurred in connection with the execution of a request by a State of the United States for the return of a fugitive located in another country must be paid by that State. When the request for extradition is made to secure the return of a fugitive wanted for a Federal offense, the expenses must be borne by the United States. It is anticipated that when the fugitive involved is sought for both Federal and State offenses, the costs incurred abroad will be allocated accordingly.

CHAPTER 33.—JURISDICTION AND VENUE

This chapter delineates the jurisdiction of United States District Courts over offenses occurring within the bounds of Federal jurisdiction, establishes the power of United States magistrates to try certain offenses, grants jurisdiction for the issuance of arrest warrants, and establishes the general rules for the placement of venue. The chapter substantially codifies current law.

SUBCHAPTER A.—JURISDICTION

(Sections 3301-3303)

SECTION 3301. JURISDICTION OF DISTRICT COURTS OVER OFFENSES

1. In General

The Federal district courts are courts of limited jurisdiction and their authority to act in a particular matter is dependent on a grant of jurisdiction from the Congress. The purpose of this section then is to grant that jurisdiction to try offenses and to do so in language appropriate to that of the remainder of the Code.

2. Present Federal Law

The bulk of current Federal law on this subject is found in two sections—18 U.S.C. 3231 and 3241. [1] The former section establishes in general terms the original jurisdiction of United States District Courts over offenses against the laws of the United States. The section, moreover, makes such jurisdiction exclusive of the courts of the States but purports not to impair the jurisdiction of such courts over acts which violate both Federal and State law.

18 U.S.C. 3241 grants to the District Court for the Canal Zone and the District Court of the Virgin Islands jurisdiction over offenses against the laws of the United States committed within the territorial jurisdiction of those courts, as well as concurrent jurisdiction over offenses committed on the high seas.

3. Provisions of the Bill, as Reported

Section 3301 makes few substantive changes in existing Federal law. It combines the general terms of 18 U.S.C. 3231 and 3241 into one section, eliminates the provision of section 3231 dealing with nonimpairment of State jurisdiction which is covered in section 206 of the Code, and expands the provisions of section 3241 to include the District Court of Guam and the District Court of the Northern Mariana Islands.[2]

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[1] In addition, 18 U.S.C. 3242 deals with jurisdiction over offenses committed by Indians on Indian reservations. That subject is treated in the proposed Code under section 203(a)(3).

SECTION 3302. JURISDICTION OF UNITED STATES MAGISTRATES OVER OFFENSES

1. In General

In order to free Federal district court judges from the burdens of presiding over relatively minor cases, and to provide defendants in those cases with a method of relatively rapid disposition of the charges against them, provision is made both under current law and under the proposed Code for trial before United States magistrates under certain conditions which include, generally, a waiver of the right to trial before a district court.

2. Present Federal Law

Present Federal law on jurisdiction of the magistrates is found in sections 3401 and 3402 of title 18. The former section permits magistrates, when designated by the district court, to try and sentence persons for misdemeanor offenses. However, before the magistrate may exercise that authority, the section also requires a knowing waiver of trial before a jury and trial in a district court.[3] Section 3302 follows the same general approach, but for cases involving only petty offenses it deletes the necessity of such a waiver of trial before a district court judge.

18 U.S.C. 3401 also contains provisions dealing with procedural matters such as the extension of probation laws to cases tried by magistrates, the ordering of presentence reports, and the recording of proceedings.

Section 3402 of title 18 establishes a right of appeal from the magistrate's court to the district court and authorizes the Supreme Court to establish rules of practice and procedure in magistrates' courts.

3. Provisions of the Bill, as Reported

Section 3302 of the proposed Code carries forward most of the substantive aspects of both 18 U.S.C. 3401 and 3402 with the bulk of the 1979 amendments. The areas dealing with probation and presentence reports are deleted from the section because the amended Rule 32 of the Federal Rules of Criminal Procedure (Presentence Reports) and chapter 21 (Probation) of the Code continue those provisions of current law. It should be noted that by including all misdemeanors and infractions within magistrates' jurisdiction the fine level limitations of current law have been substantially raised.[4]

The language of the section has the same scope and effects as under current law, as recently amended, the changes being only stylistic in nature. The Committee, as noted, has limited the right to elect a trial in district court to Class A misdemeanors.[5] Class B and Class C misdemeanors and infractions, which carry maximum penalties of six months or less, will be tried before a magistrate with no separate right to elect a trial in district court. It should be noted that subsection (b) permits the government as well as the person charged to elect trial by a district court.

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[2] This latter provision is in keeping with the terms of 48 U.S.C. 1424 and 1424b.

[3] Public Law 96-82, October 10, 1979.

[4] It has been held that a magistrate has the power to sentence consecutively beyond his apparent jurisdictional authority. *United States* v. *Manjarrez-Arce.* 382 F. Supp. 1046 (S.D. Cal.), a'ffd, 504 F.2d 426 (9th Cir. 1974), cert. denied, 419 U.S. 1112 (1975). Section 3302 does not alter the applicability of that case.

One other matter that deserves mention is the waiver of jury trial provision contained in section 3302(b). While this section would allow a defendant to waive a jury trial, its provisions and those of Rule 23 of the Federal Rules of Criminal Procedure require the consent of the government and court or magistrate to such a waiver. While these consents would normally be forthcoming in minor cases, the Committee intends that they be required under the proposed Code.

SECTION 3303. JURISDICTION TO ORDER ARRESTS FOR OFFENSES

1. *In General*

As a general rule, arrests are carried out under the order of a judicial officer. The authority to issue arrest orders requires a legislative grant. The granting of such authority, the exercise of that authority by State officials, and the extension of that authority beyond the borders of the United States and its territories, are among the considerations covered by section 3303.

2. *Present Federal Law*

The subject matter of this section is currently treated in 18 U.S.C. 3041 and 3042. The former section grants authority to arrest for Federal offenses to Federal judges and magistrates as well as to certain State officials. The section further provides that, when the arrest is made under the authority of a State judicial officer, State procedures shall be followed, but that matters of pretrial release are governed by chapter 207 of title 18, United States Code.

18 U.S.C. 3042 deals with extraterritorial arrest powers. It applies the provision of section 3041 to any country in which the United States exercises extraterritorial jurisdiction. The provision was enacted in response to a request made several decades ago by then Secretary of State Cordell Hull.[6] At the time of the enactment, the United States was exercising criminal jurisdiction over United States nationals in at least five countries (China, Egypt, Ethiopia, Muscat, and Morocco). The host countries were apparently offended by this practice and had refused to extradite persons to the United States. They would not, however, object to arrest and removal by United States officers. Secretary Hull sought the extension of the provisions of 3041 in order to avert the problems caused by the refusal to extradite. There is no indication that the provision is currently being employed, and there are no such United States extraterritorial courts currently in existence.

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[5] The Committee held hearings on the question of eliminating the defendant's right of election in connection with the legislation which ultimately was enacted as P.L. 96-82 (1977). The Committee's report (S. Rept. No. 96-74, 96th Cong., 1st Sess.) noted that under existing law it does not appear to be constitutionally required that a defendant in a petty offense case be tried either before an Article III judge or by a jury. S. Rept. No. 96-74, *supra* at 6.

[6] H. Rept. No. 217, 73d Cong. 1st Sess., pp. 1-2.

Section 3303(a) tracks much of current law. It permits the Federal judges (including, by definition, magistrates) to order the arrest of Federal offenders within the United States, and permits State judicial officers to order such arrests within their States. The term "judicial officer" is used to avoid the problems inherent in trying to list all of the varying titles that States may give to those empowered within their borders to order arrests.

State officers are to follow their own State's procedures insofar as they do not conflict with the Federal Rules of Criminal Procedure, and release after arrest is to be governed by subchapter A of chapter 35 of the Code. These provisions, which are covered by subsection 3303(c), continue the same provisions set forth by 18 U.S.C. 3041, but with a somewhat greater degree of specificity.

Subsection (b) deals with extraterritorial arrests and differs significantly from current law. As mentioned previously, current law purports to allow the exercise of United States authority in the territory of another sovereign. The abandonment of the practice of exercising extraterritorial jurisdiction in this manner eliminates much of the need for provisions such as 18 U.S.C. 3042. However, there still remain areas where no sovereign can yet be said to have established jurisdiction. Examples are such places as Antarctica and outer space. It is in these areas, and other areas as yet uncharted, that there exists both an interest and a legitimacy in the exercise by the United States of extraterritorial jurisdiction over persons for the purpose of effectuating an arrest.

The exercise of such arrest jurisdiction is limited to offenses described in section 204 (Extraterritorial Jurisdiction) and to fugitives from justice where the offender or the fugitive is outside of the jurisdiction of the United States and outside of the jurisdiction of any nation.

SUBCHAPTER B.—VENUE

(Sections 3311-3313)

Subchapter B of chapter 33 establishes the rules for determining the place of a trial or a grand jury inquiry. With some noteworthy differences, sections 3311 through 3313 codify current law.

SECTION 3311. VENUE FOR AN OFFENSE COMMITTED IN MORE THAN ONE DISTRICT

1. In General

Section 3311 deals with offenses in which there would appear to be a choice of districts in which to initiate prosecution.

2. Present Federal Law

The bulk of current Federal law on establishing venue is found in 18 U.S.C. 3237 which provides that a Federal offense may be prosecuted in any judicial district where the offense was begun, continued, or was completed. The present subsection (a) contains an exception to this multiple venue option where there is an express venue provision set out to the contrary in another statute. Subsection (a) also provides that unless there is an expressly contrary venue statute, an offense involving use of the mails, or transportation in interstate or foreign commerce, is a continuing offense which may be prosecuted in any judicial district through which or into which the mail or commerce moves.

Subsection (b) of current 18 U.S.C. 3237 modifies the general format of subsection (a) by providing that where a prosecution is instituted for violations of certain specific tax statutes [1] in a judicial district other than a district in which the defendant resides, the defendant may file a motion within 20 days after arraignment by which he can elect to be tried in the district in which he was residing at the time the alleged offense was committed. As explained in the legislative history of 18 U.S.C. 3237 [2] subsection (b) was designed to alleviate the hardship on a defendant in a tax case who might otherwise have to bear the expense and rigors of defending himself in a district distant from his normal residence, such as the district in which he was required to file his return.

Other provisions of current law establishing particular places of venue include: 18 U.S.C. 1073, dealing with fugitives and requiring venue to be placed where the original crime took place or in which the fugitive had been held in custody or confinement; 18 U.S.C. 3236, dealing with venue for murder or manslaughter and requiring venue in the district where the injury was inflicted as opposed to the place where the death occurred; and 18 U.S.C. 3239 dealing with threatening communications and placing venue in the district where the threat was first placed in motion, such as the district in which a threatening letter was mailed.

3. Provisions of the Bill, as Reported

This section contains six subsections which will be discussed *seriatim.*

Subsection (a) establishes the general rule, for cases where there could be multiple districts in which to place venue, that a prosecution may take place in any district in which the offense was begun, continued, or completed. This rule is in accord with current law. The provision also recognizes, by its introductory language, that other provisions of law may exist that govern the establishment of venue. Venue may still be established through a specific statute located outside new title 18 even if the offense to which it relates has been moved into the Code. Although such statutes are rare, one example is 8 U.S.C. 1329 which establishes venue for the immigration offenses now contained in sections 1211–1213. Venue for violation of those offenses is governed by the title 8 provision. Note that 8

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[1] 26 U.S.C. 7201, 7203, or 7206(1), (2), or (5).

[2] 1958 U.S. Code, Cong. and Admin. News, p. 3261; 1966 U.S. Code. Cong. and Admin. News, p. 3676; *United States* v. *Youse*, 387 F. Supp. 132 (D. Wis. 1975).

U.S.C. 1329 at one point specifically refers to sections 1325 and 1326 of that title. By operation of section 721 of the reported bill that reference should be deemed to refer to 18 U.S.C. 1211.

Subsection (b) deals with venue in conspiracy cases and establishes the rule that such cases may be prosecuted in any district in which the conspiracy was entered into or in which any person engaged in conduct to effect an objective of the conspiracy. This, too, is in accord with current law.[3] As a corollary to this principle of venue, subsection (b) also provides that a substantive offense committed pursuant to a conspiracy may be prosecuted with the conspiracy offense in any district in which the conspiracy is prosecuted. Again, this is in accord with current law.[4]

Subsection (c) deals with mail, commerce, and importation of objects into the United States. If jurisdiction is based on one of these factors, then the offense is regarded as a continuing offense and prosecution may occur in any district described in subsection (a) or in any district through or into which the mail, commerce, or controlled substance moved. To the extent that the section deals with mail or commerce, it codifies current law.[5] The Committee decided to include the importation of an object into the United States as a continuing offense in order to alleviate the burden of holdings such as *United States* v. *Lember,* [6] which limit venue in importation cases to the place of entry rather than the final destination, creating major difficulties as the witnesses are usually located at the place of destination.[7]

Subsection (d) carries through the policy of 18 U.S.C. 3237(b) by permitting a defendant in certain tax offenses to elect to be tried in the district in which he was residing at the time of the offense. The Committee has converted, as closely as possible, the existing list of tax offenses for which the special venue provisions of 18 U.S.C. 3237(b) apply to the new tax offense sections in chapter 14 of the Code.

Subsection (e) codifies 18 U.S.C. 3236 dealing with venue for homicide offenses with only stylistic changes, and subsection (f) codifies 18 U.S.C. 1073.

The provisions of the proposed Code do not carry forward the law found currently at 18 U.S.C. 3239. That section provides that in the case of threatening communications the defendant has the right to have venue lie in the district from which the threat was sent. The Committee has rejected the continuation of this provision. It is difficult to discern any reason to place venue in a case where a threat is placed in the mails in a different district, as a matter of right, than would be the case if an explosive or narcotics were placed in the mails. Under the Code, venue will generally be determined by the provisions of section 3311(c) and, should that provision prove a hardship for the defendant, he will retain his right to move for a change of venue under Rule 21 of the Federal Rules of Criminal Procedure.

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[3] See *Hyde* v. *Shine,* 199 U.S. 62 (1905); *United States* v. *Overshon,* 494 F.2d 894 (8th Cir.). cert. denied, 419 U.S. 853 (1974).

[4] *United States* v. *Whitaker,* 372 F. Supp. 154 (E.D.Pa.), aff'd, 503 F.2d 1399, 1400 (3d Cir.), cert. denied. 419 U.S. 1113 (1975). The Committee deleted other provisions appearing in subsection (g) of S. 1630, as introduced, that would have restricted current law with respect to venue for offenses involving conspiring to disseminate, or the substantive crime of disseminating, obscene material.

[5] *United States* v. *McGregor,* 503 F.2d 1167 (8th Cir. 1974), cert. denied, 402 U.S. 926 (1975) (mails); *United States* v. *Hankish,* 502 F.2d 71 (4th Cir. 1974) (commerce).

[6] 319 F. Supp. 249 (E.D.Va. 1970).

[7] In overruling cases such as *Lember,* the Committee is following what is developing as the majority rule that venue in the case of importation of a controlled substance can be placed at the point of destination as well as at the place of entry. See *United States* v. *Godwin,* 546 F.2d 145 (5th Cir. 1977): *United States* v. *Bernard,* 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974): *United States* v. *Jackson,* 482 F.2d 1167 (10th Cir. 1973), cert. denied. 414 U.S. 1159 (1974); see also *United States* v. *Raymond,* 536 F.2d 810 (9th Cir.). cert. denied, 429 U.S. 839 (1976).

SECTION 3312. VENUE FOR AN OFFENSE COMMITTED OUTSIDE ANY DISTRICT

1. In General

This section deals with venue for crimes, such as aircraft hijacking, which may be an offense against the United States and yet may take place outside of the jurisdiction of any particular judicial district.

2. Present Federal Law

Existing Federal law in this area is found in 18 U.S.C. 3238 which provides that if an offense is committed outside of any State or Federal judicial district, venue will lie where the offender is first arrested or brought. However, if the offender remains outside the jurisdiction of any district an indictment may be brought in the district of his last known residence or, where such residence is unknown, in the District of Columbia. The purpose of this latter provision is to allow for an indictment to toll the statute of limitations while the offender is still at large.

3. Provisions of the Bill, as Reported

Section 3312 largely follows current law. Subsection (a) as drafted merely reflects stylistic changes to comport with the structure of the Code's jurisdiction provisions in chapter 2. The phrase "is first brought" is modified by the term "after arrest" to carry out the clear intention of existing law that it is the district in which the defendant is first restrained in which venue will properly lie.[8]

Subsection (b) is new and allows for a very restrictive change of venue provision on the motion of any party to the case, including the prosecution. A number of cases have arisen where the defendant is being returned from outside the United States and his plane has made a stop, generally due to an emergency of some sort, outside the district where the government intended to return him. Thus, a plane destined for the Eastern District of Virginia (Dulles Airport) might make an unscheduled stop in Maine or Massachusetts because of engine trouble, weather, illness, or the like. Under these and similar exigent circumstances, subsection (b) would allow the defendant or the government to move for a change of venue. The subsection serves to avoid the problem of a district suddenly having responsibility for a major criminal case in which the evidence and witnesses are to be found in a distant district.

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[8] See *United States* v. *Erdos*, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973); *United States* v. *Ross*, 439 F.2d 1355 (9th Cir. 1971), cert. denied, 404 U.S. 1015 (1972).

SECTION 3313. VENUE IF A NEW DISTRICT OR DIVISION IS ESTABLISHED

1. In General

This section treats the venue problems that arise from the creation of a new district or division encompassing the place in which the offense was committed.

2. Present Federal Law

Current Federal law is found in 18 U.S.C. 3240 and establishes that prosecutions are to continue in the old district or division as if the new one had not been created. However, the court is given discretion, upon the motion of the defendant, to order a transfer to the new district or division.

3. Provisions of the Bill, as Reported

With one exception, section 3313 makes only stylistic changes in the language of current law. The exception is that a defendant's motion for a change to the new district must be made no later than twenty days after arraignment. The purpose of this addition is to avoid the possibility, under the provisions of current law, that the defendant will move for a change of venue at a very late date up to and including the time of trial.

CHAPTER 34.—APPOINTMENT OF COUNSEL

(Sections 3401–3405)

This chapter establishes the procedures for the appointment of counsel, creates guidelines for payment of appointed counsel, and offers alternative plans for the districts in establishing full-time appointed defense counsel. The whole of current Federal law in this area is set forth in 18 U.S.C. 3006A. The importance of the subject of affording the right to counsel is such that the Committee believes it is deserving of treatment in a separate chapter. The chapter in large measure continues the existing law as set forth in 18 U.S.C. 3006A, breaking that section into five separate sections, each dealing with a phase of the appointment of counsel for indigents. Other than a substantial increase in maximum compensation rates to reflect the effects of inflation, the changes that have been made are largely stylistic and will be discussed in the context of each section.

SECTION 3401. DISTRICT PLANS FOR APPOINTMENT OF COUNSEL

This section is drawn from 18 U.S.C. 3006A(a) and provides for the establishment by each district court of a plan for the representation of indigent defendants under specified circumstances, the broadest of which includes any time that such a person has a right, under the Sixth Amendment, to the assistance of counsel.[1] The provision is designed to be and is, in fact, flexible enough to encompass emerging concepts of the right to counsel. The section also specifically provides for the plan to contain provisions for the appointment of counsel in juvenile proceedings, thus implementing a provision found in the Juvenile Justice and Delinquency Act of 1974.[2] Further, it includes a provision for counsel at a hearing to determine if a juvenile should be treated as an adult.

The subsection includes investigative resources, expert witnesses, and other assistance necessary to provide for an adequate defense within the term "representation." [3] In each case the plan of the district must be approved by the judicial council of the circuit.

The only difference of note between this provision and current law is that the language used in subsection (a)(1)(A) is phrased not in terms of felony, misdemeanor, or petty offense but, rather, in terms of the type of offenses under the Code for which counsel would be required. The holding in *Argersinger* v. *Hamlin*, [4] which required counsel as to lesser offenses only where a deprivation of liberty was a possible result of the trial, would be covered in the general language of subsection (a)(4) concerning appointment of counsel when required under the Sixth Amendment. Subsection (a)(4) is drafted broadly enough to permit payment of counsel if the court decides that counsel is required under the Sixth Amendment or if a new statute should provide a right to counsel in a situation where a person faces loss of liberty and cannot afford adequate representation. An example of such a right to counsel would be a situation in which foreign counsel is required to take a deposition in a foreign court pursuant to Rule 15 of the Federal Rules of Criminal Procedure.

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[1] See *United States* v. *Bailey*, 581 F.2d 984 (D.C. Cir. 1978).

[2] P.L. 93-415, September 7, 1974.

[3] See *United States* v. *Durant*, 545 F.2d 823 (2d Cir. 1976); *United States* v. *Moss*, 544 F.2d 954 (5th Cir. 1976).

[4] 407 U.S. 25 (1972).

SECTION 3402. APPOINTMENT OF COUNSEL

This section is drawn from 18 U.S.C. 3006A (b) and (c) and enumerates the sources from which appointed counsel may be obtained. These sources are a panel of attorneys designated or approved by the court, or a bar association, legal aid agency, or defender organization furnishing representation under the district's plan. It also provides for retroactive appointment upon a subsequent showing of indigency as well as permitting the appointment of separate counsel for co-defendants where the interests of the parties so require. In addition, the section provides that appointed counsel is to be made available through every stage of the proceedings, and, to that extent, it goes beyond the requirements of the Sixth Amendment which does not require appointed counsel in discretionary appeals.[5]

Finally, the section also contains provisions for dealing with a change in the defendant's financial circumstances—for better or worse—and for substitution of counsel if that becomes necessary.

SECTION 3403. COMPENSATION OF COUNSEL

This section is derived from 18 U.S.C. 3006A (d), (e), (f), and (g). Subsection (a) sets the rates for counsel fees by the hour and by the case and allows for waiver of these maximum amounts with the approval of the chief judge of the circuit. The bill provides a 50 percent increase in the compensation permitted for representing criminal defendants in order to adjust for inflation. Since the figures were last adjusted (in June 1970), the cost of living has increased substantially more than 50 percent; thus, the increase in this section is relatively modest. The subsection also provides that appeals and petitions for certiorari may be filed by indigents without repayment of costs or security. One other change has been made. Under current law, hourly payments were possible up to the minimum hourly rate established by a bar association. Fee schedules set by bar associations have received much criticism recently and, in one circumstance, they have been held to violate the antitrust laws.[6] Accordingly, the Committee in subsection (a) refers only to the usual minimum hourly rate in the district for similar services without reference to any rate setting body.

Subsection (b) provides for services other than counsel and limits the amount of funds that may be expended for such services, but again permits waiver of the maximum.

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[5] *Ross* v. *Moffit*, 417 U.S. 600 (1974).

[6] *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975).

Subsection (c) deals with the situation in which the court finds, after appointing counsel, that funds are available for the defendant from some other source. It permits the court to direct that such funds be used for payment of fees or to reimburse the Treasury.[7]

Subsection (d) permits appointment of counsel for material witnesses, for habeas corpus proceedings, and for proceedings concerning transfer of convicted offenders between countries pursuant to treaty.[8]

SECTION 3404. DEFENDER ORGANIZATIONS

This section is drawn from 18 U.S.C. 3006A(h) and establishes two main types of defender organizations—the Federal Public Defender Organization and the Community Defender Organization. The main difference between the two is that the former is appointed by the judicial council of the circuit while the latter is a community organization (perhaps a county or State defender's office) which offers its service to the Federal courts.

SECTION 3405. GENERAL PROVISIONS FOR CHAPTER 34

This section is derived from 18 U.S.C. 3006A(d)(5) and (6), (i), (j), and (l) and contains various housekeeping provisions. The section carries forward current law in these areas, but it omits the definition of the term "district court" since such a definition is already found among the general definitions of the Code in section 111.

Subsection (a) requires each district court and judicial council to submit to the Administrative Office of the United States Courts various reports at times to be specified.

Subsection (b) covering administration provides that the director of the Administrative Office of the United States Courts is to supervise disbursements of funds appropriated to carry out the provisions of the chapter.

Subsection (c) makes the provisions of the chapter applicable to the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. It expressly makes this chapter inapplicable to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. This limitation on the application of this chapter to local courts located in the District of Columbia reflects legislation adding a program for representation of indigents in criminal cases to the District of Columbia Code.[9] In addition, current 18 U.S.C. 3006A(1) makes the defender organization provisions of 18 U.S.C. 3006A(h) inapplicable to United States courts in the District of Columbia. Due to a recent major shift of criminal jurisdiction that provision is no longer appropriate. Accordingly, subsection (c) now makes the defender organization provisions of section 3404 applicable to United States courts in the District of Columbia. This will provide to the Federal courts in the District the same options that are available to Federal courts in the rest of the country.[10]

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[7] This provision was cited as "constitutionally proper" in *United States* v. *Bracewell*, 569 F.2d 1194 (2d Cir. 1978).

[8] 28 U.S.C. 3117, as redesignated by section 524 of the bill.

[9] P.L. 93-412, September 3, 1974, amending 18 U.S.C. 3006A.

[10] The problem is outlined in a letter to the Committee from the director of the District of Columbia Public Defender Service. See Hearings p. 9422.

Such a change enjoys broad bipartisan support, is in no way controversial, and has the support of the bench and bar.

Subsection (d) codifies 18 U.S.C. 3006A(d)(5) and states that for purposes of compensation a court ordered new trial shall be considered a new case.

Subsection (e) codifies 18 U.S.C. 3006A(d)(6) and waives payment of various fees for indigents on an appeal or a petition for certiorari.

Subsection (f) carries forward the provisions of 18 U.S.C. 3006A(j), relating to authorization of appropriations.

CHAPTER 35.—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

(Sections 3501–3508)

This chapter substantially revises the Bail Reform Act of 1966[1] in order to address such problems as the need to consider community safety in setting nonfinancial pretrial conditions of release, the need to impose limitations on the arbitrary use of money bail, the need to expand the list of statutory release conditions, the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons, the need for a more appropriate basis for deciding on post-conviction release, the need to permit temporary detention of persons who are arrested while they are on a form of conditional release, and the need to provide procedures for revocation of release for violation of the conditions of release. Many of the changes in the Bail Reform Act incorporated in this chapter reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the court adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. At the same time, these new provisions recognize that the existing bail system all too often promotes injustice through the arbitrary imposition of financial conditions which cannot be satisfied by a defendant and which result in his incarceration pending trial.

The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.

SECTION 3501. RELEASE AND DETENTION AUTHORITY GENERALLY

This section specifies which judges have the authority to order the release[2] or detention of persons pursuant to this chapter. Subsection (a) deals with release and detention authority pending trial, and provides that a judge who is authorized to order the arrest of a person shall order that an arrested person brought before him be released or detained, pending judicial proceedings, pursuant to this chapter. The word "judge," which is used throughout these provisions, is defined in section 111 as "any judicial officer, and includes a justice of the Supreme Court and a magistrate." Thus, the term judicial officer would include those State judicial officers who are authorized to arrest and commit offenders, and would also include

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[1] 18 U.S.C. 3146 et seq.

[2] Instead of using the term "bail", this provision and other provisions in this chapter use the term "release" in order to distinguish between money bond (i.e., "bail") and conditional release (often referred to as "release on bail").

United States magistrates. Similar authority is now set out in 18 U.S.C. 3141, although that portion of 18 U.S.C. 3141 which limits the authority to set bail in capital cases to judges of courts of the United States having original jurisdiction over the case has not been carried forward.

Release and detention authority pending sentence and appeal, which is addressed in subsection (b), is limited to a judge of a court having original jurisdiction over the offense, or a judge of a Federal appellate court. Although it would be inappropriate for a State judge or a magistrate to make a release determination after a Federal conviction, 18 U.S.C. 3141 makes no distinction between release authority pending trial and that after conviction, despite the fact that Rule 9(b) of the Federal Rules of Appellate Procedure requires that an application for release pending appeal be made in the first instance before the trial court.[3] Section 3501(b) resolves this ambiguity.

SECTION 3502. RELEASE OR DETENTION OF A DEFENDANT PENDING TRIAL

This section makes several substantive changes in the basic provisions of the Bail Reform Act of 1966. That Act, in 18 U.S.C. 3146, adopted the concept that in non-capital cases a person is to be ordered released pretrial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law.

Considerable criticism has been leveled at the Bail Reform Act in the years since its enactment because of its failure to recognize the problem of crimes committed by those on pretrial release.[4] In just the past year, both the President[5] and the Chief Justice[6] have urged amendment of federal bail laws to address this deficiency. In its final report, the Attorney General's Task Force on Violent Crime summarized what is increasingly becoming the prevalent assessment of the Bail Reform Act:

> The primary purpose of the Act was to deemphasize the use of money bonds in the federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the Act—cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual de-

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[3] The advisory notes to Rule 9(b) of the Federal Rules of Appellate Procedure state that "[n]otwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court."

[4] Criticism of the Bail Reform Act is set forth in H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 87-104 (1970). See also generally materials set forth in *Amendments to the Bail Reform Act of 1966*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess. (1969); *Preventive Detention*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Cong., 2d Sess. (1970); *Bail Reform*, Hearings before the Subcommittee on The Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (September 17, and October 1, 1981) (hereinafter cited as *Bail Reform Hearings*).

[5] Address of President Reagan to the International Association of Chiefs of Police, September 28, 1981.

[6] Address of Chief Justice Burger to the American Bar Association, February 8, 1981.

> fendants—are ones which are worthy of support. However, 15 years of experience with the Act have demonstrated that, in some respects, it does not provide for appropriate release decisions. Increasingly, the Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community. [7]

The constraints of the Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial despite these fears, or it can find a reason, such as risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.

The concept of permitting an assessment of defendant dangerousness in the pretrial release decision has been widely supported, and has been specifically endorsed by such diverse groups as the American Bar Association,[8] the National Conference of Commissioners on Uniform State Laws,[9] the National District Attorneys Association,[10] and the National Association of Pretrial Service Agencies.[11] In addition, the laws of several States recognize the validity of weighing the issue of the risk a released defendant may pose to community safety,[12] and the release provisions of District of Columbia Code, passed by the Congress in 1970, specifically recognize that defendant dangerousness is an appropriate consideration in setting conditions of pretrial release and may also serve as a basis for pretrial detention.[13]

This broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release. In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times.[14] Similar levels of pretrial criminality were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent.[15] The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.[16]

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[7] Final Report of the Attorney General's Task Force on Violent Crime, August 17, 1981, at 50-51. With some modification, all of the recommendations of the Attorney General's Task Force with respect to amendment of the Bail Reform Act are adopted in this chapter.

[8] American Bar Association, *Standards Relating to the Administration of Criminal Justice: Pretrial Release* (1978), Standards 10-5.2, 10-5.8, and 10-5.9.

[9] National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974), Rule 341.

[10] National District Attorneys Association, *National Prosecution Standards: Pretrial Release* (1977), Standard 10.8.

[11] National Association of Pretrial Service Agencies, *Performance Standards and Goals for Pretrial Release and Diversion,* Standard VII.

[12] *Bail Reform Hearings, supra* note 4 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[13] D.C. Code, sec. 23-1321 et seq.

[14] Lazar Institute, *Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact* 48 (Washington, D.C., August 1981).

In facing the problem of how to change current bail laws to provide appropriate authority to deal with dangerous defendants seeking release, the Committee concluded that while such measures as permitting consideration of community safety in setting release conditions and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, and that these measures therefore should be incorporated in this chapter, there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale—that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests—has been used to support court decisions which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threatened jurors or witnesses,[17] or who pose significant risks of flight.[18] In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.

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[15] Institute for Law and Social Research, *Pretrial Release and Misconduct in the District of Columbia* 41 (April 1980) (hereinafter cited as the INSLAW Study).

[16] Consideration of defendant dangerousness in the pretrial release decision is currently permitted only in capital cases and may serve as the basis for denial of release. 18 U.S.C. 3148. The special conditions for release in capital cases under 18 U.S.C. 3148 were recently held in *United States* v. *Kennedy*, 617 F.2d 557 (9th Cir. 1980), to be derived from the particularly dangerous nature of such offenses and not the nature of the penalty, so that consideration of danger continued to be appropriate irrespective of the fact that the proscribed death penalty could not be imposed in light of *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[17] See *United States* v. *Wind*, 527 F.2d 672 (6th Cir. 1975); *United States* v. *Gilbert*, 425 F.2d 3 (D.C. Cir. 1969).

[18] *United States* v. *Abrahams*, 575 F.2d 3 (1st Cir.), cert. denied, 439 U.S. 821 (1978).

The concept of pretrial detention has been the subject of extensive debate.[19] However, in light of the sound reasons for including a provision for pretrial detention in this chapter, the Committee has declined to follow the past practice of avoiding the issue in the Code because of the controversy it has generated. It should be noted that the legislative history of the Bail Reform Act indicates that although the issue of pretrial detention was then recognized as "intimately related to the bail reform problem" the need to reform existing bail procedures was viewed as "so pressing that such reform should not be delayed with the hope of enacting more comprehensive legislation that might deal also with the preventive detention problem," and as a consequence, the issue of pretrial detention was reserved for "additional study." [20] Four years after the passage of the Bail Reform Act, the Congress did pass a preventive detention provision in the context of the District of Columbia Court Reform and Criminal Procedure Act of 1970; action to include a similar provision of general applicability in federal criminal cases is overdue.

The Committee has given thorough consideration to the issues which have arisen during the lengthy debate over pretrial detention.[21] In particular, this consideration has focused on three questions: first, whether pretrial detention is constitutionally permissible; second, whether a preventive detention statute that is appropriately narrow in scope, and that provides necessarily stringent safeguards to protect the rights of defendants, will be sufficiently workable, as a practical matter, that it will be utilized to any significant degree; and third, whether the premise of a pretrial detention statute—that judges can predict with an acceptable degree of accuracy which defendants are likely to commit further crimes if released—is a reasonable one.

With respect to the first two questions, experience with the preventive detention provision of the District of Columbia Code [22] has been a useful reference. Although this statute was enacted in 1970, its constitutionality has been squarely addressed only recently. In *United States* v. *Edwards,*[23] the District of Columbia Court of Appeals *en banc* upheld the constitutionality of the statute. While the opinion of the court addressed a variety of constitutional issues, the decision focused on, and ultimately rejected, the two most commonly raised arguments that pretrial detention is unconstitutional: that the Eighth Amendment's prohibition on excessive bail impliedly guarantees an absolute right to release pending trial, and that pretrial detention is violative of the Due Process Clause of the Fifth Amendment in that it permits punishment of a defendant prior to an adjudication of guilt. In its review of the Eighth Amendment issue, the court exhaustively examined both the origins of the excessive bail clause and case law interpreting it, and concluded that the purpose of the amendment was to limit the discretion of the judiciary in setting money bail in individual cases, and not to limit the power of the Congress to deny release for certain crimes or certain offenders.[24] With respect to the Due Process issue, the court concluded, correctly in the view of the Committee, that pretrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather that it is designed "to curtail reasonably predictable conduct, not to punish for prior acts," and thus, under the Supreme Court's decision in *Bell* v. *Wolfish,* is a constitutionally permissible regulatory, rather than a penal, sanction.[25]

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[19] See materials in Senate 1970 Hearings on Preventive Detention, *supra* note 4; Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act: The Next Step in Bail Reform,* 37 Brooklyn Law Review 277 (1971); Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1140 (1972); Silbert and Rauh, *Criminal Laws and Procedures: The District of Columbia Court Reform and Criminal Procedures Act of 1970,* 20 Am. U. L. Rev. 252 (1970–71).

[20] S. Rep. 89–750, 89th Cong., 1st Sess. 5 (1965).

[21] See materials in *Bail Reform Hearings, supra* note 4.

[22] D.C. Code, sec. 23–1322.

[23] *United States* v. *Edwards,* No. 80–294 (D.C. App. May 8, 1981), petition for cert. filed July 8, 1981.

Based on its own constitutional analysis and its review of the *Edwards* decision, the Committee is satisfied that pretrial detention is not *per se* unconstitutional. However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

Whether a pretrial detention statute would in practice be of the utility argued by its proponents was an issue which had previously concerned the Committee in light of the fact that, in the past, the pretrial detention provision of the District of Columbia Code was rarely used.[26] However, in recent years, the use of this provision has been significantly expanded, in part because its constitutionality has been resolved by the local courts and in part because prosecutors are learning how to use it more efficiently and effectively.[27]

An additional concern of the Committee, in assessing the practical utility of a pretrial detention statute, was the argument that stringent financial conditions of release, believed by many now to be used indirectly to detain dangerous defendants, would be used to avoid the limitations and procedural requirements that would necessarily be incorporated in a provision that directly authorized pretrial detention.[28] Senator Kennedy, in particular, is of the view that *current* bail procedures often result in pretrial detention through the arbitrary use of high money bail as a way to assure a defendant's incarceration. The Committee concluded that, by providing both a workable pretrial detention statute and restrictions on the use of financial conditions of release, this problem could be effectively addressed. This issue is discussed in further detail below.

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[24] *Id.* at 6–19 (slip op.).

[25] *Id.* at 20–25 (slip op.). In *Bell* v. *Wolfish,* 441 U.S. 520 (1979), the Court rejected the contention of persons detained prior to trial that certain conditions of their confinement constituted punishment that was impermissible under the Fourth Amendment and violative of the presumption of innocence, two arguments parallel to those frequently raised in opposition to pretrial detention generally. The petitioners did not attack the constitutionality of the initial decision to detain and the Court specifically reserved any determination of this issue. 441 U.S. at 534 and n. 15.

[26] S. Rep. No. 96-553, 96th Cong., 2d Sess., 1073 (1980).

[27] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, United States House of Representatives, 97th Cong., 1st Sess., July 29, 1981 (testimony of Charles Ruff, United States Attorney for the District of Columbia).

[28] Use of high money bond to detain defendants has been cited as the reason for the infrequent use of the D.C. Code pretrial detention statute over much of its history. INSLAW study, *supra* note 15 at 45.

The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experience under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined. However, the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release.[29] While predictions which attempt to identify those defendants who will pose a significant danger to the safety of others if released are not infallible, the Committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy.

Predictions of future behavior with respect to the issue of appearance are already required in all release decisions under the Bail Reform Act, yet one study on pretrial release suggests that pretrial rearrest may be susceptible to more accurate prediction than nonappearance.[30] Furthermore, as noted in testimony before the Committee,[31] current law authorizes judges to detain defendants in capital cases and in post-conviction situations based on predictions of future misconduct.[32] Similarly, a Federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending a juvenile delinquency proceeding in order to assure the safety of others. The Committee agrees that there is no reason that assessments of the probability of future criminality should not also be permitted in the case of adult defendants awaiting trial.

In sum, the Committee has concluded that pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released.

While providing statutory authority for pretrial detention is a substantial change in Federal law, it is well known that a substantial minority of Federal defendants in the past have in fact been detained pending trial, primarily because of an inability to meet conditions of release.[33] Under the Bail Reform Act, it is permissible for a defendant to be detained if he is unable to meet conditions of release that have been determined by a judge to be reasonably necessary to assure his appearance. However, it has been suggested that the phenomenon of pretrial detention under the Bail Reform Act is often the result of intentional imposition of excessively stringent release conditions, and in particular extraordinarily high money bonds, in order to achieve detention. Furthermore, it has been suggested that in many cases, while the imposition of such conditions has apparently been for the purpose of assuring the defendant's appearance at trial, the underlying concern has been the need to detain a particularly dangerous defendant, a concern which the Bail Reform Act fails to address.

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[29] INSLAW study, *supra* note 15.

[30] *Id.* at 63–64.

[31] *Bail Reform Hearings, supra* note 4 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[32] 18 U.S.C. 3146.

[33] In a study assessing the demonstration pretrial services agencies established under 18 U.S.C. 3152, of 31,108 Federal defendants, 4766 (approximately fifteen percent) were never released. Administrative Office of the United States Courts, *Fourth Report on the Implementation of the Speedy Trial Act, Title II,* June 29, 1979 at Table III–1.

Although there is a question of the extent to which the authority to set conditions of release may have been abused to achieve detention of particularly dangerous defendants, in view of the Bail Reform Act's failure to give judges any mechanism to address the inevitable and appropriate concern they would have about releasing an arrested person who appears to pose a serious risk to community safety, it is, as recently noted by Senator Hatch, "[n]o wonder many judges laboring under this law admit using 'extreme rationalizations in circumventing' this policy." [34] A simiiar view of this problem was expressed in testimony of the Department of Justice:

> That such instances of *de facto* detention of dangerous defendants would occur is hardly surprising. . . . [C]urrent law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance, but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the community open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.[35]

The Committee does not sanction the use of high money bonds to detain dangerous defendants; but criticism of this practice should be focused not on the judiciary, but rather on the deficiencies of the law itself, and indeed, on the delay in amending the law to cure this problem.

Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness and effectiveness for society, the victims of crime—and the defendant as well.

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[34] *Bail Reform Hearings, supra* note 4 (statement of Senator Orrin G. Hatch).

[35] *Id.* (testimony of Jeffrey Harris, Deputy Associate Attorney General).

It is the intent of the Committee that the pretrial detention provisions of section 3502 replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond. Because of concern that the opportunity to use financial conditions of release to achieve pretrial detention would provide a means of circumventing the procedural safeguards and standard of proof requirements of a pretrial detention provision, the Committee was urged to do away with money bond entirely.[36] Indeed, section 3502 of this bill as introduced did not provide for imposition of financial conditions of release. While the retention of money bond does create the potential for such abuse, the Committee concluded, after consideration of arguments for continuing to provide discretion to impose financial conditions of release, that the abolition of money bond at this time would promote unnecessary controversy. Instead, the bill assures the goal of precluding detention through use of high money bond by stating explicitly that "[t]he judge may not impose a financial condition that results in the detention of the person." [37] Retention of money bond was recommended by the Department of Justice, which noted that money bond has historically been one of the primary methods of securing the appearance of defendants who are released and that this form of release has proved to be an effective deterrent to flight for certain defendants.[38]

The core pretrial detention provisions of section 3502 are set out in subsections (e) and (f). These and the other subsections of section 3502 are each discussed in detail below. Although section 3502—by permitting the consideration of dangerousness generally and by providing, in limited circumstances, for pretrial detention—represents a significant departure from the Bail Reform Act, many improvements made by the Bail Reform Act, have been retained.

Subsection (a) provides that when a person charged with an offense is brought before a judge, the judge is required to pursue one of four alternative courses of action. He may release the person on his personal recognizance, or upon his execution of an unsecured appearance bond, pursuant to section 3502(b); he may release the person subject to one or more of the conditions listed in subsection (c); he may, if the arrested person is already on a form of conditional release, order the person temporarily detained pursuant to subsection (d); or he may pursuant to subsection (e) order the detention of the person (after a hearing under subsection (f) that the judge is required to hold if the defendant is charged with a specified offense described in subsection (f), or, if on motion of the government or the judge, there appears to be a serious risk that the defendant will flee or obstruct justice, or the defendant has a long record of felonies). The first two forms of pretrial release are like those now set forth in the Bail Reform Act,[39] and it is anticipated that they will continue to be appropriate for the majority of Federal defendants. Neither detention provision has a precedent in the Bail Reform

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[36] *Id.* (testimony of Bruce D. Beaudin, Director, D.C. Pretrial Services Agency).
[37] Section 3502(c).
[38] *Id.* (testimony of Jeffrey Harris, Deputy Associate Attorney General).
[39] 18 U.S.C. 3146(a)

Act, although there are similar provisions now incorporated in the District of Columbia Code.[40]

Subsection (b) requires the judge to release the person on his own recognizance, or upon execution of an unsecured appearance bond in a specified amount, unless the judge determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community. Like 18 U.S.C. 3146(a), subsection (a) emphasizes release on personal recognizance or unsecured appearance bond for persons who are deemed to be good pretrial release risks. However, unlike current law, in making the determination whether release under this subsection is appropriate, the judge is to consider not only whether these forms of release are adequate to assure the appearance of the defendant, but also whether they are appropriate in light of any danger the defendant may pose to others. As discussed above, the Committee has determined that danger to the community is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of flight. Thus, subsection (a), like the other provisions of section 3502, places the consideration of defendant dangerousness on an equal footing with the consideration of appearance.

The concept of defendant dangerousness is described throughout this chapter by the term "safety of any other person or the community." The reference to safety of any other person is intended to cover the situation on which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence. This principle was recently endorsed in *United States* v. *Provenzano and Andretta*,[41] in which it was held that the concept of danger as used in 18 U.S.C. 3148 extended to nonphysical harms such as corrupting a union. The Committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the "safety of any other person or the community."[42]

If released under subsection (a), a person is subject to the mandatory condition that he not commit a Federal, State, or local crime while on release. Persons released under the discretionary conditions set out in subsection (c) are also subject to this mandatory condition, which is new to the law. While it may be self-evident that society expects all of its citizens to be law-abiding, it is particularly appropriate, given the problem of crimes committed by those on pretrial release, that this requirement be stressed to all defendants at the time of their release.[43] In addition, the establishment of probable cause to believe that a person on pretrial release has committed a crime will be sufficient to trigger the provisions of section 3506 permitting revocation of release and the use of the court's contempt power.

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[40] D.C. Code, sec. 23-1322.

[41] 605 F.2d 85 (3rd Cir. 1979).

[42] Risk of continued drug activity is currently considered a danger to the community or other persons under 18 U.S.C. 3148. See, e.g., *United States* v. *Hawkins*, 617 F.2d 59 (5th Cir.), cert. denied, 449 U.S. 952 (1980).

[43] This concept was endorsed in the commentary to the Uniform Rules of Criminal Procedure, *supra* note 9 at 64, citing an Arizona case to the effect that it is permissible to condition the pretrial release by a requirement that the defendant conduct himself as a law-abiding citizen, *State* v. *Cassius*, 110 Ariz. 485 (1974).

Subsection (c) provides that if the judge determines that release on personal recognizance or unsecured appearance bond will not reasonably assure the appearance of the person or will endanger the safety of any other person or the community, he is to release the person subject to the mandatory condition discussed above that he not commit an offense while on release, and subject to the least restrictive condition or combination of conditions set out in subsection (c)(2) that will provide such assurance. Except for financial conditions that can be utilized only to assure appearance, any of the discretionary conditions listed in subsection (c)(2) may be imposed either to assure appearance or to assure community safety.

Current 18 U.S.C. 3146 sets forth five specific conditions, including a catch-all permitting imposition of "any other condition deemed reasonably necessary to assure appearance as required." [44] The committee has determined to maintain these five conditions with only minor modifications, and to increase the number of explicitly stated conditions by adding nine more. Although each of the additional conditions could appropriately be imposed today under the catch-all in current law, spelling them out in detail is intended to encourage the courts to utilize them in appropriate circumstances. Under utilization of some of these conditions today may occur because they are more relevant to the question of danger to the community than they are to the risk of flight. Since the court will be allowed to consider danger to the community in setting release conditions, some of these specified conditions will become of more utility, being more directly related to this new basis for qualifications on release.

It must be emphasized that all conditions are not appropriate to every defendant and that the Committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition set out in subsection (c)(1). The Committee intends that the judge weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him and to the offense charged, and with specific reference to the factors set forth in subsection (g).

The added conditions are in large measure drawn from those conditions deemed suitable for imposition of a sentence of probation,[45] the nearest parallel. The existing conditions for pretrial release set forth in 18 U.S.C. 3146 are also largely reflected in the basic probation law.

The first condition explicitly set forth in subsection (c)(2) is the familiar third party custodian provision of existing 18 U.S.C. 3146(a)(1), with one major change. The Committee endorses the use of third party custodians in appropriate cases. However, the Committee is aware of some recent criticism of the practice that indicates a high incidence of rearrest for those released to third party custodians in the District of Columbia.[46] To assure that third party custodians are chosen with care, the condition has been amended to require that the custodian agree to report any violation of a release condition and that he be reasonably able to assure the judge that the person will appear as required and that he will not pose a danger to the safety of any other person or the community. It is not intended by this provision that the custodians be held liable if the person to be supervised absconds or commits crimes while under the custodian's supervision. Rather it is intended to alert the judge to the necessity of inquiring into the ability of proposed custodians to supervise their charges and to impress on the custodians the duty they owe to the court and to the public to carry out the supervision to which they are agreeing and to report any violations to the court.

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[44] 18 U.S.C. 3146(a)(5).
[45] Section 2103.

Conditions set out in subparagraphs (B), (F), (H), (I), and (J), dealing respectively with employment or the active seeking of employment, reporting on a regular basis to a designated law enforcement officer, refraining from possessing dangerous weapons, refraining from excessive use of alcohol or any use of a controlled substance without a prescription, and undergoing available medical or psychiatric treatment, are all drawn from the probation conditions set forth in section 2103.[47] The conditions set out in subparagraph (C),[48] dealing with maintaining or commencing an educational program, complements the condition concerning employment, for it recognizes that, particularly among youthful offenders, lack of basic education often significantly impairs their ability to find employment. The Committee believes that in appropriate cases each of these conditions is applicable to individual defendants on the issues of flight or assuring community safety.

The condition in subparagraph (D) deals with restrictions on travel, associations, and place of abode, and is drawn without substantive change from existing 18 U.S.C. 3146(a)(2).

Under subparagraph (G), a person may be required to abide by a specific curfew. Although this is a new provision, it is similar in purpose to the traditional conditions restricting travel and association.

The condition in subparagraph (E) is new. It requires that, when imposed, the defendant avoid all contact with alleged victims of the crime and potential witnesses who may testify concerning the offense. It is a continuing complaint that victims and witnesses are intimidated by those released on bond[49] and, indeed, under current law, pretrial detention appears appropriate if witnesses are threatened.[50] This condition enables the court to raise the issue with the defendant before actual intimidation has occurred. In addition, in all releases the court will now be required to warn the defendant of the provisions of section 1323 (Tampering with a Witness, Victim, or an Informant) at the time of initial release.[51] Protecting against witness intimidation is most important to the fair and impartial administration of criminal justice. This condition should be imposed whenever the circumstances are such that the judge believes any form of victim or witness intimidation may occur.

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[46] The INSLAW Study, *supra* note 15 at 54, 58, found that defendants released to third-party custodians seemed more likely to be rearrested than were defendants on other forms of pretrial release.

[47] Section 2103(b)(5), (16), (8), (9) and (10), respectively.

[48] This is patterned after a part of section 2103(b)(5).

[49] In general see *Reducing Victim/Witness Intimidation: A Package,* American Bar Association, Section of Criminal Justice Committee on Victims (1979).

[50] See *United States* v. *Gilbert* and *United States* v. *Wind, supra* note 17.

[51] Section 3502(f).

The condition in subparagraph (K), although similar to the ten percent appearance bond condition set out in 18 U.S.C. 3146(a)(3), is designed to provide greater flexibility to the court in setting financial conditions of release. The concept of an appearance bond is retained, but the court has the discretion to determine what percentage of the amount of the bond is to be posted with the court. Where there is a substantial risk of flight, the judge may require the posting of the entire amount. As an alternative to the posting of money, the court may require the execution of an agreement to forfeit designated property. When this alternative is employed the indicia of ownership of the property, such as the title to a car or the deed to real property, is to be posted with the court. A party other than the defendant may post money or execute an agreement to forfeit designated property under this paragraph, but in such a case the judge should first ascertain whether the prospect of forfeiture by the third party would be sufficient to assure the appearance of the defendant. Generally such assurance will exist where there is a close relationship between the defendant and the third party, such as a family tie.

Subparagraph (L) carries forward the surety bond condition set forth in 18 U.S.C. 3146(a)(4). While the Committee is aware of criticism of the surety bond system generally, and of the recommendation of the American Bar Association to abolish the use of commercial sureties,[52] the surety bond option has been retained. However, the obligation of commercial sureties to assure the appearance of their clients, and, if necessary, actively to maintain contact with them during the pretrial period, is emphasized.

As discussed above, the Committee was urged to abolish financial conditions of release in order to insure that imposition of excessively high bonds was not used to achieve the detention of dangerous defendants. Although the Committee decided to retain financial conditions of release, concern about the potential for such abuse does exist. Consequently, the use of the conditions of release set out in sections 3502(c)(2)(K) and 3502(c)(2)(L) is specifically limited to the purpose of assuring the appearance of the defendant.[53]

In addition, section 3502(c) provides that a judge may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judge determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judge's finding to the contrary, he cannot meet the bond, although the judge may reconsider the amount of the bond, if he concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3502(e), is the basis for an order of detention, and therefore the judge may proceed with a detention hearing pursuant to section 3502(f) and order the defendant detained, if appropriate. The Committee emphasizes, however, the need for a hearing pursuant to section 3502(f); the $50,000 bond may *not* be imposed without a hearing in the example given since the defendant does not have the financial wherewithal to satisfy the bond. The reasons for the judge's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judge's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition, would be set out in the detention order as provided in section 3502(i)(1). The defendant could then appeal the resulting detention pursuant to section 3505.

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[52] ABA Standards on Pretrial Release, *supra* note 8, Standard 10-1.3(c).

[53] In any event, a defendant who is a danger to the community remains dangerous even if he has posted a substantial money bond.

The major advantages of this approach are twofold: first, a candid, open assessment of dangerousness is made through application of the new pretrial detention provisions; second, unstated, arbitrary use of money bail as a way to incarcerate pretrial is expressly eliminated from the new bail procedures.

The condition set out in subparagraph (M) of section 3502(c)(2) tracks the catch-all provision of 18 U.S.C. 3146(a)(5), and permits the imposition of any other condition that is reasonably necessary to assure the appearance of the person as required and the safety of any other person and the community.

The final sentence of section 3502(c) retains the authority now set forth in 18 U.S.C. 3146(e) for the court to amend the release order at any time to impose different or additional conditions of release. This authorization is based on the possibility that a changed situation or new information may warrant altered release conditions. It is contemplated by the Committee that the imposition of additional or different conditions may occur at an ex parte hearing in situations where the court must act quickly in the interest of justice. In such a case, a subsequent hearing in the defendant's presence should be held promptly.[54] Either the defendant or the government may move for an amendment of conditions, [illegible] the court may do so on its own motion.[55]

Subsection (d) permits a judge to detain a defendant for a period of up to ten days if it appears that the person is already in a conditional release status and the judge further determines that the person may flee or pose a danger to any other person or to the community if released. The provision applies if the defendant, at the time the current offense was committed, (1) was on pretrial release for a Federal, State, or local felony; (2) was on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or (3) was on probation or parole for any Federal, State, or local offense. The ten-day period is intended to give the government time to contact the appropriate court, probation, or parole official responsible for the existing conditional release and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate. This provision is based largely on a provision for a five-day hold in similar circumstances that is now the law in the District of Columbia. The Committee deems five days to be too short a period in which to expect proper notification and appropriate action by the original releasing body and thus has opted for ten days. It should also be noted that the District of Columbia measure is in effect a local provision and most of those under arrest to whom it applies are likely to be released either pretrial in the District of Columbia or be on parole or probation for a District offense; thus notification and appropriate action might more easily occur within the five day period. The Federal code, on the other hand, has national application, and in individual cases there will be need to consult and notify over longer distances; thus the time frame of ten days was adopted. While a deprivation of liberty of up to ten days is a serious matter, it must be balanced against the fact that the defendant has been arrested based on probable cause to believe that he has committed a crime, the fact that he is already on conditional release, presumably subject to revocation for a prior offense, and the fact that the court must find that he may flee or pose a danger to any other person or to the community if released. On balance the Committee concluded that a detention of up to ten days in those circumstances is warranted and is in the interests of justice.

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[54] Prior to establishing such new conditions, and prior to a hearing thereon, the court may revoke the defendant's release and order him arrested. *United States* v. *Gamble,* 295 F. Supp. 1192 (S.D. Tex. 1969).

[55] Authority for the government to seek amendment of release conditions is likely implicit in 18 U.S.C. 3146(e). See *United States* v. *Zuccaro,* 645 F.2d 104 (2d cir. 1981).

Subsections (e) and (f) set forth the findings and procedures that are required for an order of detention. The standard for an order of detention of a defendant prior to trial is contained in subsection (e), which provides that the judge is to order the person detained if, after a hearing pursuant to subsection (f), he finds that no condition or combination of conditions of release will reasonably assure the appearance of the defendant as required and the safety of any other person and the community. The facts on which the finding of dangerousness is based must, under subsection (f), be supported by clear and convincing evidence. Thus, this subsection not only codifies existing authority to detain persons who are serious flight risks,[56] but also, as discussed extensively above, creates new authority to deny release to those defendants who are likely to engage in conduct endangering the safety of the community even if released pending trial only under the most stringent of the conditions listed in sections 3502(c)(2).

The bill as introduced included in subsection (e) a second required finding, like the one incorporated in the pretrial detention provision of the District of Columbia Code,[57] for cases in which detention is sought on the basis of the defendant's dangerousness—a finding that there is a "substantial probability" that the defendant committed the offense for which he is charged. This "substantial probability" requirement was construed by the District of Columbia Court of Appeals in *United States* v. *Edwards*, as being "higher than probable cause" and "equivalent to the standard required to secure a civil injunction."[58] However, as noted by the Department of Justice in its recommendation that the requirement be deleted, the *Edwards* opinion strongly suggests that the probable cause standard consistently sustained by the Supreme Court as a basis for imposing "significant restraints on liberty" would be constitutionally sufficient in the context of ordering pretrial detention.[59] The Department pointed out that the burden of meeting the "substantial probability" requirement of the District of Columbia's pretrial detention statute was the principal reason cited by prosecutors for the failure, over much of the last ten years, to request pretrial detention hearings under that statute.

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[56] *United States* v. *Abrahams, supra* note 18.

[57] D. C. Code, sec. 23-1322(b)(2)(C).

While the inclusion of this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judge has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a "substantial probability" test is outweighed by the practical problems in meeting this requirement at the stage at which the pretrial detention hearing is held.[60]

In determining whether any form of conditional release will reasonably assure the appearance of the defendant and the safety of other persons and the community, the judge is required to consider the factors set out in section 3502(g). The offense and offender characteristics that will support the required finding for pretrial detention under subsection (e) will vary considerably in each case. Thus the Committee has, for the most part, refrained from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis. However, the Committee has made two amendments to the bill as introduced that describe sets of circumstances under which a strong probability arises that no form of conditional release will be adequate.

The first of these arises when it is determined that a person charged with a seriously dangerous offense has in the past been convicted of committing another serious crime while on pretrial release. Such a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release. Section 3502(e) provides, therefore, that in a case in which a defendant is charged with one of the serious offenses described in section 3502(f)(1) (a crime of violence, a Class A felony, or a Class B or C drug trafficking felony punishable under section 1811 or 1812), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community, if the judge finds: (1) that the defendant had been convicted of another offense described in subsection (f)(1) (or a State or local offense that would have been such an offense if circumstances giving rise to federal jurisdiction had existed); (2) that this offense was committed while the person was on pretrial release; and (3) that not more than five years have elapsed since the date of conviction, or the defendant's release from imprisonment, for the offense, whichever is later. The Committee believes that it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial.

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[58] *United States* v. *Edwards*, *supra* note 23 at 38.

[59] *Bail Reform Hearings*, *supra* note 4 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[60] Because of the requirements of Rules 4(a) and 5(a) of the Federal Rules of Criminal Procedure, probable cause that the defendant committed the offense with which he is charged must be established either prior to, or at the time of, the initial appearance. Furthermore, the issue of probable cause will subsequently be reexamined in the course of a preliminary hearing or in proceedings leading to the filing of an indictment.

The Committee notes, moreover, that a case may involve circumstances that, while not set forth in the section as a basis for a rebuttable presumption of dangerousness, nevertheless are so strongly suggestive of a person's willingness or inclination to resort to criminal violence as to warrant the inference that the person would be a danger to society even if released on the most restrictive conditions. The Committee has in mind, for example, the case of a person charged with an offense involving the possession or use of a firearm or destructive device. In the Committee's view, it would be difficult not to regard as an unreasonable risk to the safety of others a person who uses such a weapon in the course of committing a crime, or who possesses it under circumstances indicating a readiness or willingness to use it to carry out the crime.

The second rebuttable presumption arises in cases in which the defendant is charged with a Class B or C felony described in section 1811 (Trafficking in an Opiate) or section 1812 (Trafficking in Drugs). These are the most serious drug offenses and involve either trafficking in opiates or narcotic drugs, or trafficking in large amounts of other types of controlled substances. It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses.[61] Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. In view of these factors, the Committee has amended section 3502(e) to provide that in a case in which there is probable cause to believe that the person has committed a Class B or C felony punishable under section 1811 or 1812, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of the community.[62]

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[61] *Bail Reform Hearings, supra* note 4 (testimony of Senator Lawton Chiles).

Subsection (f) specifies the cases in which a detention hearing is to be held and delineates the procedures applicable in such a hearing. Paragraphs (1) and (2) of subsection (f) describe the circumstances in which a pretrial detention hearing is required. Because detention may be ordered under section 3502(e) only after a detention hearing pursuant to subsection (f), the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial.

A pretrial detention hearing to determine whether there is any form of conditional release that will reasonably assure the appearance of the defendant as well as the safety of any other person and the community must be held in a case in which the defendant is charged with an offense described in subsection (f)(1). The offenses set forth in subsection (f)(1) are a crime of violence, a Class A felony (the category of the most serious violent or dangerous offenses), or a Class B or C felony described in section 1811 (Trafficking in an Opiate) or section 1812 (Trafficking in Drugs). These offenses are essentially the same categories of offenses described in the District of Columbia Code by the terms "dangerous crime" and "crime of violence" for which a detention hearing may be held under that statute.[63] Subsection (f)(1) describes those offenses which comprise the greatest risk to community safety. The Committee has determined that whenever a person is charged with one of these offenses a pretrial detention hearing should be held so that the judge will focus on the issue of whether, in light of the seriousness of the offense charged and the other factors to be considered under subsection (g), any form of conditional release will be adequate to address the potential danger the defendant may pose to others if released pending trial. Because the requirements of subsection (e) must be met before a defendant may be detained, the fact that the defendant is charged with an offense described in subsection (f)(1) is not, in itself, sufficient to support a detention order. However, the seriousness of the offenses described in subsection (f)(1) is a sufficient basis for requiring an inquiry into whether detention may be necessary to protect the community from the danger that may be posed by a defendant charged with one of these crimes.

Under subsection (f)(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judge's own motion in three types of cases. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.[64] The third type of case in which a detention hearing may be sought is one in which a defendant charged with a serious offense has a substantial history of committing dangerous offenses. Specifically, the category described in subsection (f)(2)(C) refers to those cases in which a person charged with a felony has been convicted of two or more of the particularly serious offenses described in subsection (f)(1) or of state or local offenses that would have been offenses described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed. This sort of criminal history is strongly indicative of a defendant's dangerousness, and thus is an adequate basis for convening a pretrial detention hearing.

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[62] The concept of danger to the safety of the community includes drug trafficking. See *United States* v. *Hawkins, supra* note 42.

[63] D. C. Code, secs. 23-1322(a), 23-1331(3) and 23-1331(4).

Permitting the judge to move for a pretrial detention hearing under the circumstances described in subsection (f)(2) is an improvement over the structure of the District of Columbia Code's pretrial detention statute which permits such a hearing only upon motion of the government. It is inappropriate that a judge who believes that there may be a basis for denying release should be foreclosed from addressing this concern absent a motion for a detention hearing by the government. Therefore, this limitation of the District of Columbia pretrial detention provision has not been incorporated in section 3502(f).

If a detention hearing is justified because of the existence of circumstances described in subsections (f)(1) or (f)(2), the hearing is to be held immediately upon the person's first appearance before the judge unless a continuance is sought by either the defendant or the government. Although a continuance may be necessary for either the defendant or the government to prepare adequately for the hearing, particularly if the defendant was arrested soon after the commission of the offense with which he is charged, the period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact that the defendant will be detained during such a continuance. An extension of the continuance may be granted, however, for good cause. These time limitations are the same as those now incorporated in the pretrial detention provision of the District of Columbia Code.[65]

The procedural requirements for the pretrial detention hearing set forth in section 3502(f) are based on those of the District of Columbia statute [66] which were held to meet constitutional due process requirements in *United States* v. *Edwards.*[67] The person has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. As is currently provided with respect to information offered in bail determinations,[68] the presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in criminal trials. Pending the completion of the hearing, the defendant may be detained.

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[64] *United States* v. *Gilbert* and *United States* v. *Wind, supra* note 17; *United States* v. *Abrahams, supra* note 18.

[65] D. C. Code, sec. 23-1322(c)(3).

[66] D. C. Code, secs. 23-1322(c)(4) and 23-1322(c)(5). One element of the District of Columbia Code provision not carried forward in section 3502(f) is its sixty day limitation on the detention period which is set out in section 23-1322(d)(2)(A) of the District of Columbia Code. The Speedy Trial Act, 18 U.S.C. 3161 et seq., which is carried forward as a provision of title 28, United States Code by section 518(a) of the bill, specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within ninety days, subject to certain periods of excludable delay, such as for mental competency tests. See section 3164. These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.

[67] *Supra* note 23 at 25-42.

Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, the Committee has specifically provided that the facts on which the judge bases a finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence. This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judge to conclude that pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. The Committee does not intend, however, that the pretrial detention hearing be used as a vehicle to reexamine the validity of past convictions. Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

Subsection (g) enumerates the factors that are to be considered by the judge in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. Since this determination is to be made whenever a person is to be released or detained under this chapter, consideration of these factors is required not only in proceedings concerning the pretrial release or detention of the defendant under section 3502, but also where release is sought after conviction under section 3503, where a determination to release or detain a material witness under section 3504 is to be made, or where a revocation hearing is held under section 3506(b).

Most of the factors set out in subsection (g) are drawn from the existing Bail Reform Act and include such matters as the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the history and characteristics of the accused, including his character, physical and mental condition, family ties, employment, length of residence in the community, community ties, criminal history,[69] and record concerning appearance at court proceedings.[70] The Committee has decided to expand upon this list and to indicate to a court other factors that it should consider. These additional factors for the most part go to the issue of community safety, an issue which may not be considered in the pretrial release decision under the Bail Reform Act. The added factors include not only a general consideration of the nature and seriousness of the danger posed by the person's release, but also the more specific factors of whether the offense charged is a crime of violence or involves a narcotic drug, whether the defendant has a history of drug or alcohol abuse, and whether he was on pretrial release, probation, parole, or another form of conditional release at the time of the instant offense.[71]

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[68] 18 U.S.C. 3146(f). Although section 3205(f) is the only provision of this chapter which specifically addresses the issue of the applicability of the rules of evidence, it is the intent of the Committee to retain current law so that any information presented or considered in any of the release or detention proceedings under this chapter need not conform to the rules of evidence applicable in criminal trials.

[69] Under current law, consideration of a defendant's criminal history is confined to his record of convictions. See 18 U.S.C. 3146(b). While a prior arrest should not be accorded the weight of a prior conviction, the Committee believes that it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lengthy record of prior arrests, particularly if there were convictions for similar crimes. Similarly, it would be improper to prohibit consideration of prior arrests if there were also evidence that the failure to convict was due to the defendant's intimidation of witnesses. In any event, independent information concerning past criminal activities of a defendant certainly can, and should, be considered by a court.

Subsection (g) also contains a new provision designed to address a problem that has arisen in using financial conditions of release to assure appearance. The rationale for the use of financial conditions of release is that the prospect of forfeiture of the amount of a bond or of property used as collateral to secure release is sufficient to deter flight. However, when the proceeds of crime are used to post bond, this rationale no longer holds true. In recent years, there has been an increasing incidence of defendants, particularly those engaged in highly lucrative criminal activities such as drug trafficking, who are able to make extraordinarily high money bonds, posting bail and then fleeing the country. Among such defendants, forfeiture of bond is simply a cost of doing business, and it appears that there is a growing practice of reserving a portion of crime income to cover this cost of avoiding prosecution.[72]

The source of property used to fulfill a condition of release is thus an important consideration in a judge's determination of whether such a condition will assure the appearance of the defendant.[73] In recognition of this, the Committee has provided in subsection (g) that the judge, in considering the conditions of release described in sections 3502(c)(2)(K) and 3502(c)(2)(L), may upon his own motion, or shall upon the motion of the government, conduct an inquiry concerning the source of property to be designated for potential forfeiture or to be offered as collateral to secure a bond. The reference to "collateral to secure a bond" refers not only to property of the defendant or a third party which is to be directly used to secure release, but also money or other property which may be pledged or paid to a surety in order to secure his execution of a bond. The judge must decline to accept the designation or use of property that, because of its source, would not reasonably assure the appearance of the defendant.[74]

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[70] 18 U.S.C. 3146(b). See *Wood* v. *United States*, 391 F.2d 981 (D.C. Cir. 1968); *United States* v. *Alston*, 420 F.2d 176 (D.C. Cir. 1969).

[71] The emphasis on drug-related factors and on prior criminal history is in accord with empirical research conducted in the District of Columbia which indicates a significant correlation between drug use and both failure to appear and pretrial rearrest, and between criminal history and pretrial rearrest. INSLAW Study, *supra* note 15, 57–59 and 61–65.

[72] *Bail Reform Hearings, supra* note 4 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[73] The Committee notes that the authority to consider danger to the community, and the presumption that drug traffickers should be detained, alleviates the problem addressed here to some extent, since many major drug traffickers would simply be held without bond under the bill.

[74] The judge may also decline accepting the property if the defendant refuses to explain its source. See *United States* v. *DeMorchena*, 330 F. Supp. 1223 (S.D. Cal. 1970), in which the court refused to accept a $50,000 surety bond secured by $55,000 delivered in cash to the bondsman until the defendant presented evidence as to the source of the money.

Such inquiries into the source of property used to secure release are currently used to some extent, and are commonly referred to as *Nebbia* hearings.[75] However, because of a lack of clear statutory authority to conduct such hearings, particularly with respect to corporate sureties,[76] many courts have refused government requests for any inquiry into the source of property used to post bond. Therefore, the Committee has, in subsection (g), provided for this statutory authority so that judges may make informed decisions as to whether financial conditions of release will be sufficient to assure appearance of defendants.

The Committee also notes, with respect to the factor of community ties, that it is aware of the growing evidence that the presence of this factor does not necessarily reflect a likelihood of appearance,[77] and has no correlation with the question of the safety of the community. While the community considered deleting the factor altogether, it has decided to retain it at this time. However, the Committee wishes to make it clear that it does not intend that a court conclude there is no risk of flight on the basis of community ties alone; instead, a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community.

Subsection (h) provides that in issuing an order of release under subsection (b) or (c), the judge is to include a written statement setting forth all the conditions of release in a clear and specific manner. He is also required to advise the person of the penalties applicable to a violation of the conditions and that a warrant for his arrest will be issued immediately upon such violation. A similar provision exists in current law.[78] This subsection, however, specifically provides that failure to render such advice is not a bar or defense to prosecution under section 1312 (Bail Jumping). This carries forward the intent of Congress in enacting the Bail Reform Act and the judicial interpretation of the Act.[79] The purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required; such warnings were never intended to be a prerequisite to a bail jumping prosecution. Subsection (h) also requires the court to advise a defendant being released of the provisions of section 1323 (Tampering with a Witness, Victim, or Informant). This is intended to impress on the defendant the seriousness of such conduct. As with bail jumping, the issuance of such a warning is not a prerequisite to a prosecution under section 1323.

Subsection (i) requires the court in issuing an order of detention to include written findings of fact and a written statement of reasons for the detention. The court's order must also direct that the person be confined in a detention facility in which he is separated, to the extent practicable, from persons who have been convicted,[80] and that the person be afforded reasonable opportunity for private consultation with his counsel. The order is required to include a directive to the person in charge of the detention facility to deliver the person to the United States Marshal for court appearances. The judge may, in addition, subsequently order the temporary release of the person into the custody of a United States marshal or other appropriate person if he finds that such release is necessary for the preparation of the person's defense or for another compelling reason.[81]

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[75] *United States* v. *Nebbia*, 357 F.2d 303 (2d Cir. 1966).

[76] Rule 46(d) of the Federal Rules of Criminal Procedure provides that every surety, except an approved corporate surety, may be required to file an affidavit listing the property used to secure the bond. This provision may implicitly authorize a hearing to inquire into the source of the property. The Rule's exemption of approved corporate sureties from this requirement raises a question whether similar inquiries can be made in the case of corporate sureties. At least two courts, however, have conducted such an inquiry. See *United States* v. *Melville*, 309 F. Supp. 824 (S.D. N.Y. 1970); *United States* v. *DeMorchena*, *supra* note 74.

[77] INSLAW Study, *supra* note 15 at 54, 58.

[78] 18 U.S.C. 3146(c).

[79] See *United States* v. *Cardillo*, 473 F.2d 325 (4th Cir. 1973); *United States* v. *DePugh*, 434 F.2d 548 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Eskew*, 469 F.2d 278 (9th Cir. 1972).

SECTION 3503. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCE OR APPEAL

This section makes several revisions in that portion of 18 U.S.C. 3148 which concerns post-conviction release. Although there is clearly no constitutional right to bail once a person has been convicted,[82] current 18 U.S.C. 3148 as well as this section statutorily permit release of a person while he is awaiting sentence or while he is appealing or filing for a writ of certiorari. The basic distinction between the existing provision and section 3503 is one of presumption. Under 18 U.S.C. 3148 the judge is instructed to treat a person who has already been convicted according to the release standards of 18 U.S.C. 3146 that apply to a person who has not been convicted, unless he has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail even after conviction.[83] It is this presumption that the Committee wishes to eliminate in section 3503.

In doing so the Committee has largely based section 3503 on a similar provision enacted in 1971 in the District of Columbia Code.[84] Before trial in non-capital cases the burden is properly on the government and the judge to find that the defendant is likely to flee or pose a danger before placing conditions on his release or, in appropriate cases, ordering his detention. Once guilt of a crime has been established in a court of law, however, there is no reason to favor release pending appeal unless the defendant is unlikely to be sentenced to imprisonment under the applicable guidelines. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years. Section 3503 therefore, separately treats release pending sentence, release pending appeal by the defendant, and release pending appeal by the government.

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[80] Whether a separation of the detained person from persons already convicted will be practicable is to be gauged in light of existing facilities. The Committee emphasizes that this provision is not intended to be used to require the construction of new detention facilities, or renovation of existing facilities.

[81] The counterpart of subsection (i) appears at D. C. Code secs. 23-1321(h) and 23-1322(c).

[82] *United States* v. *Baca*, 444 F.2d 1292, 1296 (10th Cir.), cert. denied, 404 U.S. 979 (1971).

[83] *United States* v. *Bynum*, 344 F. Supp. 647 (S.D. N.Y. 1972).

[84] D.C. Code, sec. 23-1325.

As to release pending sentence, subsection (a) provides that a person convicted shall he held in official detention unless the judge finds by clear and convincing evidence that the person is not likely to flee or to pose a danger to the safety of any other person or the community. An exception is made for those awaiting sentence for whom the applicable guidelines promulgated pursuant to 28 U.S.C. 994 do not recommend a term of imprisonment. Release for such persons should be governed by sections 3502(b) and (c) with emphasis on ensuring their appearance for any future proceeding in the case.

Subsection (a) also covers those awaiting the execution of sentence as well as its imposition. This is to make it clear that a person may be released in appropriate circumstances for short periods of time after sentence, when there is no appeal pending, for such matters as getting his affairs in order prior to surrendering for service of sentence. By authorizing release in such circumstances under section 3503, the subsection establishes that absconding after imposition of sentence, but prior to its execution, is a violation of the bail jumping statute [85] which applies to release pursuant to this subchapter.

Subsection (b) deals with release after sentence of a defendant who has filed an appeal or a petition for a writ of certiorari. Such person is also to be detained unless the court finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. In addition, the court must affirmatively find that the appeal is not taken for the purpose of delay and that it raises a substantial question of law or fact likely to result in reversal or an order for a new trial. This is a further restriction on post conviction release. Under the current 18 U.S.C. 3148, release can be denied if it appears that the appeal is frivolous or taken for delay. The change in subsection (b) requires an affirmative finding that the chance for reversal is substantial. This gives recognition to the basic principle that a conviction is presumed to be correct.

Under both subsections (a) and (b), if the presumption in favor of detention can be overcome, the defendant is to be treated pursuant to the provisions of section 3502(b) or (c).

The Committee intends that in overcoming the presumption in favor of detention the burden of proof rest with the defendant. Under Rule 9(c) of the Federal Rules of Appellate Procedure the burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests on the defendant.[86] This has been questioned as not reflecting the proper release presumption of the Bail Reform Act.[87] Whether that is correct or not, the burden under this subsection is on the defendant to establish not only that he will not flee or pose a danger to the safety of any other person or the community, but also that his appeal under subsection (b) is not taken for purpose of delay but raises a substantial question of law or fact likely to result in reversal or an order for a new trial.[88]

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[85] Section 1312.

[86] See also Rule 46(c) of the Federal Rules of Criminal Procedure.

[87] See *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 Texas L. Rev. 275 (1979).

Subsection (c) concerns release pending appeal by the government and addresses two different situations. First, subsection (c)(1) concerns government appeals from orders of dismissal and suppression of evidence pursuant to section 3724. As both of these kinds of appeals contemplate situations in which the defendant has not been convicted, the defendant is to be treated under section 3502, the general provision governing release or detention pending trial. Subsection (c)(1) is a new provision derived from 18 U.S.C. 3731. Use of the term "treated" removes an ambiguity in the current statute and makes it clear that the judge may release or detain the defendant as provided in section 3502.[89] In such cases, the defendant, of course, would not have been convicted, and he thus should be treated in the same manner as a person who has not yet stood trial, as opposed to a person who has been tried and convicted.

Second, subsection (c)(2) concerns government appeal of sentence pursuant to section 3725. If the government is appealing a sentence to an imposed term of imprisonment that appears unreasonably low, the defendant will be treated under subsection (a); if, however, the defendant has not been sentenced to a term of imprisonment, he is to be treated under section 3502, although the Committee would expect that in such circumstances the defendant would not be detained.

SECTION 3504. RELEASE OR DETENTION OF A MATERIAL WITNESS

This section carries forward, with two significant changes, 18 U.S.C. 3149 which concerns the release of a material witness. If a person's testimony is material in any criminal proceeding,[90] and if it is shown that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody.[91] A judge is to treat such a person in accordance with section 3502 and impose those conditions of release that he finds to be reasonably necessary to assure the presence of the witness as required, or if no conditions of release will assure the appearance of the witness, order his detention as provided in section 3502. However, if a material witness cannot comply with the release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judge is required to order the witness' release after the taking of the deposition if this will not result in a failure of justice.

The first change in current law is that, in providing that a material witness is to be treated in accordance with section 3502, section 3504 would permit the judge to order the detention of the witness if there were no conditions of release that would assure his appearance. Currently, 18 U.S.C. 3149 ambiguously requires the conditional release of the witness in the same manner as for a defendant awaiting trial, yet the language of the statute recognizes that certain witnesses will be detained because of an inability to meet the conditions of release imposed by the judge. The Committee believes that judges should have the authority to detain material witnesses as to whom no form of conditional release will assure their appearance, in the same manner as provided in section 3502 for defendants awaiting trial.[92] However, the Committee stresses that, whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.

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[88] The advisory notes to Rule 9(c) of the Federal Rules of Appellate Procedure state that the burden of showing that the appeal appears to be frivolous or taken for delay rests with the government. The Committee intends that under section 3503 the burden of showing the merit of the appeal should now rest with the defendant. Rule 9(c) should be changed by the Judicial Conference to conform to this section.

[89] *Cf. United States* v. *Herman*, 554 F. 2d 791, 794–795 n. 5 (5th Cir. 1971) noting the ambiguity in current 18 U.S.C. 3731.

[90] A grand jury investigation is a "criminal proceeding" within the meaning of this section. *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971).

[91] *Ibid.*

The other change the Committee has made is to grant the judge not only the authority to set release conditions for a detained material witness, or, in an appropriate case, to order his detention pending his appearance at the criminal proceeding, but to authorize the arrest of the witness in the first instance. It is anomalous that current law authorizes release conditions but at the same time does not authorize the initial arrest. In one case dealing with this problem, the Ninth Circuit found the power to arrest a material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. 3149.[93] In its research on the law, the court discovered that specific arrest authority existed in Federal law from 1790 to 1948. The court concluded that the dropping of that authority in the 1948 revision of Federal criminal laws was inadvertent. The Committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judge to release on conditions that is set forth in 18 U.S.C. 3149. To cure this ambiguity, the Committee has added to section 3504 (the successor to 18 U.S.C. 3149) specific language authorizing a judge to order the arrest of a material witness.

SECTION 3505. REVIEW AND APPEAL OF A RELEASE OR DETENTION ORDER

Section 3505 sets forth the provisions for the review and appeal of release and detention orders. Subsections (a) and (b) provide for the review of release and detention orders by the court having original jurisdiction over the offense in situations in which the order is initially entered by a magistrate, or other court not having original jurisdiction over the offense (other than a federal appellate court). The review of release orders is governed by subsection (a), which permits the defendant to file a motion for amendment of the conditions of his release and permits the government to file a motion for amendment of the release conditions or for revocation of the release order. Subsection (b) gives the defendant a right to seek review of a detention order analogous to his right to seek review of a release order under subsection (a)(2).

Subsection (c) grants both the defendant and the government a right to appeal release or detention orders, or decisions denying the revocation or amendment of such orders. Appeals under this subsection are governed by section 3723(a) in the case of an appeal by the defendant, and section 3724(d) in the case of an appeal by the government. Since both sections 3723(a) and 3724(d) provide only for appeals of decisions or orders entered by a district court of the United States, if the release or detention order was not originally entered by a judge of a district court, review by the district court must first be sought under section 3505(a) or (b) before an appeal may be filed under section 3505(c). This concept, now included in 18 U.S.C. 3148, promotes a more orderly and rational disposition of issues involving release determinations. Like motions for review of detention or release orders under subsections (a) and (b), appeals under subsection (c) are to be determined promptly.[94]

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[92] Of course, a material witness is not to be detained on the basis of dangerousness.

[93] *Bacon* v. *United States, supra* note 90; see also, *United States* v. *Anfield,* 539 F.2d 674, 677 (9th Cir. 1976).

Although based in part on 18 U.S.C. 3147, section 3505 makes two substantive changes in present law. First, section 3505 permits review of all release and detention orders. Under 18 U.S.C. 3147, review is confined to those situations in which the defendant has been detained or has been ordered released subject to the condition that he return to custody after specified hours, and appeals to the courts of appeals are permitted only after the defendant has sought a change in the conditions from the trial court. Section 3505 would provide defendants with the opportunity to appeal the conditions of their release irrespective of whether they were in fact detained because of an inability to meet those conditions, and it would permit direct appeal to the court of appeals rather than requiring the defendant to go back to the trial court. Only if the conditions were imposed by a court other than the trial court would the defendant be required to seek a change in the conditions from the trial court before appealing to the court of appeals.

The second, and more significant change, is that section 3505 would specifically authorize the government, as well as the defendant, to seek review and appeal of release decisions. The Bail Reform Act makes no provision for review of decisions upon motion of the government, although this authority may be implicit in the Act.[95] The Department of Justice urged that the government be granted specific authority to seek review of release decisions to the same extent that such authority is given defendants, and the Committee agrees that, as a matter of both basic fairness and sound policy, the government, on behalf of the public, should have such an opportunity. There is a clear public interest in permitting review of release orders which may be insufficient to prevent a defendant from fleeing or committing further crimes.

SECTION 3506. SANCTIONS FOR VIOLATIONS OF RELEASE CONDITIONS

Section 3506 provides in subsection (a) for two distinct sanctions that are applicable for persons released pursuant to section 3502[96] who violate a condition of their release—revocation of release and an order of detention, and a prosecution for contempt of court. In addition, this subsection emphasizes the sanction of forfeiture of property designated under the condition in section 3502(c)(2)(K). One of the criticisms of the Bail Reform Act has been its failure to provide adequate sanctions for violation of release conditions; section 3506 provides such sanctions.

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[94] The procedures for such appeals, which are set forth in Rule 9 of the Federal Rules of Appellate Procedure, are designed, as stressed in the advisory notes, to facilitate speedy review if relief is to be effective.

[95] See *United States* v. *Zuccaro, supra* note 55, which held that the right of the government to seek reconsideration of a bail determination by the trial court is implicit in the Bail Reform Act. Since 18 U.S.C. 3147(b) permits appeal of release decisions only when the defendant has been detained, it is doubtful that the government has any right to appeal, as opposed to a right to seek reconsideration of, a release decision under the Act.

[96] All releases under this subchapter, whether pretrial or pending sentence or appeal, are technically pursuant to section 3502. Thus the sanctions of section 3506 are applicable to all releases pursuant to this subsection.

Subsection (b) sets out the procedure for revocation of release. Revocation is new to the Federal Criminal Code although a similar provision exists in the District of Columbia.[97] The Committee has received testimony recommending such a provision,[98] and has adopted the concept.[99] Revocation is based upon a betrayal of trust by the person released by the court on conditions that were to assure both his appearance and the safety of the community. It should be noted that, as all persons are released under the mandatory condition under sections 3502(b) and 3502(c)(1) that they not commit a Federal, State, or local crime during the period of release, establishment of probable cause that a crime has been committed while a person was released is sufficient to trigger the revocation procedure of section 3506, as is a violation of any of the discretionary release conditions set for the defendant pursuant to section 3502(c)(2).

The attorney for the government can initiate the revocation proceeding by filing a motion to that effect with the court. A judge may then issue an arrest warrant and have the person brought before the court in the district in which his arrest was ordered for a revocation hearing. An order of revocation and detention will issue at this hearing if the court finds, first, that there is either probable cause to believe that the person has committed a Federal, State, or local crime while on release, which, as noted above is a violation of a mandatory condition imposed on all released persons, or clear and convincing evidence that the person has violated any other condition of his release; and, second, that either no condition or combination of conditions can be set that will assure that the person will not flee or pose a danger to the safety of any other person or the community, or that no condition or combination of conditions will assure that the person will abide by reasonable conditions. This latter provision is intended to reach the situation in which a defendant continuously flouts the court by disobeying conditions such as restrictions on his association or travel, and in which it is clear that he will continue to do so. If the court finds that there are conditions that will assure both appearance and safety and that the person will abide by such conditions, he is to be released pursuant to section 3502 on appropriate conditions, which may be an amended version of the earlier conditions.

In testimony before the Committee, the Department of Justice recommended that revocation of release be required if the person committed another serious crime while on release.[100] The commission of a serious crime by a released person is plainly indicative of his inability to conform to one of the most basic conditions of his release, i.e. that he abide by the law, and of the danger he poses to other persons and the community, factors which section 3506 recognizes are appropriate bases for the revocation of release. Nonetheless, there may be cases in which a defendant may be able to demonstrate that, although there is probable cause to believe that he has committed a serious crime while on release, the nature or circumstances of the crime are such that revocation of release is not appropriate. Thus, while the Committee is of the view that commission of a felony during the period of release generally should result in the revocation of the person's release, it concluded that the defendant should not be foreclosed from the opportunity to present to the court evidence indicating that this sanction is not merited. However, the establishment of probable cause to believe that the defendant has committed a serious crime while on release constitutes compelling evidence that the defendant poses a danger to the community, and, once such probable cause is established, it is appropriate that the burden rest on the defendant to come forward with evidence indicating that this conclusion is not warranted in his case. Therefore, the Committee has provided in section 3506(b) that if there is probable cause to believe that the person has committed a Federal, State, or local felony while on release, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community.

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[97] D. C. Code, sec. 23-1329.

[98] Hearings, Part XIV, p. 10323, testimony of Professor Alan Dershowitz.

[99] Revocation is also recommended by the ABA 1978 Standards, *supra* note 8, Standard 10-5.7 and by the Uniform Rules of Criminal Procedure, *supra* note 9, Rule 341(e).

[100] *Bail Reform Hearings, supra* note 4 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

Subsection (c) specifically provides that if the person fails to appear, the judge may order the forfeiture of any property designated to assure his appearance under section 3502(c)(2)(K) or of the amount of a bail bond executed under section 3502(c)(2)(L). While Rule 46 of the Federal Rules of Criminal Procedure already provides for the forfeiture of traditional bail upon a breach of a condition of the bond, this subsection emphasizes that the sanction of forfeiture is also appropriate in the somewhat different circumstance where, under section 3502(c)(2)(K), an agreement has been executed to forfeit designated property if the defendant fails to appear as required. Although it is implicit in the nature of the conditions of release set forth in both sections 3502(c)(2)(K) and 3502(c)(2)(L) that forfeiture will result if the defendant fails to appear, because the effectiveness of these conditions of release depends on the prospect of financial loss if they are breached, section 3502(c) has been included to stress the appropriateness of this sanction.

Subsection (d) emphasizes that the court may impose contempt sanctions set forth in section 1331 (Criminal Contempt) if the person has violated a condition of his release. This carries forward the provisions of existing 18 U.S.C. 3151, but makes the sanction more explicit by a cross-reference to the section on criminal contempt.

SECTION 3507. SURRENDER OF AN OFFENDER BY A SURETY

Except for minor word changes, this provision is identical to 18 U.S.C. 3142. The section provides that in cases where a person is released on an appearance bond with a surety, such person may be arrested by his surety and delivered to a United States marshal and brought before the court. The person so returned will be retained in custody until released pursuant to this chapter or under other provisions of law. The language is amended to delete as outmoded the authority of the surety to request detention of the defendant, and to substitute a requirement that the judge determine whether to revoke release in accord with section 3506.

SECTION 3508. DISCHARGE OF AN ARRESTED BUT UNCONVICTED PERSON

This section carries forward the provisions of 18 U.S.C. 4282. It provides that a court of the United States may, in its discretion, order the United States marshal for the judicial district involved to furnish subsistence and travel, upon the release of a person from custody, to the place of arrest or the bona fide residence of a person arrested for an offense but not formally charged, of a person formally charged with an offense but not convicted, or of a person held as a material witness. Under subsection (b) it makes no difference whether the reason the person was "not convicted" was because the charges were subsequently dismissed or because the person was acquitted of the charges.

SECTION 3509. APPLICABILITY TO A CASE

This section specifies that chapter 35 applies to a case removed to a Federal court from a State court. Current 18 U.S.C. 3144, relating to detention of a State prisoner whose case is before the United States Supreme Court, is deleted. It is expected that decisions on release in such cases will ordinarily be made by the State courts under State law.

CHAPTER 36.—DISPOSITION OF JUVENILE OR INCOMPETENT OFFENDERS

Chapter 36 sets out the procedural provisions for the resolution of offenses committed by two types of offenders—juveniles and mental incompetents—who are linked only by the fact that they cannot be accorded the normal treatment given to accused defendants in a criminal trial.

The Committee in its provisions on juvenile offenders has followed most of the provisions of the Juvenile Justice and Delinquency Prevention Act of 1974, passed by the Ninety-third Congress, and modeled largely on title II of S. 821, a bill processed by this Committee and passed by the Senate in 1974.[1]

The second subchapter of chapter 36 concerns the disposition to be made by the criminal justice system of those offenders deemed to be mentally incompetent. A major innovation is that, unlike current law,[2] the provisions drafted by the Committee will establish comprehensive procedures for handling mentally incompetent offenders from the pretrial stage to the time of release from custody.

SUBCHAPTER A.—JUVENILE DELINQUENCY

(Sections 3601–3605)

This subchapter deals with the treatment of a person under twenty-one years of age charged with a violation of a Federal criminal statute. Section 512 of this Code provides a bar to criminal prosecution for persons under the age of eighteen, with the exception of a juvenile charged with a crime of violence that is a felony or with trafficking in opiates or other drugs. Subchapter A establishes the procedures to be followed by Federal law enforcement officials when prosecution is based on an act of juvenile delinquency. In large measure, the subchapter reenacts the basic provisions of title V of the 1974 Act. Title V of that act effected major amendments to the existing Federal Juvenile Delinquency Act.[3]

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[1] P.L. No. 93-415, 88 Stat. 1109, hereinafter in this chapter discussion cited as 1974 Act.

[2] 18 U.S.C. 4241 *et seq.*

[3] 18 U.S.C. 5031 *et seq.*

SECTION 3601. SURRENDER OF A JUVENILE DELINQUENT TO STATE AUTHORITIES

1. In General

Section 3601 describes the circumstances in which juveniles charged with Federal offenses will be referred to State authorities, and describes the procedure for referral. This section essentially carries forward the first paragraph of 18 U.S.C. 5032 as set forth in the 1974 Act and adapts parts of 18 U.S.C. 5001, relating to offenders between the ages of eighteen and twenty-one, to juvenile offenders. The Committee endorses the principle inherent in both statutes that whenever possible juveniles should be transferred to State jurisdiction when there is State jurisdiction over the offense, except that the Committee has made an exception to this rule for a juvenile charged with a Class A, B, C, or D felony upon a certification that there is a "sufficient Federal interest in the case to warrant the exercise of Federal jurisdiction".

2. Present Federal Law

Under current law, there are two statutes dealing with the transfer to State authorities of offenders under the age of twenty-one arrested for Federal offenses. One is 18 U.S.C. 5001 which permits the United States Attorney to forego prosecution and surrender a person under twenty-one years of age to State authorities if the person was arrested and charged with a Federal offense and has committed a punishable offense under the applicable State laws. The State authorities must be willing to assume jurisdiction, and the transfer must be in the best interest of the United States and of the juvenile. The statute further provides that the juvenile must signify his willingness to be transferred to State custody, unless the United States Attorney is presented with an indictment or affidavit supporting a demand for his custody from the State executive authority.

The second statute concerning diversion of youthful Federal offenders to State authorities is the first paragraph of 18 U.S.C. 5032, as amended by the 1974 Act. Under that provision, all juveniles charged with Federal offenses must be transferred to the appropriate State officials unless the Attorney General certifies, after investigation, that the State does not have or refuses to assume jurisdiction over the juvenile or that the State does not have available programs and services adequate for the needs of juveniles. Only if such a certification is made may the juvenile be proceeded against federally.

3. Provisions of the Bill, as Reported

Subsection (a) of section 3601 reenacts the 1974 version of 18 U.S.C. 5032 with but two significant changes. First, while juveniles charged with Federal offenses will generally still be diverted to State jurisdiction, unless the Attorney General certifies that the State failed to assume jurisdiction[4] or that there is a lack of appropriate State juvenile facilities, an exception is made for those juveniles charged with a Class B misdemeanor or a Class C misdemeanor or an infraction if the offense is committed within the special territorial jurisdiction of the United States. In such cases, the certification procedure need not be used although diversion to State authorities is still preferred where possible. This change in the 1974 Act is designed to cure a practical problem that has arisen. Statutory authority exists for the creation of petty offenses, by means of regulations, that govern the national parks and lands.[5] In large measure, these offenses, which carry a six month maximum term of imprisonment, cover such matters as driving regulations, littering ordinances, and the like. When a juvenile is charged with one of these offenses committed in a national park, he is usually interested in speedy disposition and, in most cases, the States are most reluctant to assume jurisdiction over the juvenile. The certification requirement, "after investigation", imposes a serious burden on summary disposition which is in everyone's interest in such cases. The delay attendant on investigation and certification for a juvenile far from his home charged with a petty offense such as a driving violation creates a sizable and unreasonable burden for both the court and the juvenile. Accordingly, the Committee has decided to eliminate the certification requirement for such petty offenses when committed within the special territorial jurisdiction of the United States.

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[4] The certificate need only state that the appropriate State juvenile court has refused to assume jurisdiction; there is no requirement that the certificate also state that no other appropriate State court would assume jurisdiction over the juvenile as an adult. *United States* v. *Martinez,* 536 F.2d 886 (9th Cir.), cert. denied, 429 U.S. 907 (1976). In addition, a letter from a State

Second, the Committee has added a third category to existing law that would permit the disposition of a case involving a juvenile charged with a major felony by means of a Federal proceeding. This would be permissible under section 3601(a)(3) if the Attorney General certifies that the offense charged is a Class A, B, C, or D and that there is a "sufficient Federal interest in the case to warrant the exercise of Federal jurisdiction." This change from current law and from earlier versions of the bill adopts in part the recommendation of the Attorney General's Task Force on Violent Crime that the Federal government assume original jurisdiction over Federal crimes by juveniles.[6] The Committee has limited the provision to the more serious Federal felonies in the belief that the Federal government should still defer to State authorities for less serious offense by juveniles. The Committee intends that the Federal prosecutor will consider the factors set forth in section 205 (with particular attention directed to subsection (b)(2) in deciding whether there is a "sufficient Federal interest in the case." It is believed necessary to afford the Attorney General this authority when a serious crime occurs in which there is a special Federal interest. Examples of such offenses would be an assault on, or an assassination of, the President, a Member of Congress or other United States official (as defined in section 111); an aircraft hijacking (which might well be a State kidnapping as well); a kidnapping where State boundaries are crossed; a major espionage or sabotage offense; or a major theft of property belonging to the United States.

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court refusing to assume jurisdiction has been held to be a sufficient basis for the certification. *United States* v. *Hill*, 538 F.2d 1072 (4th Cir. 1976).

[5] See e.g., 16 U.S.C. 3.

[6] Attorney General's Task Force on Violent Crime, *Final Report*, Recommendation No. 59 at p. 83 (1981); see Recommendation No. 60.

Subsection (b) provides that transportation of juveniles to State authorities will continue to be effected by the United States marshal on order from the Attorney General.

Subsection (c) provides that, before a juvenile may be transferred between States (for State proceedings), he must consent to the transfer or the executive authority of the State must present a demand for the juvenile to the Attorney General pursuant to section 3202, and support the demand with an indictment or information. These established procedures have prevented unnecessary delays in juvenile proceedings and are endorsed by the Committee for subsection (a).

SECTION 3602. ARREST AND DETENTION OF A JUVENILE DELINQUENT

1. In General

Section 3602 establishes the procedures for arrest, detention, and pretrial release of juveniles. The procedures are consistent with the requirements of due process and continue current law as amended by the 1974 Act.

2. Present Federal Law

Prior to the 1974 Act, the existing Federal statute in this area was 18 U.S.C. 5035. It provided that an arrested juvenile must be taken "forthwith" before a committing magistrate, or detained in a juvenile facility, unless safety or security precautions justified placement with adult detainees. In either case, the juvenile was required to be produced before a committing magistrate as soon as possible, so that pretrial release or appropriate juvenile detention could be determined. Integration of juveniles with adults in custodial institutions was explicitly prohibited except in those circumstances where safety and security required it.

Issues raised in litigation under the statute involved the appropriateness of the length and manner of post-arrest detention, and the availability at trial of any evidence produced during such detention. A Federal court recently declared that a seven and one-half hour delay between a juvenile's weekday morning arrest and his arraignment was in and of itself a violation of the statute. The unjustifiable nature of the delay invalidated the juvenile's oral admissions during that time.[8] Thus, the rights of the juvenile to a prompt arraignment and fair treatment during detention are protected.

3. Provisions of the Bill, as Reported

Section 3602 generally codifies 18 U.S.C. 5034 and 5035 and adds a new intake screening procedure to ensure that a juvenile, wherever it is appropriate, will not be proceeded against under this subchapter.

The arresting officer is required immediately to advise the Attorney General of any arrest for an alleged act of juvenile delinquency. In addition, section 3602 further requires that he notify the parents, guardian, or custodian of the arrestee. It is recognized, however, that there may be instances where a juvenile is unknown in the vicinity of the arrest and refuses to identify his parents. The Committee does not intend that the arrest be invalidated simply because of the juvenile's refusal to cooperate with law enforcement officials.

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[8] *United States* v. *Binet,* 335 F. Supp. 1000 (S.D.N.Y. 1971). Accord. *United States* v. *DeMarce,* 513 F.2d 755 (8th Cir. 1975); *United States* v. *Glover,* 372 F.2d 43 (2d Cir. 1967); *United States* v. *Lovejoy,* 364 F.2d 586 (2d Cir. 1966), cert. denied, 386 U.S. 974 (1967); *United States* v. *Binet,* 442 F.2d 296 (2d Cir. 1971); but compare *United States* v. *Ramsey,* 367 F. Supp. 1307 (W.D. Mo. 1973).

The arresting officer is also required to advise the juvenile of his legal rights in language that is clear and non-technical. This phrase replaces the somewhat vague term "language that is comprehensible" in the 1974 Act. This is intended to include the basic rights afforded any arrested person as well as any special rights afforded a juvenile. The Committee has not spelled out all of the juvenile's rights in detail. It was agreed that the requirements of the Constitution are best defined by the courts. Any attempt to stabilize this changing area through codification may be as unwise as it would be futile. Thus, it must be assumed that the protections of this statute are only additional to the already existing constitutional rights of accused juveniles. These rights are to be afforded to juveniles irrespective of their inclusion in any statute on the subject. The final version of the 1974 Act reaches much the same conclusion. Subsection (a) also carries forward the requirement of 18 U.S.C. 5033 that the juvenile be brought before a judge "forthwith". While current law specifies that the juvenile should be brought before a magistrate, section 3602(a) is somewhat broader in permitting the juvenile to be brought before a judge or a magistrate.[9]

Subsection (b) continues several of the pre-disposition provisions of 18 U.S.C. 5033 and 5035. The most significant requirement is that a juvenile may not be detained under subsection (a) longer than necessary under the circumstances. Detention is authorized only until arraignment can be scheduled. Recent cases, discussed *supra,* clearly indicate the limited periods of detention which the courts will permit. The subsection requires that the juvenile shall not be detained in a facility in which he has regular contact with an adjudicated juvenile or an adult convicted of an offense or awaiting trial on a charge of an offense after it is determined by the Attorney General that he is a juvenile and thus subject to this subchapter. Detention is required, whenever possible, to be in a foster home or community-based facility near the juvenile's home community.

Subsection (c) of section 3602 deals with pretrial release, generally authorizing the use of the Code's provision on release.[10] In the event that a release decision is based on the danger that the juvenile may flee or pose to others, the judge is first to apply the release conditions of section 3502 before moving on to the more restrictive pretrial detention. This enables the court, when the issue is dangerousness, to consider first such restrictions as release to a third-party custodian or restrictions on travel or associations, before a more restrictive approach is taken. If, however, the court determines, after a hearing, that detention prior to trial is necessary to ensure that the juvenile will not inflict serious bodily injury on another person, the court may order that the juvenile be detained pending trial. Similar detention authority is contained in current title 18. The court is required, if it orders detention, to set forth in writing the reasons for that determination. The emphasis, of course, is on the maximum amount of pretrial release, reserving detention for cases involving a risk of flight or injury to others. A juvenile who is in official detention pending trial must be brought to trial within the latter of thirty days from the date detention began (unless he is released prior to the full period of thirty days of detention) or from the date upon which an intake screening report was due under the provisions of subsection (f). In the event of a failure to try a juvenile held in detention within this specified time period, the information is to be dismissed on motion of either the juvenile or the court unless the government can show that additional delay was caused by the juvenile or his counsel, or is in the interest of justice in that case.[11] This dismissal requirement essentially conforms with the amended version of 18 U.S.C. 5036 in the 1974 Act.[12]

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[9] See the definition of "judge" in section 111.

[10] Subchapter A of chapter 35.

Subsection (d) provides for the appointment of a guardian ad litem for the juvenile in certain situations. This carries forward the provisions of the second paragraph of 18 U.S.C. 5034.

Subsection (e) specifically sets forth the right of the juvenile to be represented by legal counsel at every stage of the proceedings that occur under this subchapter. Because of the importance of the right to counsel in the context of a juvenile proceedings, and to avoid any undue pressure being brought to bear on a juvenile from any quarter to waive his right to counsel, a juvenile under the age of eighteen may not waive this right for those offenses set forth in section 3601(a). This provision covers all offenses except petty offenses committed within the special territorial jurisdiction such as national parks where quick, summary disposition of minor offenses is in the interest of everyone. This does not mean that a juvenile deemed mature enough by the court to represent himself adequately may not do so, as this may well be his constitutional right. Rather, it means that in such an unlikely event the judge must nevertheless assure that counsel is present and available to the juvenile to consult and use as necessary. The provision in current 18 U.S.C. 5034 requiring paid counsel if a juvenile is indigent has been carried forward. The provision on appointment of counsel under section 3401(a)(1)(B) is made expressly applicable to proceedings under this subchapter, and chapter 34 outlines the schedule of fees and other aspects of court-appointed counsel. The further provision in 18 U.S.C. 5034 that permits the court to order a parent to retain private counsel is also retained. The rationale for that provision is that a parent could refuse to pay for counsel and the juvenile might then be coerced into waiving his right to counsel because of that refusal. While the juvenile under eighteen cannot waive counsel under subsection (e), there is no reason why parents who can afford to hire counsel for their child should not be ordered to do so by the court.

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[11] The provisions of the current statute have been strictly construed. See *United States* v. *Gonzalez-Gonzalez,* 522 F.2d 1040 (9th Cir. 1975).

[12] This provision applies only to actual confinement. It does not apply once the juvenile is released from custody even if the release is on restrictive release conditions. *United States* v. *Cuomo,* 525 F.2d 1285 (5th Cir. 1976).

Subsection (f) is a provision new to Federal juvenile statutory law. It concerns the process of screening juveniles at the intake point of the proceeding, and encourages diversion of the juvenile whenever possible away from formal delinquency processing. While new to Federal law, intake screening is fairly common in new modern State juvenile proceedings, and the Committee is informed that a rudimentary screening process for juveniles charged with Federal offenses already exists, operated informally by Federal probation officers. This subsection formalizes this procedure and delineates the types of alternative handling that are contemplated. The use of intake screening furthers the basic tenet of Federal juvenile law that, to the greatest extent possible, juveniles charged with minor and other offenses in which there is not a substantial Federal interest should be handled on the State and local level and not in the Federal courts. The subsection provides that after the initiation of proceedings against a juvenile, whether by warrant, summons, or first appearance after an arrest, the court is to refer the case to a probation officer for an intake screening review.

The subsection (f) procedure applies to all charges of Federal offenses other than petty offenses committed within the special territorial jurisdiction of the United States. This exception eliminates the need for intake screening for minor offenses committed in such areas as the national parks where speedy disposition is, as was mentioned above, desirable from every point of view. The intake screening review conducted by the probation officer involves the officer's review of the facts and evidence in the case and all available information on the background and characteristics of the juvenile. The officer may also interview the juvenile, his parents, the complainant or witnesses, and any other person who might provide useful information. However, as provided in section 3603(k), no statement made by a juvenile at an intake screening review is admissible against him in a subsequent criminal proceeding.

After the review is completed, the probation officer is directed to make a prompt recommendation to the attorney for the government as to the disposition of the case. The standard the probation officer is to use to aid his determination is the "best interests of the juvenile and the interests of justice." The recommendations may include such things as dismissal of the case on any appropriate ground, referral of the juvenile to any available State or local program or agency, referral to any available Federal pretrial diversion program, proceeding against the juvenile as a juvenile delinquent, or proceeding against him as an adult to the extent permitted in this subsection. It should be noted that the recommendation is not binding on the attorney for the government, although it is contemplated that it generally will be followed. If no recommendation is forthcoming within thirty days of the referral to the probation officer, the attorney for the government may proceed under the provisions of this subchapter.

If the attorney for the government accepts a recommendation involving referral to a State or local program or agency or referral to a Federal pretrial diversion program, the probation officer is then required to prepare a written statement signed by all the parties, including the juvenile, which will spell out all of the conditions of the agreement. The Committee believes that it is essential that all concerned, especially including the juvenile, be made fully aware of what is expected under the terms of the agreement. To ensure this full awareness the subsection requires that the acceptance of the agreement by the juvenile must be made upon the advice of counsel or, in the absence of counsel, with the consent of the juvenile's parent or guardian. The subsection also requires that the agreement not extend beyond a period of six months—a term long enough to judge the juvenile's conduct under the program, but not too long a period in which to hold a juvenile charge open. At the end of the period of the agreement it is the responsibility of the attorney for the government to request a prompt report from the agency or program officials as to the juvenile's compliance with the conditions of the agreement. If the report indicates full compliance by the juvenile with the conditions, the attorney for the government is directed to file a motion for dismissal of the case. If the report indicates that the juvenile has not fully complied with the conditions of the agreement, the attorney for the government has thirty days after receipt of the report to proceed against the juvenile pursuant to the provisions of this subchapter. If no report is received, the attorney for the government has thirty days after the end of the agreement period to proceed against the juvenile.

SECTION 3603. JUVENILE DELINQUENCY PROCEEDING

1. In General

Section 3603 establishes the procedures for the conduct of juvenile delinquency proceedings. Although incorporating the provisions of current law, the Code adopts clear standards for the determinations to be made by the courts. Significant improvements over the prior procedures matching several of those suggested by the 1974 Act are achieved through these clarifications.

2. Present Federal Law

Section 3603 incorporates the major provisions of chapter 403 of title 18, dealing with juvenile delinquency. The relevant sections will be discussed in detail below.

Prior to the 1974 Act, section 5032 provided for juvenile delinquency proceedings against any alleged juvenile offender not surrendered to State authorities or directed by the Attorney General to be treated as an adult. However, the juvenile was required to consent to such juvenile delinquency proceedings. The 1974 Act, in 18 U.S.C. 5032, permits the juvenile to request adult treatment in writing, a slight modification of the consent provision.

Under the pre-1974 section 5032 of title 18, the Attorney General had an absolute discretion to have any juvenile tried as an adult, although this discretion was rarely exercised. Changes were made in this discretionary power under the 1974 Act. These changes will be discussed in more detail below. The 1974 Act also continued the provisions of former 18 U.S.C. 5032 which require that the juvenile be proceeded against by information and which prohibit the institution of a criminal prosecution for the same offense.[13]

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[13] See 1974 Act, *supra* note 1; 18 U.S.C. 5032.

Jurisdiction over juvenile delinquency proceedings was established in the Federal district courts by 18 U.S.C. 5033 prior to the 1974 Act and by 18 U.S.C. 5032 thereafter. Both of these statutes eliminate the requirement of a jury trial for such proceedings and require the court fully to apprise the juvenile of his rights and of the consequences of his consent to the juvenile delinquency proceedings before accepting that consent. The Supreme Court has declared that no right to a jury trial exists in juvenile court proceedings.[14] Moreover the Federal courts have held that waiver of the right to a jury trial by consent to juvenile delinquency proceedings is not an unconstitutional infringement on the juvenile's rights.[15] The full panoply of procedural rights in juvenile proceedings depends on the standard of "fundamental fairness" developed by the Supreme Court.[16] This standards does not, nevertheless, extend all requirements of the criminal process to the juvenile setting, since such an extension would destroy the aims of the juvenile proceedings. The current statute is, thus, an attempt to codify some of the constitutional requirements for due process in juvenile proceedings.

Disposition of the juvenile was dealt with in 18 U.S.C. 5034 before the 1974 Act and by 18 U.S.C. 5037 thereafter. The original statute provided that a juvenile found delinquent by the court may be either placed on probation or committed to the custody of the Attorney General for a period not to exceed his minority.[17] Any commitment could not exceed the maximum term permitted for a criminal conviction on the offense charged.

Commitment was to be in the custody of any public or private agency designated for the purpose by the Attorney General. Further, the court could commit a delinquent for observation and study at an appropriate classification center or agency before making a final disposition determination. Specific requirements as to the length of such evaluative commitment, the factors to be considered in such an evaluation, and the report on the evaluation were set forth in the statute. Most of the disposition provisions of the 1974 Act are codified in section 3603 and will be discussed below.

The final statute relevant to a discussion of section 3603 is the pre-1974 18 U.S.C. 5036. That statute permitted the Director of the Bureau of Prisons to contract with public or private agencies or foster homes for the commitment of juvenile delinquents, including the use of necessary appropriations to defray costs. The 1974 Act continued this provision in 18 U.S.C. 5040.

3. Provisions of the Bill, as Reported

The juvenile delinquency proceeding established by section 3603 is intended to provide the fundamental fairness that is constitutionally required. As a basic rule, the procedures set forth are available to all persons included in the definition of "juvenile" under section 3605(a) and clearly indicate the Code's preference for juvenile proceedings where appropriate. The Committee has concluded that, since there is no right to a jury trial for the juvenile to waive in foregoing criminal prosecution,[18] there is no need for him to consent to juvenile treatment as was formerly required by statute.[19] Under section 3603(a), the general rule is that a juvenile who is not surrendered to State authorities shall be proceeded against as a juvenile delinquent. If, however, the juvenile elects upon advice of counsel, in writing, that he be given adult treatment, the court will be required to grant that request. Upon motion of the Attorney General,[20] moreover, the court, after a hearing on reasonable notice to the juvenile, his parents, and his counsel, may determine that a juvenile under the age of eighteen and at least twelve years old, who is charged with a serious felony,[21] should be proceeded against as an adult in the interests of justice.

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[14] *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971).

[15] See *United States* v. *Hill*, supra note 4; *United States* v. *King*, 482 F.2d 454 (6th Cir.), cert. denied, 414 U.S. 1076 (1973); *United States* v. *James*, 464 F.2d 1228 (9th Cir.), cert. denied, 409 U.S. 1086 (1972); *Cotton* v. *United States*, 446 F.2d 107 (8th Cir. 1971). Contra, *Nieves* v. *United States*, 280 F. Supp. 994 (S.D.N.Y. 1968).

[16] *In re Gault*, 387 U.S. 1 (1967); see also *In re Winship*, 397 U.S. 358 (1970).

[17] The use of this vague term has caused some difficulty where the age of majority is other than twenty-one years. See, e.g., *United States* v. *Minor*, 455 F.2d 937 (6th Cir.), cert. denied, 406 U.S. 975 (1972). For purposes of Federal law, however, the applicable standard is held to be 21 years of age. *United States* v. *Hall*, 306 F. Supp. 735 (E.D. Tenn. 1969).

The disproportionate commission of serious felonies by youths,[22] the increasing juvenile crime rate,[23] heightened awareness of the plight of victims, and growing dissatisfaction with rehabilitation as an achievable goal,[24] have caused a number of States to amend their juvenile statutes in order to enable prosecution of certain juveniles as adults.[25] This section accords with that trend by recognizing that certain juveniles who commit particularly serious crimes should be held responsible for those acts as adults.[26]

Section 3603(b) establishes five specific criteria which must be considered by the court in making the determination to treat a juvenile as an adult on motion of the Attorney General; establishment of such criteria is another innovation taken from the 1974 Act. The Committee believes that these criteria are essential to the fairness of the juvenile proceedings and are a significant improvement over the arbitrary standards of the pre-1974 law. Former 18 U.S.C. 5031 automatically excluded from treatment as juveniles persons charged with offenses subject to death or life imprisonment; as noted, this limitation has been rejected, and such treatment will be possible on motion of the Attorney General and in the court's discretion after application of the enumerated criteria.

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[18] *McKeiver* v. *Pennsylvania, supra* note 14. It is the Committee's understanding that, notwithstanding the formal deletion in 18 U.S.C. 5033 of the sentence precluding jury trial, nothing in P.L. No. 93-415 was intended to confer any right to a jury trial in a juvenile delinquency proceeding. *United States* v. *Hill, supra* note 12; see also *United States* v. *Cuomo, supra* note 12, at 122-1293; *United States* v. *Doe*, 385 F. Supp. 902 (D. Ariz. 1974). The Committee intends the same result under this subchapter.

[19] 18 U.S.C. 5033 prior to 1974.

[20] The Committee intends to permit a delegation of the motion making authority. See *United States* v. *Cuomo, supra* note 12, at 1287-1289.

[21] Section 3603(a)(2) specifies Class A, B, C, or D felonies that are crimes of violence and offenses described in section 1811 (trafficking in an Opiate) and 1812 (Trafficking in Drugs) as those which permit consideration of adult treatment; the 1974 Act drew the line at offenses carrying a maximum term of imprisonment of ten years or more.

[22] Attorney General's Task Force on Violent Crime, *Final Report*, p. 81 (1981); Empey, *Juvenile Lawbreaking: Its Characteristics and Social Location*, in Juvenile Justice, The Progressive Legacy and Current Reforms, pp. 78-79 (1979); A. Vachss and Y. Bakal, *The Life-Style Violent Juvenile* , pp. 15, 30, n. 59 (1979).

[23] Gilman, *IJA/ABA Juvenile Justice Standards Project: An Introduction*, 57 B.U.L. Rev. 617 (1977); Hamperian, *Introduction to Youth in Adult Courts*, reprinted in *Major Issues in Juvenile Justice Information and Training* 169 (J. Hall, D. Hamparian, J. Pettibone, and J. White, eds. 1981).

[24] Hellum, *Juvenile Justice: The Second Revolution*, Crime and Delinquency 299, 302-03 (July 1979).

[25] Schackman, *New York's New Juvenile Felony Law*, 19 Judges Journal 33 (1980); Hellum, supra note 24 at 299, 300; IJA/ABA Juvenile Justice Standards, *Standards Relating to Transfer Between Courts*, commentary to Standard 1.1B (1979).

[26] IJA/ABA Standards, supra note 25.

The five criteria focus on the nature and circumstances of the offense, the age, intellectual development, psychological maturity, and social background of the juvenile; his prior delinquency and criminal records and prior juvenile treatment efforts and adult sentences; whether juvenile disposition will reflect the seriousness of the offense (including consideration of the loss of juvenile jurisdiction when the juvenile reaches the age of twenty-one), promote respect for the law, promote the protection of the public from the juvenile's conduct; provide a just response to the conduct; and the availability of programs designed to treat his behavioral problems. The court must make findings of fact in the record as to each of the criteria. Section 3603(b), while providing the flexibility appropriate to these proceedings, avoids the vagueness inherent in the general standards of the Youth Corrections Act, 18 U.S.C. 5010.[27]

With regard to the fifth criterion—that the court make findings as to "the availability of programs designed to treat the juvenile's behavioral problems"—the Bureau of Prisons has indicated that this requirement taken from the 1974 Act has caused problems because the Bureau does not determine the exact place of incarceration of a person until after conviction. However, as the Bureau's policy has recently been to send adjudicated juveniles to State juvenile facilities and to treat all other youthful offenders together, regardless of age, in a facility where appropriate treatment, service, and programs are available, this criterion can be satisfied by reference to the general youth facilities available to the Bureau of Prisons and those that the State will provide. It is intended to be sufficient that the court was aware of the general practices and took them into account.

Subsection (c) sets jurisdiction over juvenile delinquency proceedings in the Federal district courts, or before a United States magistrate if the court or magistrate would have had jurisdiction over the offense if it had been committed by an adult. As under the current statute, proceedings are to be initiated only by information, and, except as provided in subsection (a), no criminal prosecution for the offense may be instituted.

Subsection (e) provides that if the court finds that the juvenile is a juvenile delinquent, it shall release or detain him in accord with the provisions of section 3502 pending the disposition hearing, and specifies that detention shall not be with adults convicted of or charged with offenses but that it should be in a juvenile facility or other suitable facility. The provision generally reenacts the provisions of current law for commitment for observation and study pending disposition. Such a commitment allows the court to base its disposition of the juvenile on the evaluation and analysis of relevant experts. This evaluation period may not, however, exceed thirty days, and the preferred method of study is on an outpatient basis although the possibility of impatient study is retained. In addition, the court must specify in its order the additional information that it needs before requiring a thirty day commitment.

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[27] That Act is repealed by the Code.

After a finding of juvenile delinquency, the court is authorized by subsection (f) to hold a disposition hearing concerning the appropriate disposition, which must be held, as under current law, within twenty court days after the juvenile delinquency hearing. After the disposition hearing the court may suspend the finding of juvenile delinquency, enter an order of restitution as set forth in section 2006, or place the juvenile either on probation or in official detention. Subsection (g) applies the Code provisions for adult probation to juvenile delinquents, setting forth the periods of applicable probation and subsection (h) establishes the periods of official detention, paralleling the 1974 Act provisions set forth in the current 18 U.S.C. 5037 for juveniles under eighteen at the time of the proceeding. However, for juveniles between the age of eighteen and twenty-one at the time of the proceeding, the bill specifies that the term of official detention for a Class A, B, or C felony is a maximum of five years and for any other offense the maximum term is the lesser of three years or the maximum sentence applicable to an adult offender. The provision permitting entry of an order of restitution is new to the law. The Committee believes that the concept of restitution to the victim as an available sanction in sentencing is an important innovation and particularly applicable to juvenile delinquency activity resulting in theft, injury to the person, and damage to property. The Committee has also added a provision to subsection (f) to apply the provisions on release set forth in section 3503 to those juveniles who have been found to be juvenile delinquents for the period pending disposition, or pending appeal or petition for a writ of certiorari after disposition. This parallels the provision in section 3602 that applies the pretrial release provisions of section 3502 to juveniles from the time of arrest until the juvenile delinquency hearing.

The Bureau of Prisons is authorized by subsection (i) to designate appropriate facilities for the official detention of juveniles found delinquent and committed by the court. This provision also prohibits the use of any facility in which the juvenile has regular contact with adults who are being held either awaiting trial or post-conviction. This statutory segregation of juveniles and adults may be violated only if necessary to provide transportation or medical care for the juvenile offender—a very limited exception which the Committee expects to be applied rarely and for very short periods of time. The subsection also mandates that basic necessities and care be provided to a detained juvenile and that, if possible, the place of detention is to be near his home community.

As currently established, the Director of the Bureau of Prisons is authorized by subsection (j) to contract with the necessary agencies to provide appropriate facilities for the care and custody of juvenile delinquents. Subsection (k) provides that a statement made by a juvenile during or in connection with a proceeding to determine if he should be treated as an adult under section 3603(a) is not admissible against him in a subsequent criminal proceeding. This is designed to carry forward the final paragraph of 18 U.S.C. 5032 contained in the 1974 Act as interpreted in *United States* v. *Spruille*.[28] Finally, subsection (l) adopts the 1974 Act's statement prohibiting placing a juvenile in double jeopardy[29] and frames it as a bar to subsequent prosecution.

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[28] 544 F.2d 303 (7th Cir. 1976).

Subsection (m) applies the Federal Rules of Criminal Procedure to juvenile proceedings to the extent that they are applicable under Rule 54(b)(5). Under that Rule, the Federal Rules are not applicable to juvenile proceedings under current law "so far as they are inconsistent" with the title 18 juvenile delinquency chapter. This provision merely restates the current provision.

SECTION 3604. USE OF JUVENILE DELINQUENCY RECORDS

1. In General

Section 3604 establishes safeguards in the use of juvenile delinquency records essential to the non-criminal nature of the proceedings. The outlined practices insure necessary protections to the juvenile, enhancing the benefits derived from pursuing juvenile, rather than adult, prosecutions.

2. Present Federal Law

There was no Federal statute dealing with the use of juvenile delinquency records in effect until the passage of 18 U.S.C. 5038 in the 1974 Act which provides restrictions on the use of juvenile records. Section 3604 is substantially similar to 18 U.S.C. 5038, except that it permits fingerprints and photographs of a person adjudicated a juvenile delinquent in connection with conduct that would constitute a crime of violence or drug trafficking.

3. Provisions of the Bill, as Reported

Section 3604 provides appropriate protection for the confidentiality of juvenile delinquency proceedings. Throughout the proceedings the court must prevent disclosure of the record to unauthorized persons; after completion of the proceedings, the entire record is to be sealed. Thereafter, information concerning the sealed record may be released only as necessary to comply with an inquiry from another court, an agency preparing a presentence report for another court, a treatment agency or facility to which the juvenile has been committed, a law enforcement agency investigating the commission of an offense, or agencies investigating the person for a position within a law enforcement agency or for a position immediately and directly affecting the national security, or a branch of the armed services considering the person for military service. A seventh criteria has been added to provide that release of information may be made to the victim, or if the victim is deceased, to the family of the victim, if the request for information is related to the final disposition of the case. This addition recognizes the vital interest of the victim in the disposition of the juvenile and carries forward recent amendments to current law.[30] In the other specific circumstances, the relevance of the juvenile record to the permitted inquiry is apparent. Such information may not be generally released in connection with employment. However, the record may be so utilized if the position is within a law enforcement agency or a branch of the armed services or will "immediately and directly" affect national security. Information may not be released pursuant to any other inquiries, and such responses may not differ from responses about persons without any record of involvement in delinquency proceedings.

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[29] This is in accord with the Supreme Court decision on double jeopardy and juvenile proceedings. *Breed* v. *Jones*, 421 U.S. 519 (1975).

[30] P.L. 95-115, Oct. 3, 1977.

Subsection (b) provides an important notice requirement. The court must inform the juvenile and his parents or guardian of his rights regarding the confidentiality of his juvenile records in clear and non-technical language.

In S. 1437 as passed by the Senate in the 95th Congress, subsection (d)(2), closely adhering to 18 U.S.C. 5038, stated that neither the name nor the photograph of the juvenile was to be made public in connection with a juvenile delinquency proceeding "by any medium of public information". The quoted phrase, which implies that a newspaper could not publish the name or a photograph of a juvenile it had legitimately obtained, has been deleted in the reported bill. The Supreme Court has recently held, in interpreting a West Virginia statute that made such publication illegal, that the First Amendment will not permit the State to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper.[31] The deletion of the quoted language brings subsection (d)(2) into accord with this ruling. However, this section, along with subsection (c) dealing with the duty of court officers, will continue as a bar to the release of such information by court officials. The Committee has amended subsection (d) to permit, without special judicial authorization, photographing and fingerprinting of a juvenile delinquent if his offense was a crime of violence or a drug trafficking offense. This is in accord with a recommendation of the Attorney General's Task Force on Violent Crime made to improve the ability of the government to investigate violent crime.

SECTION 3605. DEFINITIONS FOR SUBCHAPTER A

Section 3605 defines a juvenile as a person less than eighteen years old, or less than twenty-one years old if charged with an act of juvenile delinquency committed before his eighteenth birthday. This definition follows the 1974 Act[32] which added the latter phrase on twenty-one year olds to the existing law. The additional class of persons covered under the Code will be minimal in number. However, the definition will extend the protection of juvenile treatment to all appropriate persons.

The definition of juvenile delinquent provided by section 3605 is essentially a codification of 18 U.S.C. 5031, as amended by the 1974 Act. A juvenile who commits an offense is a juvenile delinquent. Thus, offenses of persons under eighteen years old, not subject to criminal prosecution, will be subject to proceedings as juvenile delinquents.

Prior to the 1974 Act, the statute excluded offenses punishable by death or life imprisonment from the definition of juvenile delinquency. Rather than arbitrarily eliminating all Class A felony offenders over the age of sixteen from treatment as juvenile delinquents, this subchapter authorizes the Attorney General to make a motion to have the court decide whether a criminal prosecution as an adult should be undertaken for the more serious offenses.[33] The Committee strongly believes that this limited use of discretion promotes the individualized attention demanded by the juvenile justice system.

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[31] *Smith* v. *Daily Mail Publishing Co.*, 47 L.W. 4824 (June 26, 1979).
[32] 18 U.S.C. 5031.

SUBCHAPTER B.—OFFENDERS WITH MENTAL DISEASE OR DEFECT

(Sections 3611–3617)

Subchapter B of chapter 36 of the bill, as reported, deals with the procedure to be followed by the Federal courts with respect to offenders suffering from a mental disease or defect. The scope of this subchapter is much more comprehensive than that of the current law on the subject—chapter 313 of title 18, United States Code. Of particular importance is the provision in section 3613 that provides for the hospitalization of a person adjudged to be not guilty by reason of insanity.

SECTION 3611. DETERMINATION OF MENTAL COMPETENCY TO STAND TRIAL

1. In General

Section 3611 follows present Federal law in that it provides for a determination by the court of a defendant's competency to stand trial. However, section 3611 modifies and expands upon current 18 U.S.C. 4244 to conform to the general scheme of the new title 18.

The function of the incompetency standards is twofold: first, it is fundamentally unfair to convict an accused person, in effect, *in absentia*. This was basically the Supreme Court's position in *Pate* v. *Robinson,*[1] in terms of the due process clause of the Fourteenth Amendment. Second, the accuracy of the factual determination of guilt becomes suspect when the accused lacks the effective opportunity to challenge it by his active involvement at the trial.[2]

2. Present Federal Law

Competency to stand trial in Federal courts is governed by chapter 313 of title 18,[3] which constitutes part of comprehensive legislation enacted in 1949 "to provide for the care and custody of insane persons charged with or convicted of offenses against the United States."[4] The chapter was proposed by the Judicial Conference of the United States "after long study by a conspicuously able committee, followed by consultation with Federal district and circuit judges."[5]

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[33] Section 3603 (a)(2)(B).

[1] 383 U.S. 375 (1966).

[2] See the report of Professor David Robinson, Hearings, pp. 6427–6429.

[3] 18 U.S.C. 4241–4248.

[4] Act of Sept. 7, 1949, ch. 535, BB 1, 63 Stat. 686.

18 U.S.C. 4244 deals with the procedure to be followed by the court in determining the mental competency of a defendant after arrest and prior to the imposition of sentence or prior to the expiration of a period of probation. Upon motion by the government or the defendant, or on its own motion, the court is required to order that the defendant be examined by at least one psychiatrist. If the psychiatrist's report indicates mental incompetency, the court must then hold a hearing and make a finding with respect to the defendant's competency.

The statute does not state an explicit test for the presence or absence of mental competency to stand trial, although the statute does state that the question at issue in having the defendant examined by a psychiatrist is to determine whether the accused is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." The leading decision on the question of the test to be applied is *Dusky* v. *United States.*[6] There the Court reversed a conviction after the government admitted that the trial court had erred in finding competency on the basis of the record before it. In a very brief, per curiam opinion, the Supreme Court stated:[7]

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant (is) oriented to time and place and (has) some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him."

18 U.S.C. 4245 sets forth the procedure to be followed whenever there is probable cause to believe that a person convicted of an offense was mentally incompetent at the time of his trial, but where the issue of mental competency was not raised or determined before or during the trial. If the court finds that the person was mentally incompetent at the time of his trial, the court must vacate the judgment of conviction and grant a new trial.

18 U.S.C. 4246 provides for the commitment of a defendant found mentally incompetent under section 4244 or 4245. The commitment is to the custody of the Attorney General until the defendant is competent to stand trial or until the pending charges against him are disposed of according to law.

3. Provisions of the Bill, as Reported

Section 3611 contains six subsections which deal exclusively with the determination of the mental competency of the defendant to stand trial. This section tracks, with some modifications, sections 4244, 4245, and 4246 of title 18 as they now exist. It is intended that the procedures for determining the mental competency of the defendant to stand trial are also to apply to the issue of the defendant's competency to enter a plea.

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[5] *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956).
[6] 362 U.S. 402 (1960).
[7] *Ibid.*

Section 3611(a) permits a motion to determine the mental competency of the defendant to stand trial to be filed by the government or by the defendant after the defendant has been arrested or charged and before the imposition of sentence on the defendant. The court must order a hearing upon its own motion, or on the motion of the government or the defense, if there is reasonable cause to believe that the defendant is presently incompetent to stand trial. Such reasonable cause exists if the court believes that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.[8]

Section 3611(a) substantially follows 18 U.S.C. 4244 in that the motion for a competency hearing may be filed by the government or by the defendant; in addition the court may act *sua sponte*. Under section 3611(a) there is no specific requirement, as in 18 U.S.C. 4244, that the motion set forth the grounds for the belief that the defendant is incompetent to stand trial; however, this requirement is incorporated into the statute by Rule 47 of the Federal Rules of Criminal Procedure which provides that all motions to the court must state the grounds upon which they are made.[9] Of course, pursuant to that rule, the motion may be made orally,[10] but grounds for the motion must still be stated.

The motion may be made only after the commencement of a prosecution against the defendant and prior to the imposition of sentence on the defendant. Under 18 U.S.C. 4244, the motion could only be made after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation.[11] Referring to the commencement of a prosecution, as does section 3611(a), permits the procedure to be set in motion at the earliest of the date of the actual arrest or of the date of the filing of an information or the return of an indictment, thus preserving the current case law interpretation.[12] In the view of the Committee, it would be improper for the attorney for the government to initiate plea bargaining during the period of commitment to determine competency to stand trial, although he could properly participate in plea bargaining initiated by the defendant. The intention of the Committee is that a prosecutor should not use such a motion to obtain undue leverage in plea bargaining by filing the motion and then initiating plea negotiations during the commitment. The Committee has eliminated the provision on filing a motion during a period of probation as anomalous in light of the fact that probation is treated in section 2001 as a sentence rather than as a suspension of the imposition or execution of sentence and because Rule 33 of the Federal Rules of Criminal Procedure allows the defendant to move for a new trial based upon newly discovered evidence within two years after final judgment.[13] Evidence that the defendant was incompetent at the time of trial most likely would be newly discovered evidence. In addition, the defendant may file a motion under 28 U.S.C. 2255 at any time.[14]

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[8] The Committee intends to perpetuate current law to the effect that neither amnesia nor the use of narcotics *per se* renders an accused incompetent to stand trial. See. E.G., *United States* v. *Borum*, 464 F.2d 896 (10th Cir. 1972); *United States* v. *Williams*, 468 F.2d 819 (5th Cir. 1972).

[9] See *United States* v. *Becera-Soto*, 387 F.2d 792 (7th Cir. 1967), cert. denied, 391 U.S. 928 (1968); *Krupnick* v. *United States*, 264 F.2d 213 (8th Cir. 1959).

[10] See *United States* v. *Irvin*, 450 F.2d 968 (9th Cir. 1971); *United States* v. *Burgin*, 440 F.2d 1092 (4th Cir. 1971).

[11] This period has been judicially construed to include the time after arrest and before the defendant is indicted. *United States* v. *Adams*, 296 F. Supp. 1150 (S.D.N.Y. 1969); or arraigned, *Arco* v. *Ciccone*, 359 F.2d 796 (8th Cir. 1966); on the day of trial, *Mitchell* v. *United States*, 316 F.2d 354 (D.C. Cir. 1963); and after trial. *United States* v. *Lawrenson*, 210 F. Supp. 422 (D. Md. 1962), aff'd. 315 F.2d 612 (4th Cir.), cert. denied, 373 U.S. 938 (1963).

[12] Compare section 511(e).

18 U.S.C. 4244 provides that the court is to hold a hearing if the report of the examining psychiatrist indicates a state of mental incompetency in the defendant. Section 3611(a) gives the court discretion to order a competency hearing to determine the mental competency of the defendant on its own motion or on the motion of the government or the defense. Moreover, it is mandatory that the court order a hearing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Thus, unlike present Federal law, section 3611(a) permits the court to order that a hearing be held prior to a psychiatric examination if the requisite finding can be made. However, the Committee contemplates that a psychiatric examination will be routine in virtually all cases in which the court is required to hold a hearing, and although discretion to hold the hearing without a psychiatric examination is provided, the court may not abuse this discretion and refuse to order an examination where the facts warrant an examination.[15]

Subsection (b) of section 3611 provides that the court may order that a psychiatric examination be conducted and that a psychiatric report to be filed, pursuant to section 3617 (b) and (c). Under section 3617(b), the court may order that a psychiatric examination be conducted by a licensed or certified psychiatrist or by a clinical psychologist, or by additional examiners if the court finds it would be appropriate in a particular case.

For the purpose of the examination, the court is empowered to commit the defendant, for a period of not more than thirty days, to the custody of the Attorney General who must place the defendant in a suitable facility. The director of the facility may apply to the court for an extension of time up to fifteen days. If the defendant is committed, the examination shall be conducted, unless impracticable, in the suitable facility closest to the court. If, however, the court believes that the defendant's examination can be conducted on an outpatient basis, there need not be a commitment under this provision. In the unusual case where the person was inadvertently detained beyond the period authorized by this subsection, habeas corpus would be available. Even if this occurred, however, since the examination, and in fact all the procedures included in this section, are for the benefit of the defendant,[16] as well as for the benefit of society, the report of a psychiatric examination of a defendant whose commitment extended beyond the permissible period would be admissible on the question of competency to stand trial.

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[13] See the recommendation of Anthony P. Marshall representing the views of the New York State Bar Association's Committee on Federal Legislation, Hearings, pp. 6367-6368.

[14] See *Hanson* v. *United States,* 406 F.2d 199 (9th Cir. 1969). Moreover, the section 2255 motion obviates the necessity to include a section similar to 18 U.S.C. 4245 which sets out the procedure to be followed when the Director of the Bureau of Prisons finds that a prisoner was incompetent at trial. Thus, the defendant may file a section 2255 motion based upon his incompetency at trial, and the government is under a continuing duty to notify the court of such information.

[15] See *United States* v. *Cook,* 418 F. 2d 321 (9th Cir. 1969).

Section 3617(c) requires the psychiatric examiner to file with court a report that includes (1) the defendant's history and present symptons; (2) a description of the tests employed and their results; (3) the examiner's findings; and (4) the examiner's opinions as to diagnosis and prognosis, and whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Copies of this report must also be sent to the counsel for the defendant and the attorney for the government.[17]

Although the examiner is required, pursuant to section 3617 (b), to examine the defendant, the Committee is aware that the examiner may decide that it is unnecessary to administer tests to the defendant in a particular case. The absence of tests will not invalidate the examiner's report to the court and is not a basis for an objection to the report that is filed if the reporting examiner has indeed examined the defendant and studied the data, if any, gathered from tests and the reports made by others.

Section 3611(c) provides that the hearing shall be conducted pursuant to section 3617(d), which requires that the hearing fully comport with the requirements of due process. Included in the protections afforded by the subsection for the hearing are the right to counsel (court appointed if the defendant is indigent), the right to testify and to present evidence, the opportunity to confront and cross-examine witnesses, as well as the right to present witnesses in his own behalf.

Subsection (d) of section 3611 provides that the court must make a determination with respect to the defendant's competency based upon a preponderance of the evidence. It should be noted that the question of competency of a defendant is for the court to determine and is not to be tried before a jury. This is in accord with present Federal law.[18]

The finding that the court must make is whether the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. This test of competency, in essence, adopts the standards set forth by the Supreme Court in *Dusky* v. *United States, supra.*

If the court makes a finding of incompetency, it must then commit the defendant to the custody of the Attorney General, who is required to hospitalize the defendant for treatment in a suitable facility.[19] For example, the Attorney General might conclude that a wing of a prison set aside for treatment of offenders with mental illness could be suitable for a defendant charged with a serious crime of violence. In accord with the Supreme Court's holding in *Jackson* v. *Indiana,*[20] commitment under section 3611 may only be for a reasonable period of time necessary to determine if there exists a substantial probability that the person will attain the capacity to permit the trial to go forward in the foreseeable future. Under section 3611(d)(1), the period may not exceed four months, however. If a determination is made that there is a substantial probability the person can attain the capacity within an additional reasonable period of time, the commitment can continue for such additional reasonable period of time until his mental condition improves to the extent that the trial can proceed or until all charges against him are dropped, whichever is earlier. If, at, or before the end of the four-month period or the two-month extension, it is determined that the defendant's mental condition will not so improve or has not so improved as to permit the trial to proceed, the defendant is made subject to the provisions of section 3616, dealing with hospitalization of a person due for release but suffering from a mental disease or defect.[21]

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[16] It has been held that it is a denial of due process to try a defendant who is mentally incompetent to stand trial. See *Pate* v. *Robinson supra* note 1; *United States* v. *Horowitz,* 360 F. Supp. 772 (E.D. Pa. 1973).

[17] Throughout the subchapter, references are made to reports being sent to the counsel for the defendant (rather than to the defendant) in order that counsel may determine whether in his judgment it is appropriate or useful for the defendant to see the report, recognizing that this may be inadvisable in some cases.

[18] See *United States* v. *Huff,* 409 F.2d 1225 (5th Cir.), cert. denied, 396 U.S. 857 (1969); *United States* v. *Davis,* 365 F.2d 251 (6th Cir. 1965).

This commitment procedure is very similar to current Federal law[22] which has been held constitutional by several courts.[23] In addition, commitment of an incompetent defendant under provisions such as those contained in section 3611 has been held to be not unconstitutional as denying the defendant his right to speedy trial.[24]

Under subsection (e) of section 3611, when the head of the facility in which a defendant is hospitalized determines that the defendant has recovered to the extent that he is competent to stand trial, he must file a certificate so stating with the clerk of the committing court. The clerk must then send copies of the certificate to the defendant's counsel and to the attorney for the government. Upon receipt of the certificate, the court is required to order a hearing to determine the present competency of the defendant. The hearing must follow the due process requirements of section 3617(d).

If the court finds by a preponderance of the evidence adduced at the hearing that the defendant has recovered to the extent that he is competent to stand trial, the court must order the release of the defendant from the facility in which he is hospitalized and set a date for the trial of the defendant or for the next stage in the criminal proceeding against the defendant. A defendant ordered released after a hearing pursuant to this subsection is subject to the pretrial release provisions of chapter 35.

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[19] Pursuant to section 3616(j)(2), the Attorney General is authorized to contract for non-Federal facilities in order to hospitalize the defendant.

[20] 406 U.S. 715 (1972).

[21] If all charges against a presently mentally defective defendant are dropped, the head of the facility in which the defendant is hospitalized may notify State authorities of the defendant's condition so that State authorities may determine if civil commitment proceedings are warranted. If State authorities cannot or will not arrange for the commitment of the defendant, Federal proceedings under section 3615 may be instituted if the reason for dropping the charges was related solely to the mental condition of the defendant. If the charges were dropped for other reasons, such as inadequate evidence to prove an offense, the Federal Government has no further interest in the case and cannot seek to civilly commit the defendant even if the State chooses not to proceed.

[22] 18 U.S.C. 4246.

[23] *Greenwood* v. *United States, supra* note 5; *Kirkwood* v. *Harris,* 229 F. Supp. 904 (W.D. Mo. 1964); *Tienter* v. *Harris,* 222 F. Supp. 920 (W.D. Mo. 1963).

[24] *United States* v. *Davis, supra* note 18; *United States* v. *Miller,* 131 F. Supp. 88 (D. Vt. 1955).

Section 3617(e)(1) requires the director of the facility in which the defendant is hospitalized to submit semiannual reports to the committing court concerning the mental condition of the defendant and recommendations concerning his continued hospitalization. The head of the facility must also send copies of the report to such other persons as the court may direct.

This procedure requiring semiannual reports is consistent with Federal case law. In *In re Harmon,*[25] the First Circuit stated that if a defendant is committed to the custody of the Attorney General pursuant to 18 U.S.C. 4246, the district court should require frequent reports on the accused's mental condition at stated intervals.

There may be some question as to the duty and authority of a court which receives a report stating that the defendant is presently competent to stand trial. The Committee intends that whenever a court receives such a report submitted pursuant to this subsection, the court is to treat the report as a certification filed pursuant to section 3611(e). Accordingly, the court must order a hearing on the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the proceedings against him and to assist properly in his defense, the court must order the release of the defendant from the facility in which he is hospitalized, determine whether he should be released or detained pursuant to section 3502 pending trial, and set the date for trial of the defendant.

Section 3617(g) codifies the provision in 18 U.S.C. 4244 by making any statement made by the defendant, during the course of a psychiatric examination pursuant to section 3611 (or 3612, dealing with examinations, concerning sanity at the time of the offense), inadmissible on the issue of whether the defendant engaged in the conduct that constitutes the offense charged.[26] Current law is amended to make the statement also inadmissible on sentencing issues, and to make clear that the restrictions on disclosure at trial and sentencing do not apply if the defendant has waived his privilege against self-incrimination.

Section 3611(f) makes it clear that a finding by the court as to the competency of the defendant to stand trial is not to prejudice the defendant on the separate issue of whether he was insane at the time of the offense. Moreover, the finding itself as to the defendant's competency is specifically made inadmissible at the trial for the underlying offense charged. This rule of evidence is similar to the limitations present in 18 U.S.C. 4244.

SECTION 3612. DETERMINATION OF THE EXISTENCE OF INSANITY AT THE TIME OF THE OFFENSE

1. In General

Section 3612 provides for psychiatric examination of the defendant when a defendant files a notice of intent to rely upon the defense of insanity at the time of the offense. The section also provides for the special verdict required if the defendant uses such notice.

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[25] 425 F. 2d 916 (1st Cir. 1970).

[26] See *United States* v. *Malcolm,* 475 F.2d 420 (9th Cir. 1973), and cases cited therein.

2. Present Federal Law

Present Federal law, other than the District of Columbia Code, contains no provision for a verdict or finding of not guilty by reason of insanity.[27] The concept of a notice of an intent to raise an insanity defense was first suggested by a 1974 amendment to the Federal Rules of Criminal Procedure.[28] Furthermore, there is no procedure for commitment to mental institutions of persons who obtain acquittals on the basis of insanity defenses—if the basis of the acquittal can even be determined with certainty.[29] Federal officials must attempt civil commitment of such persons by urging local authorities to institute commitment proceedings.[30] Frequently such efforts are unsuccessful; not uncommonly this is due to lack of sufficient contacts between the acquitted defendant and a particular State for the latter to be willing to undertake care and treatment responsibility for him.[31] The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of title 18, United States Code, for Federal commitment of persons found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[32]

3. Provisions of the Bill, as Reported

Section 3612(a) must be read in conjunction with Rule 12.2 of the Federal Rules of Criminal Procedure.[33] The rule provides that if a defendant intends to rely upon the defense of insanity at the time of the alleged offense, he must notify the attorney for the government and file a copy of the notice with the clerk of the court. Upon motion of the attorney for the government, the court may order the defendant to submit to a psychiatric examination as provided in this section.

Accordingly, subsection (a) provides that after the filing by the defendant of a Rule 12.2 notice, and upon motion of the attorney for the government, the court may order that the defendant be examined under the provisions of section 3617(b). The examination is triggered by the government motion since it is the government which would dispute the insanity defense and would want an independent psychiatric evaluation of the defendant. If no such motion is made by the government, there is no requirement that the court order an examination; however, under its inherent power, the court, in an appropriate case, may order the examination.[34]

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[27] However, the giving of an instruction permitting the jury to return a not-guilty-by-reason-of-insanity verdict is not necessarily reversible error. See *United States* v. *McCracken*, 488 F.2d 406, 418–421 (5th Cir. 1974).

[28] Rule 12.2.

[29] The subject is well canvassed in *United States* v. *McCracken*, *supra* note 27, at 415–425, which noted that: "Time and again federal courts have decried this gaping statutory hole . . . and have called upon Congress to take remedial action."

[30] See testimony of Anthony P. Marshall, *supra* note 13 at 6367.

[31] See Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131, 133 (1968).

[32] See 18 U.S.C. 4241–4248.

[33] Section 111(i) of this bill, as reported, contains technical amendments to Rule 12.2.

[34] See *United States* v. *Malcolm*, *supra* note 26.

Under section 3617(b), for the purpose of the examination the court may order that the defendant be committed for a period of not longer than forty-five days, with an opportunity for a thirty-day extension upon application of the director of the facility to the court for good cause shown.

Section 3617(c) requires the psychiatric examiner or examiners conducting an examination pursuant to section 3612 to file a report with the court and to send copies of the report to the counsel for the defendant and the attorney for the government, as is required for examinations pursuant to section 3611. Section 3617(c) requires the same first three items in the report for an examination pursuant to section 3612 as are required for section 3611. The fourth required item is different, reflecting the different procedure involved in section 3612. Here the examiners must present their opinions as to diagnosis and prognosis, and as to whether the defendant was insane at the time of the offense charged.[35]

As heretofore stated, the Federal law generally contains no provision for a verdict of not guilty by reason of insanity.[36] To cure the problems that this lack creates, section 3612(b) provides that where the issue of insanity is raised, the jury is to be instructed to find, or, in the event of a non-jury trial, the court is to find, the defendant either (1) guilty; (2) not guilty; or (3) not guilty solely by reason of insanity.

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity.[37] If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.[38]

In augmentation of the Fifth Amendment privilege against self-incrimination and in accordance with present Federal practice,[39] section 3617(g) prohibits the admission into evidence on the issue of guilt of statements made by the defendant during the course of a psychiatric examination pursuant to section 3612 on the issue of guilt. Of course, since the exclusion is for the defendant's benefit, he may waive it.[40] The provision also makes the defendant's statements inadmissible on issues of punishment.

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[35] The Committee accepts the evidentiary rule which permits an expert witness to express his opinion on the ultimate jury question. Of course, in a jury trial it is the jury, and not the court or the expert witness, which must decide the ultimate issue of insanity; and the jury is free to accept or reject the testimony of any expert witness. See *Feguer* v. *United States*, 302 F.2d 214. 242 (8th Cir.), cert. denied. 371 U.S. 872 (1962).

[36] It should be noted that the District of Columbia Code, section 24-301(c), provides that the jury must state in its verdict if acquittal was solely on the grounds that the defendant was insane at the time of the commission of the offense. See also Criminal Jury Instructions for the District of Columbia (1972). Instructions 5.07 and 5.11.

[37] See also *United States* v. *McCracken, supra* note 27 at 418-421. Compare Instruction 5.11 of the Criminal Jury Instructions for the District of Columbia (1972), which states: "If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness."

See section 3613 of the Code for the proposed Federal procedure with respect to the hospitalization of a person acquitted by reason of insanity.

[38] *United States* v. *Brawner*, 471 F. 2d 969 (D.C. Cir. 1972).

[39] See *United States* v. *Malcolm, supra* note 26.

[40] *Ibid.*

Statements made by the defendant to the psychiatric examiner are admissible at trial on the issue of sanity even though they are inadmissible on the issue of whether the defendant engaged in the proscribed conduct. This position is in accord with present Federal law under Rule 12.2(c) of the Federal Rules of Criminal Procedure,[41] and with State cases allowing such statements to be admitted as to insanity provided that the jury is instructed not to consider the statements with regard to the defendant's guilt.[42] Limited admission was approved in the adoption of comparable language in P.L. 94-64, July 31, 1975.

SECTION 3613. HOSPITALIZATION OF A PERSON ACQUITTED BY REASON OF INSANITY

1. In General

Section 3613 sets out the procedure to be followed when a person is found not guilty solely by reason of insanity at the time of the offense. Included is a commitment provision whereby a person acquitted solely by reason of insanity, who is presently suffering from mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, will be committed for treatment to the custody of the Attorney General.

2. Present Federal Law

At present, there is no Federal procedure for commitment to mental institutions of persons who are acquitted solely by reason of insanity and who are presently dangerous.[43] Federal officials can obtain civil commitment of such persons only by urging local authorities to institute such proceedings. As noted above, such efforts are rarely successful largely due to a lack of sufficient contacts between the acquitted defendant and the individual State for the latter to be willing to undertake responsibility for him. The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of title 18, United States Code, for Federal commitment of persons found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[44]

3. Provisions of the Bill, as Reported

Section 3613 contains six subsections which deal with the hospitalization of a person acquitted by reason of insanity.

Subsection 3613(a) provides that when a person is found not guilty solely by reason of insanity at the time of the offense charged, he must be committed to a suitable facility until he is eligible for release pursuant to subsection (d).

Subsection (b) of section 3613 provides that, in connection with a hearing filed pursuant to subsection (c), the court shall order that the acquitted person be examined in accordance with sections 3617

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[41] See S. Rept. 94-336, pp. 4-5, 10.

[42] See *People* v. *Schranz*, 213 N.W. 2d 257 (Mich. App. 1973); *State* v. *Whitlow*, 210 A.2d 763 (N.J. 1965). But see *Parkin* v. *State*, 238 S.2d 817 (Fla. 1970), cert. denied, 401 U.S. 974 (1971).

[43] The District of Columbia Code (1973), section 24-301(d), provides for the automatic commitment of a person acquitted by reason of insanity.

[44] See 18 U.S.C. 4241-4248.

(b) and (c), which provide for examination by a qualified psychiatrist or psychologist designated by the court. The procedure to be followed is essentially the same as that for examinations pursuant to sections 3611 and 3612.

Subsection (c) provides that, within forty days of the special verdict, a hearing is to be conducted pursuant to the provisions of section 3617(d). It will frequently be desirable to appoint the same individual or individuals who examined the acquitted person for purposes of the insanity defense to examine the person under this subsection. Nevertheless, there may be situations where a valid reason will exist for not appointing the same psychiatrist or clinical psychologist. This is left to the discretion of the court.

The requirements of subsections (a) through (c) are similar to the most recent pronouncement of Congress in this area, the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970.[45] Under this Act, a person acquitted by reason of insanity in the District of Columbia is subject to mandatory commitment to a mental hospital with a hearing to be held within fifty days of the confinement to determine whether the person is entitled to release from custody. The decision of the court must be made within ten days of the beginning of the hearing.[46]

For the purpose of the examination under section 3617(c), commitment with an opportunity for a thirty-day extension for good cause shown, may be ordered as is the case under the preceding section. Of course, if the court believes that the examination can be conducted on an outpatient basis, it need not order commitment for the examination. In addition, the court may make any order reasonably necessary to secure the appearance of the person at the hearing. This may include incarceration or continued hospitalization after completion of the psychiatric examination.

Section 3617(c) requires the examining psychiatrist or clinical psychologist to file a report with the court and to send copies of the report to counsel for the defendant and to the attorney for the government. Since in this case the person has already been acquitted and since the hearing must be held within forty days of the special verdict, the court will need the report in a relatively short period of time. In addition, the Committee contemplates that the hearing provided for in section 3613(c) should be held promptly after the reports are filed.

The report of the examiner or team must include (1) the acquitted person's history and present symptoms; (2) a description of the psychological and medical tests employed and their results; (3) the examiner's findings; and (4) the examiner's opinion as to diagnosis, prognosis, and whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury or serious damage to the property of another.[47] The first three items are identical to those required for an examination ordered under section 3611 or 3612. The fourth is somewhat different, reflecting the difference in the procedure involved.

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[45] P.L. 91-358, 84 Stat. 590.

[46] D.C. Code, section 24-301(d).

[47] The Committee has intentionally included risk of serious damage to the property of another as part of the criteria for insanity under this section. Clearly, danger to the public from a person who is insane need not be limited to the risk of physical injury to persons. *Overholser* v. *Russell*, 283 F.2d 195 (D.C. Cir. 1960).

Subsection (d) of section 3613 provides that the court must make a determination, based upon clear and convincing evidence, as to whether the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another.

If the court makes an affirmative finding of present insanity and substantial risk, it must commit the person to the custody of the Attorney General, who in turn must release the person to the appropriate State official in the person's State of domicile or the State in which the person was tried, if the State will assume responsibility for the person's custody, care, and treatment. The Attorney General must make all reasonable efforts to cause such a State to assume such responsibility. If, nevertheless, neither State will do so, the Attorney General must hospitalize the person in a suitable facility. The commitment will be until either the State assumes responsibility or until the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to the property of another,[48] whichever is earlier. The Attorney General is directed to continue periodically to exert all reasonable efforts to cause an appropriate State to assume responsibility for the person's custody, care, and treatment. This commitment procedure not only affords assistance to those requiring the benefit of treatment, but also affords the public protection from those who, due to mental disease or defect, pose a danger to the rest of society.[49]

Under subsection (e), when the director of the facility in which an acquitted person is hospitalized determines that the person has recovered to the extent that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to the property of another, he shall promptly file a certificate so stating with the clerk of the committing court. The clerk shall send a copy of the certificate to the attorney for the government and the attorney for the committed person. Upon receipt of the certificate, the court must either order the release of the person, or upon motion of the government, or upon its own motion, hold a hearing to determine whether the person should be released. The hearing must follow the procedural requirements of section 3617(d). After the hearing, if the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must order the immediate release of the person. If the person does not meet the criteria for unconditional release but the court finds that the person has recovered from his mental disease or defect to such an extent that his conditional release under a prescribed regimen of medical care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be discharged under an appropriate prescribed regimen of medical care or treatment on the explicit condition that he comply with the prescribed regimen. The court at any time may, after a hearing, modify or eliminate the regimen of medical care or treatment employing the same criteria applicable to the original determination. It should be noted that the standard used for determining recovery—and thus release—by a preponderance of the evidence—is intentionally lower than the standard for commitment—upon clear and convincing evidence.[50]

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[48] This test is similar to that in 24 D.C. Code 301(e) ("will not in the reasonable future be dangerous to himself or others"). See *United States* v. *Ecker*, 543 F. 2d 178 (D.C. Cir. 1976). The provisions in this section and section 3616 to permit a court to release a person on condition that he conform to a prescribed regimen of medical care or treatment was persuasively recommended by R. Dennis Bevans whose family experienced a tragedy that this provision, if available in the jurisdiction in which the incident occurred, might have been prevented. See Hearings, Part XIV, pp. 10057-10070.

[49] See *United States* v. *Ecker, supra* note 48.

Subsection (f) provides a procedure for dealing with the situation in which the released person fails to comply with the prescribed regimen of medical care or treatment. Under this procedure the director of the medical facility responsible for administering the regimen imposed under subsection (e) shall notify the Attorney General and the court having jurisdiction over the case of the failure to comply with the prescribed regimen. In a procedure similar to revocation of probation, upon notice by the medical director or other probable cause to believe the person has failed to comply with the regimen, the person may be arrested and, upon arrest, must be brought without unnecessary delay before the court having jurisdiction. The court must, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

Section 3617(e)(1) requires the director of the facility in which an acquitted person is hospitalized to submit to the committing court annual reports concerning the mental condition of the person and recommendations concerning his continued hospitalization. This provision is similar to the reporting procedure for commitments pursuant to section 3611 and the comments on that section have equal applicability here.

Section 3617(h) states that the acquitted person committed under this section retains the right to habeas corpus relief. Thus, nothing in section 3613 should be construed as precluding an acquitted person committed under this section from establishing by writ of habeas corpus his eligibility for release under the provisions of this section.

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[50] The preponderance-release standard, on which the committed person bears the burden of proof, is identical to that under the District of Columbia Code. See *United States* v. *Brawner*, *supra* note 38. However, whereas commitment of a person acquitted by reason of insanity is automatic under the District of Columbia Code, under the provisions of this subchapter the government must satisfy the heavy burden of "clear and convincing" evidence that the acquitted person is *presently* mentally ill and dangerous in order to have him committed.

SECTION 3614. HOSPITALIZATION OF A CONVICTED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In General

Section 3614 sets forth the procedure to be followed when there is reasonable cause to believe that a recently convicted defendant may be presently suffering from a mental disease or defect for which he needs care or treatment in a suitable facility. This section is new to Federal law and is inserted in order to assist the court in determining the proper facility for commitment of a convicted defendant. This section is also for the benefit of a convicted defendant who is mentally ill and who needs hospitalization. In addition, the hospitalization of such a person benefits society not only by protecting the public from mentally ill convicted defendants but also by treating and hopefully curing such a person.

2. Present Federal Law

Present Federal law contains no provision for the hospitalization, in lieu of imprisonment in a penal facility, of a convicted person suffering from mental disease or defect.[51]

3. Provisions of the Bill, as Reported

Subsection (a) of section 3614 provides that, within ten days after a defendant is found guilty of an offense, the defendant or the government may file a motion for a hearing on the present mental condition of the defendant. The court must grant the motion and order a hearing if it is of the opinion that there is reasonable cause to believe that the defendant may be presently suffering from a mental disease or defect for which he needs care or treatment in a suitable facility. The motion must state the grounds upon which the motion is made; this follows the requirement set out in Rule 47 of the Federal Rules of Criminal Procedure.

In addition, the court, on its own motion, may order a hearing on the present mental condition of the defendant at any time prior to the imposition of sentence, if facts are brought to the attention of the court which would lead the court to have a reasonable belief that the defendant may be presently suffering from such a mental disease or defect. In such cases, the court must order a hearing on the mental condition of the defendant. These facts might be brought to the attention of the court if, as part of the presentence procedure, the court had ordered that the defendant be examined by a psychiatrist or by a clinical psychologist pursuant to section 2002(c).

Subsection (b) of section 3614 provides that a convicted defendant may be examined by a psychiatrist or by a clinical psychologist pursuant to section 3617(b) which provides that the defendant may be examined by an examiner or examiners designated by the court. This procedure is similar to that set forth in section 3617 for examinations pursuant to section 3611. Section 3617(c), providing for the psychiatric reports, and section 3617(d), dealing with the procedures for the hearing, also provide similar procedures to those provided for other examinations discussed earlier in relation to the preceding sections of this subchapter. One distinction for section 3614 is that the examiner, among his other opinions, must report on the person's need of custody for care or treatment in a suitable facility. At this point the defendant has been convicted and the issue is the best disposition under the circumstances. This contrasts with the required opinion for section 3613, dealing with an acquitted person, where the issue posed is the person's risk of bodily injury to another person or serious damage to the property of another. In addition, if the examiner's report finds the presence of a mental disease or defect but does not find that it requires placement of the person in a suitable facility, the report must include a recommendation as to the sentencing alternatives available under part III of the Code that will best accord the defendant the treatment he does need.

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[51] Under 18 U.S.C. 4241 a procedure is provided for an inmate who, after he has been imprisoned, is found to be mentally ill. None exists, however, at the earlier stage contemplated by section 3614.

Subsection (c) provides that a hearing shall be conducted in accord with the provisions of section 3617(d), relating to due process requirements.

Subsection (d) provides that if, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court then must commit the defendant to the custody of the Attorney General for treatment in a suitable facility.

Under the subsection, commitment is to be to the custody of the Attorney General, who must hospitalize the defendant for treatment in a suitable facility. This commitment to the Attorney General shall be treated for administrative purposes as a provisional sentence to imprisonment for the maximum term authorized by chapter 23 for the offense committed. This sentence is provisional, however, in light of the release provision set forth in subsection (e).

Under subsection (e), when the director of the facility in which the defendant is hospitalized determines that the defendant has recovered from his mental disease or defect to the extent that he is no longer in need of custody for care or treatment in such a facility he must file a certificate so stating with the clerk of the committing court. The clerk then must send copies of the certificate to the attorney for the defendant and to the attorney for the government.

Upon receipt of the certificate, if the defendant's provisional sentence imposed pursuant to subsection (d) has expired, the court need not act since the Attorney General must release the defendant. However, if the defendant's sentence has not expired, the court must order a hearing to determine whether to proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under chapter 20. However, if the court is of the opinion that the defendant has not recovered to the necessary extent, the Committee intends that the court reinstitute the procedures under subsections (a) through (d) for a new determination of the defendant's mental condition, and, if necessary, the court may recommit the defendant to the custody of the Attorney General for continued hospitalization.

Section 3617(e)(1) requires the director of the facility in which the defendant is hospitalized to submit to the committing court annual reports concerning the mental condition of the defendant and recommendations concerning his continued hospitalization. This subsection parallels the similar procedure set forth in section 3617 for other sections of the subchapter

SECTION 3615. HOSPITALIZATION OF AN IMPRISONED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In General

Section 3615 deals with the hospitalization of an imprisoned person who is presently suffering from a mental disease or defect for which he is in need of custody for care or treatment. This section significantly changes 18 U.S.C. 4241 and 4242.[52]

One major change the Committee has made in existing law is to require a court hearing before a prisoner may be transferred to a mental hospital if he objects to such a transfer. The Committee is in agreement with present Federal law which permits the Attorney General to determine the appropriate method of handling Federal prisoners as well as the appropriate place of incarceration for these prisoners.[53] Indeed, the Committee has generally codified present Federal law in this respect.[54] While the Committee is unaware of abuses by Federal authorities with respect to transfer of prisoners to mental hospitals, the Committee is aware of certain shocking cases involving transfer of State prisoners.[55] It is to insure that Federal prisoners continue to receive fair and just treatment that the Committee has included the protective procedures of section 3615.

Certain factors have led the Committee to the conclusion that incarceration in a suitable facility is sufficiently different from incarceration in a penal institution to require these procedural safeguards. First, although regrettable, it is a fact that there is a stigma attached to the mentally ill which is different from that attached to criminals. Thus, a prisoner transferred to a mental health facility might possibly be described as "twice cursed."[56]

Second, there are numerous restrictions and routines in a mental health facility which differ significantly from those in a prison. Since these restrictions and routines are designed to aid and protect the mentally ill, persons who do not have need for such discipline should not be subjected to it.[57]

Most importantly, however, the Committee is concerned that a person mistakenly placed in a mental health facility might suffer severe emotional and psychological harm. As the Second Circuit, in a State prisoner transfer case, graphically put it:[58]

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[52] A section establishing a similar procedure applicable to a person convicted and awaiting sentence or imprisonment was included in S. 1437 as introduced (section 3614), but was deleted by the Committee. Its deletion is not intended to alter current law and practice.

[53] See 18 U.S.C. 4082.

[54] See subchapter C of chapter 38, especially section 3821(b).

[55] E.g., *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969), and cases cited therein.

[56] See generally Morris. *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Corrections of the State of New York*, 17 Buff. L. Rev. 651 (1968).

[57] See *Matthews* v. *Hardy*, 420 F.2d 607 (D.C. Cir. 1969), cert. denied, 397, U.S. 1010 (1970).

[58] *United States ex rel. Schuster* v. *Herold*, *supra* note 55 at 1078.

> * * * [W]e are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad but dangerously so. . . . [H]e will be exposed to physical, emotional, and general mental agony. Confined with those who are insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration. . . .

Accordingly, the Committee has concluded that a prisoner's transfer to a mental health facility or prison maintained for the criminally insane cannot be handled as a mere administrative matter. In view of the substantial deprivations, hardships, and indignities such a move may produce in a sane prisoner, judicial scrutiny is necessary to insure that the procedures preceding the transfer of a prisoner who does not agree that he should be transferred adequately safeguard the fundamental rights of the prisoner.

2. Present Federal Law

18 U.S.C. 4241 currently provides that a board of examiners must examine an inmate of a Federal penal institution who is alleged to be insane. The Board must report its findings to the Attorney General who may direct that the prisoner be removed to the United States hospital for defective delinquents.

18 U.S.C. 4242 states that an inmate of the United States hospital for defective delinquents whose sanity is restored prior to the expiration of his sentence may be retransferred to a penal institution.

3. Provisions of the Bill, as Reported

As noted, under section 3615 a prisoner who is serving a sentence in a Federal facility may not be transferred over his objections to a mental hospital without a court order. Section 3615(a) provides that the court for the district in which the defendant is imprisoned may hold a hearing on the present mental condition of a defendant serving a sentence of imprisonment. First, if a defendant objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for a hearing on the present mental condition of the defendant. A motion filed under this subsection stays the release of the defendant until the procedures contained in this section are completed.

After the motion is filed, the court must order a hearing to determine if there is reasonable cause to believe that the defendant may be presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

Section 3617(b) provides that after the court orders a hearing to determine the present mental condition of the defendant pursuant to this section, the court, in its discretion, may order that the defendant be examined by a qualified psychiatrist or a clinical psychologist. The defendant may request the court to designate an additional examiner selected by the defendant.[59] Section 3617(b) also sets forth time limits applicable to the examination. These are identical to those with respect to section 3611 and the discussion there should be consulted here.

Section 3617(c) sets forth the requirements of the report that is to be filed and section 3617(d) describes the hearing that is to be held. Under subsection (c), the examiner's report must include, in addition to the diagnosis and prognosis, the examiner's opinion as to whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility. Under subsection (d), the hearing is required to meet certain due process requirements.

Subsection (d) of section 3615 provides that if, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court then must commit the defendant to the custody of the Attorney General, who must hospitalize the defendant for treatment in a suitable facility. The phrase "suitable facility" is meant to include the psychiatric section of a prison. Thus a person who is committed under this section need not necessarily be transferred to another facility if the prison he is in has a suitable section for treatment.

The subsection also provides that the Attorney General shall hospitalize the defendant until the defendant is no longer in need of custody for care or treatment or until expiration of the term of imprisonment, whichever is earlier. If the defendant has not recovered from his mental illness before his sentence expires, procedures for commitment may be undertaken pursuant to section 3616. If, however, the defendant recovers before his sentence expires he is subject to release and reimprisonment pursuant to subsection (e) of this section. Accordingly, the Committee has taken precautions to insure that a defendant will not be wrongfully hospitalized or wrongfully detained in a suitable facility.

Under subsection (e), when the director of the facility in which the defendant is hospitalized determines that the defendant has recovered from his mental disease or defect to the extent that he is no longer in need of custody for care or treatment in such a facility, such director shall file a certificate so stating with the clerk of the committing court. If, at the time of the filing of the certificate, the sentence imposed upon the defendant has not expired, the court must order that the defendant be released from the facility and reimprisoned. Since, after the defendant is reimprisoned he will be in the custody of the Bureau of Prisons, the Bureau may designate the place of imprisonment of the defendant pursuant to subchapter C of chapter 38.

It should be noted that, while the procedures of section 3615 would not be applied to a prisoner who did not object to hospitalization, if such a prisoner objected to continued hospitalization at a later date, the procedures of this section would have to be followed if the Bureau of Prisons believed that continued hospitalization was necessary.

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[59] Payment for the examiner selected by the defendant may be made pursuant to chapter 34 of this title in appropriate cases.

SECTION 3616. HOSPITALIZATION OF A PERSON DUE FOR RELEASE BUT SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In General

Section 3615 covers those circumstances where State authorities will not institute civil commitment proceedings against a hospitalized defendant whose Federal sentence is about to expire or against whom all criminal charges have been dropped solely for reasons related to his mental condition and who is presently mentally ill. At such a point the responsibility for the care of insane persons is essentially a function of the States.[60] The Committee intends that this section be used only in those rare circumstances where a defendant has no permanent residence or there are no State authorities willing to accept the defendant for commitment. If criminal charges are dropped for reasons other than the mental condition of the defendant, such as insufficient evidence, but the defendant was mentally ill, the Attorney General would release the defendant to State authorities.

2. Present Federal Law

18 U.S.C. 4243 provides that the superintendent of the United States hospital for defective delinquents must notify the proper State authorities of the date of expiration of sentence of any prisoner who is still insane. The superintendent then must deliver the prisoner to these authorities.

18 U.S.C. 4247 sets out an alternate procedure to be followed where suitable arrangements are not available for the custody and care of a prisoner who is insane and whose sentence is about to expire. The Director of the Bureau of Prisons must certify, and the Attorney General must transmit, a certificate to the court for the district in which the prisoner is confined, that, in the judgment of the Director, and the Board of Examiners provided for in 18 U.S.C. 4241, the prisoner is presently insane. The court then must order that the prisoner be examined by two qualified psychiatrists, one designated by the court and one selected by the prisoner. After the examination a hearing must be held, and if the court determines that the prisoner is insane or mentally incompetent and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the court may commit the prisoner to the custody of the Attorney General.

18 U.S.C. 4248 provides that a commitment pursuant to 18 U.S.C. 4247 shall run until the sanity of the person is restored or until other suitable arrangements have been made with the State of residence of the prisoner. Whenever either of these events occur, the Attorney General must file a termination certificate with the committing court. In addition, it is provided that nothing in section 4248 precludes a prisoner committed under section 4247 from establishing his eligibility for release by a writ of habeas corpus.

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[60] See *Higgins* v. *United States*, 205 F.2d 650 (9th Cir. 1953).

3. Provisions of the Bill, as Reported

Subsection (a) of section 3616 places responsibility in the director of the facility in which a defendant is hospitalized and whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 3611(d), or against whom all charges have been dismissed for reasons related to the mental condition of the person, to determine preliminarily whether the defendant should be released. Whenever the director of the facility determines that the defendant is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, he must determine whether other suitable arrangements for the care and custody of the person are available. In this context, it is expected that he will notify the proper authorities in the State in which the defendant maintains a residence or in which he was tried to determine if the State will assume responsibility for the defendant. If the State determines that the defendant should be civilly committed, the director of the facility may transfer the defendant upon expiration of his sentence to the proper State authorities. In essence, the defendant is about to be released and because of his condition the State has instituted civil commitment procedures as it would against any other mentally ill citizen. On the other hand, if there is no State to which the defendant has sufficient ties, then the head of the facility must proceed pursuant to this section. In addition, if the State determines that the defendant is not in need of further hospitalization, the director of the facility may attempt commitment pursuant to this section since "suitable arrangements . . . are not available" in a State facility. Of course, any determination in a State proceeding is proper evidence at the hearing held under subsection (c) of this section.

If suitable arrangements for the custody and care of the defendant are not otherwise available, the director of the facility must transmit to the court for the district in which the defendant is confined a certificate stating that the defendant is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for the custody and care of the defendant are not otherwise available. The filing of the certificate stays the release of the defendant until completion of the procedures contained in this section. Upon receipt of the certificate, the court must order that a hearing be held to determine whether the defendant is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another.

Subsection (b) provides for psychiatric examination and for reports under sections 3617 (b) and (c), and subsection (c) provides for a hearing under section 3617(d). Under those provisions the person must receive a due process hearing and the examiner must report to the court his opinions as to diagnosis and prognosis for the person and as to whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another or serious damage to property of another.

Subsection (d) provides that if, after the hearing, the court finds by clear and convincing evidence that the defendant is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must commit the defendant to the custody of the Attorney General, who shall release the defendant to the appropriate official in the State of the person's domicile or in which he was tried, if such State will assume responsibility for his custody, care, and treatment. The Attorney General is directed to make all reasonable efforts to cause such a State to assume such responsibility. If, nevertheless, the State will not assume responsibility, the Attorney General must hospitalize the defendant for treatment in a suitable facility. The duration of the defendant's commitment is until (1) such a State will assume such responsibility or (2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another, whichever is earlier. The Attorney General is instructed under this subsection, moreover, to continue periodically to exert all reasonable efforts to cause a State to assume responsibility for the person's custody, care and treatment.

Under the provisions of subsection (e), if the director of the facility in which the person is hospitalized determines that he has recovered from the mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he must file a certificate to that effect with the clerk of the court that ordered the commitment, and the clerk must send a copy of the certificate to the person's counsel and to the attorney for the government. The court must then either release the person or, on motion of the attorney for the Government or on its own motion, hold a hearing to determine whether he should be released. The person must be released if the court finds, by a preponderance of the evidence, that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another. If the person does not meet the criteria for unconditional release but the court finds that the person has recovered from his mental disease or defect to such an extent that his conditional release under a prescribed regimen of medical care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be discharged under an appropriate prescribed regimen of medical care or treatment on the explicit condition that he comply with the prescribed regimen. The court at any time may, after a hearing, modify or eliminate the regimen of medical care or treatment employing the same criteria applicable to the original determination. These provisions are similar to those with respect to section 3613 dealing with persons acquitted by reason of insanity, and the discussion there should be consulted here.

Subsection (f) provides a procedure for dealing with the situation in which the released person fails to comply with the prescribed regimen of medical care or treatment. Under this procedure the director of the medical facility responsible for administering the regimen imposed under subsection (e) shall notify the Attorney General and the court having jurisdiction over the case of the failure to comply with the prescribed regimen. In a procedure similar to revocation of probation, upon notice by the medical director or other probable cause to believe the person has failed to comply with the regimen, the person may be arrested and, upon arrest, must be brought without unnecessary delay before the court having jurisdiction. The court must, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

Section 3617(e)(1), dealing with annual reports by the director of the facility concerning a defendant committed under this section, and section 3617(h), dealing with the continuing availability of habeas corpus relief, provide similar procedures to those provided in other sections of this subchapter.

Subsection (g) of section 3616 provides the procedure to be followed in the case of a person against whom all charges have been dropped for reasons unrelated to his mental condition, such as in a case where there is not enough evidence to prove guilt of an offense, but who is, in the opinion of the director of the facility in which he has been hospitalized, presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. Since the Federal Government would not have enough contacts with the person to justify continued Federal hospitalization of a person if there were no Federal offense involved to justify such hospitalization, this subsection requires that the Attorney General, upon receiving a certificate from the director of the facility in which the person was hospitalized that the person needed continued hospitalization, notify the appropriate official of the State in which the person was domiciled or in which he was tried that he wished to place the person in that State's custody. If the Attorney General received notice that neither State would take responsibility, he would have to release the defendant. In any event, he could not hold the person longer than 10 days after the certification by the director of the facility in which the person was hospitalized.

SECTION 3617. GENERAL PROVISIONS FOR SUBCHAPTER B

This section contains, in subsection (a), the definition of insanity as a mental disease or defect as a result of which a person lacked the state of mind required as an element of the offense charged; the definition of "rehabilitation program" as educational training to assist the defendant in understanding society and the magnitude of his offense, vocational training, drug, alcohol, and other treatment programs to assist in overcoming psychological or physical dependence, and organized sports and recreation programs; and the definition of "suitable facility" as a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

Section 3617 also contains the general procedures for psychiatric examinations and reports (subsections (b) and (c)), rights at hearings (subsection (d)), reports of mental facilities (subsection (e)(1)), admissibility of defendant's statement made during a mental examination (subsection (g)), and rights to habeas corpus (subsection (h)). These provisions are discussed in detail in the discussion of section 3611 through 3616.

Subsection (e)(2) requires the director of the facility in which a person is hospitalized under section 3611, 3613, 3614, 3615, or 3616 to inform the person of available rehabilitation programs, as defined in subsection (a).

Subsection (f) of this section provides for a new procedure under which the court, on written request of defense counsel, may in its discretion order a videotape record to be made of the defendant's testimony or interview upon which the periodic report of the director of the suitable facility pursuant to subsection (e)(1) is based. If the court orders a videotape record to be prepared, such record shall be submitted to the court along with the periodic report. The purpose of this subsection is, by allowing a videotape record to be created, to insure the quality of mental examinations of persons hospitalized under this subchapter, and to furnish courts with a better basis upon which to make ultimate decisions as to the mental competency, sanity, and dangerousness of such persons.

Subsection (i) supplements subsection (h) with respect to habeas corpus, by providing that regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to subsection (e) of sections 3611, 3613, 3614, 3615, or 3616, counsel for the person or his legal guardian may file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility. A copy of the motion shall be sent to the director of the facility and the attorney for the government. Motions may not be filed within 180 days of a court determination that the person should continue to be hospitalized.

Finally, this section, in subsection (j), authorizes the Attorney General to contract for non-Federal facilities in order to hospitalize for treatment persons committed to his custody pursuant to this subchapter, authorizes him to apply for civil commitment to the States for a person in his custody pursuant to section 3613 or 3616, directs him to consider the availability of appropriate rehabilitation programs before deciding in which facility to place a person under section 3611, 3613, 3614, 3615, or 3616, and directs him to consult with the Secretary of Health and Human Services on the implementation of the subchapter and on establishment of standards for facilities for implementing the subchapter. It is intended that the Attorney General will make the application for State commitment unless there is clear reason not to do so in a particular case.[62]

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[62] This general provisions section in S. 1437 as passed by the Senate in the 95th Congress contained in subsection (j) a provision addressing the problem of use of psycho-Surgery, electric shock treatment, and drug treatment applicable to persons under this subchapter. In the reported bill these provisions have been moved to the Public Health Service Act in the conforming amendments relating to title 42 of the United States Code (section 611 of the bill).

CHAPTER 37.—PRETRIAL AND TRIAL PROCEDURE, EVIDENCE, AND APPELLATE REVIEW

This chapter consists of three subchapters. Subchapter A concerns the method for establishment of the rules governing pretrial and trial procedure in Federal criminal cases. Subchapter B sets forth the method of establishing the rules governing the admissibility of evidence in Federal criminal cases. In addition to authorizing the Supreme Court to prescribe amendments to the Federal Rules of Evidence, subchapter B contains specific provisions concerning the admissibility of confessions, the admissibility of eyewitness testimony, and the admissibility of evidence in sentencing proceedings. Subchapter C establishes the method for providing the rules governing appellate review and, in addition, sets forth specific appellate review procedures. In addition to the normal appellate review of legal issues, subchapter C, for the first time, provides for appellate review of certain sentences.

SUBCHAPTER A. PRETRIAL AND TRIAL PROCEDURE

(Sections 3701–3702)

This subchapter outlines the statutory basis for the Supreme Court's rulemaking power in regard to pretrial and trial procedure.

SECTION 3701. PRETRIAL AND TRIAL PROCEDURE IN GENERAL

Section 3701 is introductory only. It merely sets forth the sources for rules governing pretrial and trial procedure in criminal cases in the district courts of the United States and before United States magistrates. Such rules are found in the provisions of title 18, the Federal Rules of Criminal Procedure, and such other rules as the Supreme Court may prescribe.

SECTION 3702. RULEMAKING AUTHORITY OF SUPREME COURT FOR RULES OF CRIMINAL PROCEDURE

This section is based upon 18 U.S.C. 3771. Subsection (a) gives the Supreme Court authority to prescribe amendments to the Federal Rules of Criminal Procedure and otherwise to prescribe rules of pleading, practice, and procedure with respect to proceedings prior to, including, and relating to the entry of judgment in criminal cases in the district courts of the United States or before United States magistrates. This section also provides, as does existing law, that any provision of law that is in conflict with a rule adopted pursuant to the section shall be of no further effect after the rule takes effect.

Subsection (b) provides that the Chief Justice shall report the rules prescribed under the authority of this section to the Congress at or after the beginning of a regular session, but not later than the first day of May, and that the rules shall take effect one hundred and eighty days thereafter, unless a later effective date has been set by the Court. The Court is also authorized to fix the extent to which the rules shall, upon taking effect, apply to pending proceedings. Under existing law, rules take effect ninety days after they have been reported to the Congress. In the opinion of the Committee, a ninety-day period does not allow sufficient time for Congress to review the rules; consequently, the time has been enlarged to one hundred and eighty days. In addition, Congress' power by Act of Congress to enlarge the effective date of the rules beyond the one hundred eighty day limit as well as to disapprove or modify proposed rules through the usual legislative process is expressly recognized.

SUBCHAPTER B.—EVIDENCE

(Sections 3711–3715)

This subchapter sets forth the statutory basis for the Supreme Court's rulemaking power as to evidentiary rules and carries forward from current law several specific statutes dealing with evidentiary matters.

SECTION 3711. EVIDENCE IN GENERAL

This section is introductory only. It merely sets forth the source for rules concerning the introduction, admission, and use of evidence in criminal cases in the district courts of the United States and before United States magistrates. Such rules are found in the provisions of title 18 and the Federal Rules of Evidence.

SECTION 3712. RULEMAKING AUTHORITY OF SUPREME COURT FOR RULES OF EVIDENCE

This section parallels sections 3702, concerning rules of pretrial and trial procedure, and section 3722, concerning rules of appellate procedure, and, like the enactment in the 93d Congress,[1] it grants the Supreme Court authority to prescribe amendments to the Federal Rules of Evidence. It further provides that any provision of law in conflict with an amendment prescribed pursuant to this section shall be of no further force or effect after such amendment has taken effect.

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[1] P.L. 93-595.

Subsection (b) provides that the Chief Justice shall report the rules prescribed under the authority of this section to the Congress at or after the beginning of a regular session, but not later than the first day of May, and that the rules shall take effect one hundred and eighty days thereafter unless a later effective date has been set by the court. If, however, either House of Congress within the one hundred and eighty day period by resolution disapproves or postpones any amendment so reported, then such an amendment will not take effect. Also, if any reported amendment creates, abolishes, or modifies a privilege, such an amendment must be approved by act of Congress before it takes effect. The Supreme Court may also prescribe the extent to which the proposed rules shall apply to proceedings then pending.

SECTION 3713. ADMISSIBILITY OF CONFESSIONS

This section, except for minor word changes, carries forward the provisions of 18 U.S.C. 3501. Subsection (a) provides that the test to determine whether a confession is admissible in evidence in a Federal criminal case is whether the confession was made voluntarily.[2] To make it clear that the provision is intended to make a voluntary confession admissible in evidence to the maximum extent permitted under the Constitution, the somewhat self-evident phrase "unless otherwise required by the Constitution" is used as a preamble to subsection (a).

Subsection (b) sets out the procedure to determine the issue of the voluntariness of the confession. The judge is to hold a hearing out of the presence of the jury to determine the issue. If he determines that the confession was made voluntarily,[3] he is to admit the confession in evidence and is to permit the jury to hear relevant evidence on the issue of voluntariness. He is also to instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. Where the defendant, however, makes no issue as to the voluntariness of his confession the trial judge is not required to instruct the jury as to the weight to be given to the confession.[4]

Subsection (c) provides the factors to be taken into consideration in determining the issue of voluntariness. These factors include: (1) the amount of time that elapsed between the arrest of the person and his initial appearance before a judicial officer as required by Rule 5 of the Federal Rules of Criminal Procedure if the confession was made after arrest and before such appearance; (2) whether the person knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession; (3) whether the person was advised or knew that he was not required to make a statement and that the statement could be used against him; (4) whether the person had been advised prior to questioning of his right to assistance of counsel when questioned and when making the confession; and (5) whether the person was without assistance of counsel when questioned and when making the confession. This subsection specifically provides, however, that the presence or absence of any one or more of the listed factors need not be conclusive as to the voluntariness of the confession. The validity of this provision was sustained against a claim that it conflicted with the holding in *Miranda* v. *Arizona.*[5]

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[2] For a detailed discussion of the definition of "voluntarily," see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223–226 (1973).

[3] A preponderance of the evidence standard is used to determine whether the confession was made voluntarily, as under present law. See *United States* v. *Cox*, 487 F.2d 634 (5th Cir. 1973). The constitutionality of such a standard was upheld in *Lego* v. *Twomey*, 404 U.S. 477, 486 (1972).

[4] *United States* v. *Goss*, 484 F.2d 434 (6th Cir. 1973).

Subsection (d) provides that a confession made between the time of arrest or other official detention and the time of the initial appearance before a judicial officer required by Rule 5 of the Federal Rules of Criminal Procedure shall not be considered inadmissible solely because of delay in bringing the person before such judicial officer if: the judicial officer finds that the confession was made voluntarily; the weight to be given the confession is left to the jury; and the confession was made or given by the person within six hours immediately following arrest or other official detention, or within such additional time as is found by the judge to be reasonable in view of the distance that was required to be traveled to the nearest available judicial officer and in view of the means of transportation that was available. The intent of this provision is to limit somewhat the discretion of trial judges under subsection (b). In other words, if a confession was made within six hours of arrest, a judge cannot hold that the confession was made involuntarily on the basis of delay between arrest and the person's initial appearance before a magistrate.[6] Furthermore, while a confession made within six hours of arrest, absent some showing of involuntariness, is admissible, this section does not automatically preclude admissibility if the delay was longer.[7] This is only a factor which is to be considered on the issue of whether the confession was made voluntarily.

It should be noted that in subsection (d) the term "official detention" is substituted for the words "other detention in the custody of any law enforcement officer or law enforcement agency." The term "official detention" is defined in section 111 and such definition is coextensive with the current law phrase. Detention by State authorities would come within the definition of "official detention."

Subsection (e) makes it clear that this section does not apply in those cases where a confession was made voluntarily without interrogation—the so-called "spontaneous" confession—or was made when the person was not under arrest or held in official detention.

Subsection (f) sets forth the definition of the term "confession." A "confession" is any self-incriminating oral or written statement. It is intended to encompass all forms of self-incriminating statements and confessions.

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[5] 384 U.S. 436 (1966); *United States* v. *Crocker,* 510 F.2d 1129 (10th Cir. 1975). See also, tending to support the decision in *Crocker,* which the Committee endorses, *Michigan* v. *Tucker,* 417 U.S. 433 (1974).

[6] See *United States* v. *Halbert,* 436 F.2d 1226 (9th Cir. 1970).

[7] See *United States* v. *Shoemaker,* 542 F.2d 561 (10th Cir. 1976); *Government of Virgin Islands* v. *Gereau,* 502 F.2d 914 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States* v. *Marrero,* 450 F.2d 373 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972).

SECTION 3714. ADMISSIBILITY OF EYEWITNESS TESTIMONY

This section, except for minor changes, carries forward the provisions of 18 U.S.C. 3502. That statute provides that the testimony of a witness that he saw the accused commit or participate in the commission of the crime for which he is being tried shall be admissible in evidence in a criminal prosecution in any court established under Article III of the United States Constitution. Although the principal purpose of the legislation was apparently to generate a reexamination by the Supreme Court of its decision in *United States* v. *Wade,*[8] with respect to lineups, and *Simmons* v. *United States,*[9] with respect to identification testimony based upon showing of photographs, the statute has not proven effective in this regard.[10] However, the statute retains some utility in precluding courts from invoking their supervisory power to develop limitations on the admissibility of eyewitness testimony beyond constitutional or specific statutory requirements.[11] As with the previous section, the words "unless otherwise required by the Constitution" have been added as a prefatory phrase to make clear the intent to render eyewitness testimony admissible only to the extent permitted under the Constitution, but to the maximum extent so permitted.

SECTION 3715. ADMISSIBILITY OF EVIDENCE IN SENTENCING PROCEEDINGS

This section carries forward, in substance, the provisions of 18 U.S.C. 3577. It provides that a Federal judge, when determining an appropriate sentence, may consider any relevant information concerning the history, characteristics, and conduct of a defendant regardless of the admissibility of the information under the Federal Rules of Evidence. If, however, the receipt and consideration of such information is precluded by a section of this title relating to sentencing, or by any other Federal statute, it, of course, cannot be considered.

This section recognizes the importance of having as much information before the judge as possible when he is considering an appropriate sentence to impose.[12] Thus, under this section, it would be perfectly proper for a judge, when imposing sentence, to consider that a defendant is under indictment for other offenses.[13] However, reliance on a prior, void conviction—as opposed to reliance on independent information concerning prior criminal conduct (even conduct that was the subject of a void conviction)—would not be permissible.[14] In addition, the court is free to rely on hearsay allegations contained in a presentence report[15] and may also consider reliable but illegally obtained evidence.[16]

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[8] 388 U.S. 218 (1967).

[9] 390 U.S. 377 (1968).

[10] See *United States* v. *King,* 321 F. Supp. 614 (W. D. Tex. 1970).

[11] See *United States* v. *Anderson,* 352 F. Supp. 33, 37 n. 10 (D.D.C. 1972), aff'd, 490 F.2d 785 (D.C. Cir. 1974).

[12] See *Williams* v. *New York,* 337 U.S.C. 241 (1949); *United States* v. *Grayson,* 438 U.S. 41 (1978).

[13] See *United States* v. *Metz,* 470 F.2d 1140 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973).

[14] See *United States* v. *Tucker,* 404 U.S. 443 (1972).

SUBCHAPTER C.—APPELLATE REVIEW

(Sections 3721–3725)

This subchapter sets out the basic rules for appellate review of lower court decisions under the new Code. It includes one of the major innovations of the Code—a systematic approach to the troublesome issue of disparity in sentencing by making available a right to appellate review of a sentence that departs from the sentencing guideline applied, and a right to seek discretionary review of whether a sentence is based upon incorrect application of the guidelines.

SECTION 3721. APPELLATE REVIEW IN GENERAL

This section is introductory only. It provides that appellate review by the courts of appeals and the Supreme Court of decisions, judgments, and orders entered by the district courts in criminal cases are to be governed by the provisions of this title and by the Federal Rules of Appellate Procedure.

SECTION 3722. RULEMAKING AUTHORITY OF THE SUPREME COURT FOR RULES OF APPELLATE PROCEDURE

1. Present Federal Law

This section sets forth the authority of the Supreme Court to promulgate rules of appellate procedure in criminal cases. While current law contains no general provision concerning rulemaking for appellate cases, the Congress first conferred such authority upon the Supreme Court of the United States by the Act of February 24, 1933,[1] one of the principal purposes of which was to eliminate delays in taking appeals in criminal cases.[2] The first Criminal Appeals Rules adopted under the Act were 13 rules effective September 1, 1934.[3] Currently in effect (since July 1, 1968) are the Federal Rules of Appellate Procedure, which govern in both criminal and civil cases. These rules were promulgated by the Supreme Court under the authority of 28 U.S.C. 2072 and 2076 and 18 U.S.C. 3771 and 3772.

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[15] See *United States* v. *Garcia*, 544 F.2d 681 (3d Cir. 1976); see also *United States* v. *Burton*, 631 F.2d 280 (4th Cir. 1980).

[16] See *United States* v. *Lee*, 540 F.2d 1205 (4th Cir.), cert. denied, 429 U.S. 894 (1976); *United States* v. *Schipani*, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

[1] 47 Stat. 904 (now 18 U.S.C. 3772).

[2] H. Rept. No. 2047, 72d Cong., 2d Sess. (1933); see also *United States* v. *Robinson*, 361 U.S. 220, 226 (1960).

[3] 292 U.S. 661–670 (1934).

2. Provisions of the Bill, as Reported

Section 3722 is based upon portions of existing 18 U.S.C. 3771 and 3772. Subsection (a) clarifies the authority of the Supreme Court to prescribe amendments to the Federal Rules of Appellate Procedure and otherwise to prescribe rules of pleading, practice, and procedure in appeals from decisions, judgments, and orders entered in criminal cases in the Federal district courts. The section provides (as does existing law) that any provision of law that is in conflict with a rule adopted pursuant to the section shall be of no further effect after the rule takes effect.

Subsection (b) provides that the Chief Justice is to report the rules prescribed under the authority of this section to the Congress at or after the beginning of a regular session, but not later than the first day of May, and that rules are to take effect one hundred and eighty days thereafter, unless a later effective date has been set by the Court. The Court is also authorized to fix the extent to which the rules shall, upon taking effect, apply to pending proceedings. Under existing law, the rules take effect ninety days after they have been reported in Congress. In the opinion of the Committee, a ninety-day period does not allow sufficient time for Congress to review the rules; consequently, the time has been increased to one hundred and eighty days.

A parallel provision for civil cases has been added by section 521 of the reported bill as section 2077 of title 28.

SECTION 3723. APPEAL BY A DEFENDANT

1. Present Federal law

The right of defendants to appellate review in Federal criminal cases is of relatively recent origin.[4] There was no jurisdictional provision for appeal or writ of error in Federal criminal cases prior to enactments on the subject in 1889 and 1891.[5] It is only to the extent that appellate jurisdiction is specifically conferred by statute upon specific courts for given types of cases that Federal appellate jurisdiction exists.[6]

At present, the basis for Federal appellate jurisdiction in criminal (and civil) cases is 28 U.S.C. 1291. Present Federal law has made appeal from a district court's judgment of conviction a matter of right, and the defendant need not petition the court of appeals to allow him to bring his case before the court.[7]

2. Provisions of the Bill, as Reported

This section continues existing law in most respects. Subsection (a) provides that a defendant may, except as provided in subsection (b), appeal to a court of appeals from a final decision, judgment, or order of a district court in a Federal criminal case. Although "judgment" and "order" have been added to the lone term "decision" in current law so as to conform this section to section 3724 (carrying forward 18 U.S.C. 3731) which uses all three words, no substantive expansion in scope is intended; the significant operative word of limitation remains "final", precluding appeals from interlocutory decisions.

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[4] For a brief history of Federal laws on appellate jurisdiction, see *Carroll* v. *United States*, 354 U.S. 394 (1957). See also Frankfurter & Landis. *The Business of the Supreme Court* (1928).

[5] See *Carroll* v. *United States, supra* note 4.

[6] *United States* v. *More*, 7 U.S. (3 Cranch) 159 (1805); *United States* v. *Sanges*, 144 U.S. 810 (1892).

[7] See *Coppedge* v. *United States*, 369 U.S. 438, 441–442 (1962).

Subsection (b) is new. It permits a defendant to file a petition for leave to appeal an order under Rule 35(b)(2). Rule 35(b)(2) of the Federal Rules of Criminal Procedure is a new provision which permits correction of a sentence that was imposed under an erroneous application of the sentencing guidelines. By requiring leave to appeal such an order, the Committee has provided an avenue for correction of errors, while preventing the excessive caseload that would result if every defendant could, after a trial or after a guilty plea entered without an agreement, take an appeal of right without making a preliminary showing that the appeal had merit. Section 128 of the reported bill amends 28 U.S.C. 1291, the provision concerning the courts of appeals' jurisdiction of appeals from final decisions of the district courts, to make clear that the courts of appeals have jurisdiction to hear appeals from decisions pursuant to Rule 35(b)(2) if the court grants a petitioner leave to appeal such a decision. The discussion of section 3725, *infra*, should be consulted here insofar as it deals with the issue on an appeal under section 3723(b).

SECTION 3724. APPEAL BY THE GOVERNMENT

1. In General

Section 3724 sets forth the limited circumstances under which the government may appeal in a Federal criminal case, as a matter of right, to a United States Court of Appeals, and one instance in which it may petition for leave to appeal, parallel to section 3723(b). Subsections (a), (b), (f), and (g) are patterned closely upon 18 U.S.C. 3731, but expand it in minor respects to achieve a more rational fulfillment of the Congressional intent. The remaining subsections are taken from other special appeal statutes or implement the adoption of new provisions elsewhere in the Code.

2. Provisions of the Bill, as Reported

Under subsection (a) of section 3724, the government is authorized to appeal to a United States court of appeals from a decision, judgment, or order of a district court in a criminal case, dismissing an indictment or information, terminating a prosecution in favor of a defendant, permitting withdrawal of a plea of guilty or nolo contendere, or granting a new trial after verdict of judgment, as to one or more counts,[8] unless further prosecution of the case would be prohibited under the double jeopardy clause of the Constitution. This primarily continues provisions of 18 U.S.C. 3731.

The phrase "terminating a prosecution in favor of a defendant" (as to one or more counts) has been added in order to insure that the section receives its currently acknowledged scope of permitting governmental appeals in all cases save those where the Constitution prohibits mental appeals in all cases save those where the Constitution prohibits the appeal.[9] The added phrase makes clear, for example, that the granting of a motion in arrest of judgment may be an appealable type of order, and that the section is not to be construed as limited to orders styled in the form of a dismissal of the indictment or information. This codifies current law.[10]

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[8] See, as to the appropriately broad construction to be accorded the phrase "as to one or more counts", *United States* v. *Margiotta*, F.2d (2d Cir. 1981), and cases therein cited.

[9] See *United States* v. *Wilson*, 420 U.S. 332 (1975); *Serfass* v. *United States*, 420 U.S. 377 (1975).

The committee has included in the statute for the first time the ability to seek review of a decision, judgment, or order permitting withdrawal of a plea of guilty or nolo contendere or granting a motion for a new trial after verdict or judgment. Since, in either situation, the result of a successful appeal would be the reinstatement of the conviction, it is clear that there is no constitutional problem in so providing.[11] Nor, although present law contains no provision for a government appeal in these circumstances,[12] is there any valid justification for not extending the right to appeal to them. The consequence of an erroneous, uncorrected decision on the law by a district court permitting withdrawal of a guilty plea or granting a motion for a new trial after verdict is that the government must retry the individual.[13] Not only is such a process costly and needlessly consumptive of precious judicial resources, but there is no guarantee that the second trial will produce a guilty verdict since, by the passage of time, crucial witnesses may become unavailable. Since 18 U.S.C. 3731 currently reflects a Congressional determination to permit a government appeal in all similar circumstances, such as the dismissal of an indictment after verdict or the granting of a motion in arrest of judgment, no sound policy reason exists for not affording the same right in the instances referred to. Because of the prevailing requirement for prior authorization by the Solicitor General of all government appeals,[14] the Committee does not anticipate that the modest enlargement of the statute proposed here will give rise to problems. On the contrary, as a result of the careful screening process within the Solicitor General's Office and the ensuing high incidence of successful appeals under the government appeals statute today, it is probable that permitting appeals from unwarranted district court rulings requiring retrials will produce a net saving of judicial time and resources.

Subsection (b) permits the government to appeal to a court of appeals from a decision, judgment, or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, if the decision or order was not made during the interval between the time jeopardy attached and the return of the verdict or finding, and if the government attorney certifies to the district court that the evidence is a substantial proof of a fact material to the case. This continues the provisions of 18 U.S.C. 3731.[15]

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[10] See *United States* v. *Esposito*, 492 F.2d 6 (7th Cir. 1973), cert. denied, 414 U.S. 1135 (1974).

[11] *United States* v. *Wilson, supra* note 9.

[12] See, e.g. *United States* v. *Alberti*, 568 F.2d 617 (2d Cir. 1977); *United States* v. *Taylor*, 544 F.2d 347 (8th Cir. 1976). Of course, the extraordinary writ of mandamus may be available but only in a situation in which a district judge has acted wholly arbitrarily, not where he has "merely" acted erroneously or unlawfully.

[13] See *In re United States*, 598 F.2d 233 (D.C. Cir. 1979).

[14] 28 C.F.R. § 0.20(b).

[15] The "not made" clause has been slightly modified to make clear that the government may appeal from an order granting a motion to suppress or exclude evidence entered after a finding of guilt. See *United States* v. *Beck*, 483 F.2d 203 (3d Cir. 1973), cert. denied, 414 U.S. 1132 (1974). The Committee determined to continue the government's inability to appeal when a suppression motion is granted during the trial, because of the interruption thereby occasioned; however, the

Subsection (c) provides that the government may appeal to a court of appeals from a decision or order of a district court denying an application for an order authorizing or approving the interception of a private oral communication, provided the attorney for the government certifies to the district court that the appeal is not taken for purposes of delay. This reenacts the authority contained in existing 18 U.S.C. 2518(10)(b).

Subsection (d) permits the government to appeal to a court of appeals from a decision or order entered by a district court, granting the pretrial release of a person charged with an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release. This provision is connected, in terms of overall policy, to the series of amendments proposed to be made to the bail laws (sections 3501 *et seq.*) and is designed to create a new right in the government—comparable to that now enjoyed by defendants to appeal orders denying bail—to seek appellate review of orders releasing defendants charged with an offense or denying a motion to revoke or modify the conditions of an order granting release. The Committee believes that there is no sound reason not to afford such a right, and that its exercise will facilitate the public safety by enabling the appellate court to order the detention of a dangerous person or to tighten the conditions under which he has been released.

Subsection (e) is parallel to section 3723(b), which applies to defendants. It permits the filing of a petition for leave to appeal an order granting or denying a motion under Rule 35(b)(2). The discussion of section 3725 contains material relating to the issue on a section 3724(d) appeal and should be consulted here.

Subsection (f) requires that government appeals be diligently prosecuted.

Subsection (g) states that the provisions of this section shall be liberally construed to effectuate their purposes. This carries forward the final paragraph of 18 U.S.C. 3731.[16]

SECTION 3725. REVIEW OF A SENTENCE

1. In General

This section establishes a limited practice of appellate review of sentences in the Federal criminal justice system. The Committee is especially indebted to the work of former Senator Roman L. Hruska for the contents of this section. He has led a long and steadfast effort to introduce appellate review of sentencing—an effort stretching back over several Congresses.[17]

Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be dis-

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Committee intends that an appeal be permitted in the situation in which a defendant purposely waits until after the onset of jeopardy to move for suppression of evidence. See *United States* v. *Moon*, 491 F.2d 1047 (5th Cir. 1974); *Serfass* v. *United States, supra* note 9. The result that a defendant should not be able, through deliberate bypass, to deprive the government of its right to appeal is consistent with the congressional judgment embodied in Rule 12(e). F.R.Crim.P. (effective December 1, 1975), which requires Federal courts to determine motions prior to trial if to defer the determination would adversely affect a party's right to appeal. See also *United States* v. *Kehoe*, 516 F.2d 78 (5th Cir. 1975), holding that, in comparable circumstances, the government would not be precluded from seeking redress from the granting of a dilatory motive to dismiss the indictment. Cf. also *Lee* v. *United States*, 432 U.S. 23 (1977).

[16] See *United States* v. *Ablerti*, supra note 12.

[17] See Hearings, pp. 1568–1574.

turbed.[18] The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. Section 3725 accommodates all of those considerations by making appellate review of sentences available equally to the defendant and the government, confining it to cases in which the sentences imposed depart from established norms, and limiting the scope of review to the question whether the sentence is "unreasonable."

It is an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of unreasonable sentences.[19] The reason given for unavailability of appellate review of sentences under current law is the fact that sentencing judges have traditionally had almost absolute discretion to impose any sentence legally available in a particular case. In doing so, the judges have not been required to state reasons for their decisions, and rarely have done so. Thus, even if appellate review of sentences were available under current law, the courts of appeals would have difficulty assessing the reasonableness of a sentencing decision since they would be unable to tell in many cases why the sentences in two apparently similar cases were different.

The systematized sentencing system introduced by part III of the Code, including the use of sentencing guidelines promulgated by a newly created Sentencing Commission, as provided in chapter 58 of title 28, United States Code, should do much to eliminate unwarranted disparities in Federal sentences. Yet each offender stands before a court as an individual, different in some way from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.

It is expected that most sentences will fall within the ranges recommended in the sentencing guidelines. Only if a judge believes that there are offense or offender characteristics, not adequately considered by the Sentencing Commission, that justify a sentence different from that provided in the applicable guideline should the judge deviate from the guideline's recommendation.[20] If the sentence differs from the guideline sentence, the judge is required to state specific reasons for the sentence outside the guideline. Because sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient.

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[18] An exception is contempt. See *Green* v. *United States*, 356 U.S. 165 (1958); *United States* v. *Bukowski*, 435 F. 2d 1094 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971). Another exception was enacted in title X of the Organized Crime Control Act of 1970, P.L. 91-452 (Oct. 15, 1970), and codified in present 18 U.S.C. 3576.

[19] See Hearings, pp. 5649–5653 (statement of the Hon. Marvin E. Frankel.)

[20] See *United States* v. *Dorszynski*, 418 U.S. 424 (1974) (relating to the Youth Corrections Act).

Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines.

Although some persons have challenged the wisdom and validity of permitting an appeal of a sentence by the government, the Committee is convinced that neither objection has merit.

It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.[21] This has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the foundation for the Code's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater uniformity might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

With respect to validity, it is clear that a system, such as is contained in the reported bill, in which sentence increase is possible as a consequence of sentence review initiated by the government is not objectionable on constitutional grounds. Title X of the Organized Crime Control Act of 1970 includes a provision (18 U.S.C. 3576) permitting a sentence imposed under the dangerous special offender provision to be increased upon appeal by the United States.[22] The Supreme Court in *United States* v. *DiFrancesco*[23] held that the authority contained in that statute for government appeal of sentence did not violate the double jeopardy clause. According to the Court:

> The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sen-

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[21] This would be the case even if the appellate court were authorized to augment (as well as diminish) the sentence, since it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court so inadequate as to warrant enhancement. Such a system, moreover, places an undesirable strain on the defendant's right to seek sentence review. For these reasons, *inter alia*, such a scheme was rejected by the Committee.

[22] 21 U.S.C. 849 contains a similar provision as to dangerous special drug offenders.

[23] 449 U.S. 117 (1980). The Committee does not view the decision in *Bullington* v. *Missouri*, - U.S.- (49 U.S.L.W. 4481 (May 5, 1981)), as undermining the validity of the sentence review procedures set forth in section 3725.

> tence. We have noted . . . the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U.S.C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.[24]

The Court also held that there was no double jeopardy problem with the fact that the defendant's sentence could be increased on successful government appeal of the sentence, making clear that the bar against double punishments applied to a total punishment in excess of the statutory maximum for the offense, not to an increase in the sentence within statutory right.[25] Finally, the Court noted the growing criticism of arbitrary sentencing practices, and indicated that "Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing."[26]

2. Provisions of the Bill, as Reported

Section 3725 is concerned only with sentences imposed for felonies and Class A misdemeanors, and provides no appellate review of sentences imposed in other misdemeanor cases. Excluded also from the provisions of this section are a sentence provided for in a plea agreement and a sentence which is within the sentencing guideline promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and determined by the sentencing judge to be applicable to the case. Such sentences cannot be reviewed for propriety of the sentence; they can, however, be reviewed for errors in law to the extent permitted by current law, and for errors in the application of the guidelines, pursuant to Rule 35 of the Federal Rules of Criminal Procedure and sections 3723(b) and 3724(d) of the Code. The issue presented when a motion is made under Rule 35 (b)(2) and reviewed under section 3723(b) or 3724(d) is whether the sentencing judge erred in determining that a particular guideline, rather than another one, applied to a particular case. That issue can be raised and reviewed only under that rule and those sections, and not under section 3725.

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[24] *United States* v. *DiFrancesco, supra* note 23 at 136-137.

[25] *Id.* at 138-139, distinguishing *Ex parte Lange*, 18 Wall. 163 (1874).

[26] *Id.* at 142-143, citing M. Frankel, *Criminal Sentences: Law Without Order* (1973) and P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System* (1977).

The sentence review process under section 3725 begins under subsections (a) and (b) with the filing of notice of appeal of sentence with the district court. Both a defendant and the government may obtain review, but each will do so under different criteria. A defendant may appeal a sentence only if the fine or term of imprisonment or term of supervised release exceeds the maximum provided in the sentencing guideline determined by the sentencing judge to be applicable, or if the sentence includes a condition of probation or supervised release under section 2103 (b)(6) or (b)(11) that is more limiting than the maximum provided in the sentencing guideline determined by the sentencing judge to be applicable, or if the sentence includes an order of notice under section 2005 or an order of restitution under section 2006. The government may petition for review of a sentence with the personal approval of the Attorney General or the Solicitor General[27] if the fine or term of imprisonment or term of supervised release is less than the minimum sentence established by that guideline, or if the sentence includes a condition of probation or supervised release under section 2103 (b)(6) or (b)(11) that is less limiting than the minimum provided in the sentencing guideline determined by the sentencing judge to be applicable.

The limitations on both defendant and government appeal based upon the size of the sentence imposed are further restrictions on the use of appellate review of sentences in order to avoid unnecessary appeals. Clearly, sentences at the bottom range are less likely to be abusive to defendants. The same applies to the government when sentences approach the upper range of sentences available. The guidelines provide a practical basis for distinguishing the cases where review is most needed from those where appeal would most likely be frivolous.

Both sections 3725(a) and 3725(b) refer to the sentence being appealed as an "otherwise final sentence". This language is in accord with the provisions of sections 2102(b), 2202(c), and 2302(b) regarding reviewability of sentences. Those sections make clear that a sentence to a fine, to a term of imprisonment, or to a term of probation is final except to the extent that it may be modified or corrected through subsequent court action. The Committee intends that a sentence be subject to modification through the appellate process, although it is final for other purposes.[28]

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[27] The Committee has added the requirement that the Attorney General or Solicitor General personally approve a government appeal of sentence in order to assure that such appeals are not routinely filed for every sentence below the guidelines.

[28] See *United States* v. *DiFrancesco, supra* note 23 at 136–137.

Under subsection (c), the clerk of the court that imposed the sentence shall certify to the court of appeals that portion of the record in the case that is designated as pertinent by either of the parties, the presentence report, and information submitted during the sentencing proceeding, including the court's statement of reasons as called for by section 2003(b).

Under subsection (d), upon review of the record, the court of appeals is to determine whether the sentence is unreasonable, having regard for: (1) the factors to be considered in imposing a sentence, as set forth in part III of this title, and (2) the reasons for the sentence stated by the sentencing court.

Under subsection (e), if the court of appeals finds that the sentence imposed is not unreasonable, it is to affirm the sentence.

If the court determines that the sentence imposed is unreasonable and too high, and the appeal was filed by the defendant, it is to set aside the sentence and either impose a lesser sentence, remand for imposition of a lesser sentence, or remand for further sentencing proceedings.

If the court determines that the sentence imposed is unreasonable and too low, and the appeal was filed by the government, the court is to set aside the sentence and either impose a greater sentence, remand for imposition of a greater sentence, or remand for further sentencing proceedings. It should be noted that a sentence cannot be increased upon a section 3725 appeal by the defendant.

The relationship between an appeal under section 3725, and a petition for leave to appeal under section 3723(b) or 3724(d), may be clarified by this example:

Assume that in sentencing a defendant for a Class E felony, a judge determines that a particular guideline applies to the case, and that guideline provides for imprisonment for a determinate term between 18 and 22 months. The judge concludes, however, that because of circumstances in the case that are not adequately reflected in the guidelines, imprisonment for 15 months is the most appropriate sentence. Because the judge intended to sentence below the guidelines, the government could raise any sentencing issues it had pursuant to section 3725, even if the government thought the correct guideline specified a sentence of thirty to thirty-six months. If, on the other hand, the defendant thought the judge had misinterpreted the guidelines and unreasonably sentenced above the applicable guideline, which he thinks specifies a six-month sentence, he could also appeal under section 3725 since his allegation is that the sentence is above the "applicable" guideline. In other words, section 3725 is the avenue of appeal of sentence by either the defendant or the government if the judge indicated an intention to sentence outside the guidelines, even if part of the argument on appeal is that the judge unreasonably sentenced outside the wrong guideline. On the other hand, if the judge intended to impose sentence within the guidelines, any allegation that he used the incorrect guideline would be resolved pursuant to Rule 35 and sections 3723 and 3724.

As to the procedures to be followed, the Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under this section. Many of these rules will be applicable as they now exist; others may need modification. The Committee expects that the Judicial Conference and its Advisory Committees will issue specific proposed amendments to cover the details of these procedures where necessary and to assure, inter alia, that reviews in a single case under section 3725 and Rule 35 are considered and decided at the same time whenever possible.

The Committee believes that section 3725, when read with Rule 35 and sections 3723(b) and 3724(d), creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while providing adequate means for correction of erroneous and clearly unreasonable sentences.[29]

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[29] See Hearings, pp. 8608, [illegible]73, 8887, and 8953.

CHAPTER 38.—POST-SENTENCE ADMINISTRATION

Chapter 38 consists of three subchapters which cover the administration of the various types of sentences imposed under chapters 21, 22, and 23. Subchapter A provides for the appointment of probation officers and sets forth their duties. In addition, it provides for special probation and record expungement procedures for drug possession offenses. Subchapter B covers the payment and collection of fines which may be imposed under chapter 22. Subchapter C sets forth the procedures governing those persons sentenced to a prison term.

SUBCHAPTER A.—PROBATION

(Sections 3801–3807)

This subchapter contains the provisions for implementation of a sentence to probation pursuant to chapter 21, the placement of juvenile delinquents on probation pursuant to section 3603, and the placement of an individual on supervised release pursuant to section 2303. The subchapter, for the most part, carries forward current law concerning the appointment of probation officers by the courts and the powers and duties of probation officers.

SECTION 3801. SUPERVISION OF PROBATION

Section 3801 requires that a person sentenced to a term of probation under chapter 21, or a juvenile delinquent placed on probation pursuant to subchapter A of chapter 36, or a person placed on supervised release pursuant to section 2303, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

Current law does not treat probation as a sentence, but rather treats it as a suspension of the execution or imposition of sentence.[1] While it contains no general requirement of probation supervision, it does assume that probationers will be supervised by requiring that probation officers report to the courts on the conduct of probationers.[2]

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[1] 18 U.S.C. 3651. In the case of juvenile delinquents, probation seems to be an alternative to suspension of an adjudication of delinquency or disposition of the delinquent, and to commitment to the Attorney General, rather than the suspension of imposition or execution of sentence. See 18 U.S.C. 5 37(b).

While current law permits a juvenile delinquent to be placed on probation,[3] it does not specifically provide that probation officers and the courts have the same duties as to juvenile probationers as they have as to adult probationers.

Probation officers supervise those prisoners who are conditionally released from prison under 18 U.S.C. 3655. While current law refers to these releasees as parolees, rather than as persons released on supervised release, the role of the probation officer in supervising the releasee will remain the same as under current law.

SECTION 3802. APPOINTMENT OF PROBATION OFFICERS

Section 3802 is largely derived from 18 U.S.C. 3654. Subsection (a) requires each district court of the United States to appoint suitable and qualified persons to serve with or without compensation as probation officers under the direction of the court. Those appointed with compensation are removable by the court for cause, rather than removable at the discretion of the court. The change was made upon the recommendation of the Probation Committee of the Judicial Conference. Volunteers serving without compensation remain subject to removal at the discretion of the court. Under existing law, the court is authorized, rather than required, to appoint probation officers since the original reason for enacting probation legislation was to grant the courts the power to suspend sentences and appoint probation officers, a procedure which the courts had sought to exercise without specific authority.[4]

Existing law provides that probation officers be "suitable" but does not include the requirement that they be "qualified" by training or background to be probation officers. Given the Code's encouragement to the use of innovative conditions of probation to meet the purposes of sentencing, different sorts of qualified probation officers should be available to the courts. The effective supervision of a convicted loan-shark, union, forger, or brokerage house, for example, would require quite different qualifications. Some of these qualifications might be found among probation officer "specialists" (who might be made available, as the need arose, to any of several courts); others might be needed so rarely as to warrant only occasional special appointments from the requisite profession to supervise the few cases in which such talents would be helpful.

Existing law also provides that probation officers serve without compensation except when it appears that the "needs of the service" require compensation. This provision has been dropped as outmoded in recognition of the importance of a qualified professional probation system. Of course, the courts may continue to use the services of qualified volunteers.

Section 3802(b) carries forward the existing provision concerning the order of appointment of a probation officer.

Subsection (c) carries forward the existing provision permitting designation of a chief probation officer by the court to direct the work of all probation officers serving within the judicial district. The provision has been amended from current law to make clear that each judicial district has only one chief probation officer even if the district has more than one division or place of holding court.

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[2] 18 U.S.C. 3653 and 3655.

[3] 18 U.S.C. 5037(b).

[4] See H. Rept. No. 1377, 68th Cong., 2nd Sess. (1925), p. 1.

SECTION 3803. DUTIES OF PROBATION OFFICERS

Section 3803 carries forward the provisions of 18 U.S.C. 3655 relating to the duties of probation officers with respect to supervision of probationers and the keeping of records and making of reports, and modifies the provisions to refer to persons released on supervised release following a term of imprisonment pursuant to section 2303. The section includes a number of specific requirements not in current law including the requirements that the probation officer be responsible for supervision of any probationer or person on supervised release known to be within the judicial district (in order to clarify supervisory authority over probationers and persons on supervised release transferred into his district or temporarily present in the district), and that, when requested, he supervise and furnish information about persons on work release, furlough, or other authorized release or in pre-release custody pursuant to section 3824(c). The current law provisions requiring probation officers to keep records of money received from probationers have been dropped as unnecessary since it is not the responsibility of the probation officer to perform such functions as collecting fines imposed by the courts.

SECTION 3804. TRANSPORTATION OF A PROBATIONER

This section carries forward the provisions of 18 U.S.C. 4283 permitting a court to order a United States marshal to furnish transportation to a person placed on probation to the place where he is required to go as a condition of probation. Under existing law, the court also may order subsistence expenses for the probationer while traveling to his destination, not to exceed thirty dollars. Section 3804 would not specify a limitation on the amount of subsistence which could be paid, but would permit the Attorney General to prescribe reasonable subsistence payments.

SECTION 3805. TRANSFER OF JURISDICTION OVER A PROBATIONER

Section 3805, relating to transfer of jurisdiction over a probationer or person on supervised release from one court to another, is derived from 18 U.S.C. 3653. Both current law and section 3805 require the concurrence of the court receiving jurisdiction of a probationer in the transfer of jurisdiction. Section 3805 expands current law to cover persons on supervised release and provides that the transfer of a probationer or person on supervised release to another district may be made either as a condition of probation or supervised release or with the permission of the court, while 18 U.S.C. 3653 provides for transfer of a probationer "from the district in which he is being supervised." The ability of the sentencing judge to provide that the defendant move or go to another district as a condition of probation or supervised release[5] could prove to be a very useful aspect of an effective sentence to a term of probation. It could be used in conjunction with a condition to work at particular employment or pursue a particular course of study.[6] Perhaps most important, it could provide the judge with an alternative to a term of imprisonment in the situation where that would otherwise be the only alternative to returning the defendant to an environment that would make the commission of another offense quite probable.

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[5] See sections 2103(b)(14) and 2303(d).

Section 3805 would also permit a court to which jurisdiction over a probationer or person on supervised release was transferred to exercise all the powers over the probationer or releasee that are permitted by this subchapter or chapter 21. Under 18 U.S.C. 3653, the court to which jurisdiction was transferred could not change the period of probation without consent of the sentencing court. The Committee believes that it is unnecessary to retain this restriction since the new jurisdiction is in a better position to know whether a change in the term of probation is justified. In addition, the change should result in simplifying sentencing on new charges, by permitting the transfer of jurisdiction over the probationer or releasee to the district in which the new charges have been filed so that the sentencing judge may adjust the terms of probation or supervised release as needed to serve the purpose of sentencing on the new charge.

SECTION 3806. ARREST AND RETURN OF A PROBATIONER

Section 3806 continues the provisions of 18 U.S.C. 3653 which authorize the arrest and return of a probationer to the court having jurisdiction over him when there has been a violation of a condition of probation, and expands the provision to refer to persons on supervised release pursuant to section 2303. The Committee intends that any probationer arrested for violation of a condition of probation be returned to the district in which he is being supervised even if the arrest is in a different district. The provisions of 18 U.S.C. 3653 concerning issuance of a warrant, and authority of a probation officer to arrest a probationer with or without a warrant, are covered in section 3026 (United States Probation System). Section 3026 also provides authority for arrest with or without a warrant of a person on supervised release pursuant to section 2303. The provisions of 18 U.S.C. 3653 concerning revocation of probation and reimposition of sentence for probation violations are covered in Rule 32.1 of the Federal Rules of Criminal Procedure and in section 2105. As discussed in connection with section 2303, the bill contains no specific provisions concerning revocation of a term of post-release supervision, but instead relies on other remedies, including modification of conditions and the use of the court's contempt powers, to enforce the conditions.

SECTION 3807. SPECIAL PROBATION AND EXPUNGEMENT PROCEDURES FOR DRUG POSSESSORS

Section 3807 carries forward the provisions of 21 U.S.C. 844(b) relating to special probation without entry of judgment for first offenders found guilty of violating section 1813 (Possessing Drugs) if there has been no previous conviction of an offense under a Federal or State law relating to controlled substances. The section also permits expungement of records for persons placed on probation under the section if they were under the age of twenty-one at the time of the offense and did not violate a condition of probation. Technical amendments were made in the section to conform former 21 U.S.C. 844(b) references and terminology to those of the new Criminal Code.

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[6] Sections 2103(b)(5) and 2303(d).

SUBCHAPTER B.—FINES

(Sections 3811-3813)

This subchapter is designed to increase the efficiency with which the government collects fines assessed against criminal defendants.[1] Present law, 18 U.S.C. 3565, provides that criminal fine judgments "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases." Thus, the Federal government is greatly confined by State law and must litigate in order to collect a fine from an uncooperative defendant. These relatively cumbersome procedures have resulted in collection by the United States in recent years of only 60 to 70 percent of the amount of fines imposed. The consequent awareness by criminal defendants that they may be able to avoid paying fines with relative impunity bodes ill for respect for the law.

This subchapter attempts to remedy this situation by treating criminal fine judgments like tax liens for collection purposes, thereby making available to the Attorney General summary collection procedures similar to those used by the Internal Revenue Service. Foremost among these is the power to administratively levy against the property of the defendant, which precludes disposition of the property to avoid payment and permits realization of the amount of the fine without litigation.

The collection procedures of the subchapter are also made applicable to execution of orders to pay restitution, pursuant to section 2006.

SECTION 3811. PAYMENT OF A FINE

Section 3811 provides for the payment of a fine imposed under chapter 22 to the clerk of the sentencing court to be forwarded to the United States Treasury for credit to the Victim Compensation Fund established by section 4111. The Committee believes that it is fitting and proper that criminal fines be used to finance the fund set up to compensate victims of crime. Restitution, in whatever form, and even if not done voluntarily, as here, may nevertheless be a step toward rehabilitation.

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[1] For a comprehensive discussion on collecting and paying fines and penalties, see testimony of William T. Plumb, Jr., Hearings, pp. 1709-1732.

The section requires either immediate payment or payment by the time and method specified by the sentencing court. This latter provision is in recognition of the authorization granted the court by section 2202(d) to permit payment of a fine within a specified period of time or in specified installments.

SECTION 3812. COLLECTION OF AN UNPAID FINE

Section 3812 requires the sentencing court, whenever a fine is imposed, to provide the Attorney General with certain certified information. The Attorney General is then made responsible for the collection of those fines should they not be paid at the time required. This retains the basic current law that vests the duty of collecting fines in the Attorney General.

In the case of all fines imposed, subsection (a) requires the district court that imposes sentence to certify to the Attorney General specified information about the defendant and the fine, most of which is identification information and information relating to the case in which the fine is imposed and to the fine itself. The court is also required to certify any subsequent remission or modification of the fine, and to notify the Attorney General of any payments that the court receives with respect to previously certified fines.

This provision, placing responsibility in the clerk of the district court, should improve the notification process and thus better insure that all fine-debtors are brought to the attention of the enforcing authorities in the Department of Justice. At the present time, there is no standardized procedure for notification of the United States attorney. Rather, he receives notification of fines and payment difficulties through a number of methods, which increases the chance of administrative oversight. By centralizing the responsibility for notification in the district court, section 3812 lessens this chance.

Subsection (b) places the responsibility for collecting and enforcing criminal fines with the Attorney General. Since this responsibility is currently centered in the Criminal Division of the Department of Justice and the United States attorneys, this provision effects no change in existing law. Rather than shifting the burden of enforcement (e.g., to the Internal Revenue Service), the Committee has elected to expand the enforcement powers of the Justice Department in order to strengthen the government's collection effort. The section also provides that an order to pay restitution, which the Attorney General is responsible for enforcing, does not create any right of action against the United States by the person to whom restitution is to be paid because the defendant is unwilling or unable to pay, nor can the person who is supposed to receive restitution force the execution of the restitution order through a suit against the United States or sue the government for delay or negligence in execution.[2]

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[2] For further discussion, see Report on section 2006.

SECTION 3813: LIEN PROVISIONS FOR SATISFACTION OF AN UNPAID FINE

1. In General

Section 3813 establishes the procedure by which the Attorney General is to make collection of unpaid fines. This section significantly improves current practices by providing a Federal collection procedure independent of State laws and patterned on the collection procedures utilized so successfully over the years by the Internal Revenue Service.

2. Present Federal Law

The primary method of enforcement currently used by the Federal government is execution of the judgment, either against income (garnishment) or against real or personal property. Writs of execution are issued by the district court and endorsed by the United States marshal. In the case of income executions, the procedures are dictated by the law of the State in which the Federal court sits. Where execution is to be made against property, the procedure to be followed is that detailed in 28 U.S.C. 2001–2007; State law may also be used. In either case, however, State law prescribes how much income may be garnisheed and the classes of property (e.g., homestead) that are exempt from Federal execution.

Criminal fine judgments are liens on property in the State to the same extent as a judgment of a court of general jurisdiction in the State is a lien. They may also be perfected as liens under State law, if the law of the State in which the district court sits permits perfection of a lien based on a federal judgment in the same manner as provided for judgments in the State courts.[3] Because of State exemption laws, other perfected liens, and unclear title to the property, enforcement of this lien (which under most State laws is confined to real estate) by foreclosure and sale is usually not a realistic possibility. The Committee regards the lien as a protective first step, since it does help insure the satisfaction of the debt should the defendant-debtor wish to transfer the property.

The laws of several States allow a judgment creditor (in the case of a criminal fine the United State government) to obtain an order compelling the judgment debtor (the defendant) to make specified installment payments where it is shown that he is receiving or will receive money from any source. This order is called an installment payment order and results from a Federal district court hearing sought by the United States. Notice must be given to the judgment debtor so that he may appear and contest the motion.

Finally, Rule 69(a) of the Federal Rules of Civil Procedure states in part that:

> In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

The United States Attorney may use this rule to obtain financial information about the debtor-defendant by oral or written depositions or by written interrogatories. In most cases, the assistance of the district court or a United States magistrate is necessary.

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[3] 28 U.S.C. 1962.

3. *Provisions of the Bill, as Reported*

Section 3813(a) eliminates the clerical procedures necessary to create judgment liens, by providing that the fine:

> is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

Under this subsection, a lien similar to a tax lien arises at the time of judgment, and, as subsection (c) provides, may be enforced like a tax lien through the use of the administrative levy procedures. Filing under subsection (d) is necessary only to perfect the lien as against innocent third parties.

This procedure significantly alters current practices. As stated previously, 28 U.S.C. 1962 provides that:

> Every judgment rendered by a district court within a State shall be a lien on property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed, or otherwise conformed to rules and requirements relating to judgments of the courts of the State

These liens are usually only against real estate, and enforcement of the lien is often prevented by the State law restrictions noted above. Further, the life of the lien is prescribed by the law of the State in which the district court sits. State laws usually require an abstract of judgment to be filed in the office of the county clerk, county recorder, or other State or county office. A small recording fee is assessed. Most of these procedural limitations and requirements are eliminated by section 3813(a).

Subsection (b) changes current law by imposing a twenty-year statute of limitations on the collection of criminal fines. Under existing law, the government's right to seek execution of a criminal sentence, including a fine, is not subject to time limitations.[4] Currently, such cases may be closed only through payment in full, death of the debtor, or Presidential pardon. The limitation period established by subsection (b) will permit the closing of files by United States Attorneys for cases which are so old that collection of fines is unlikely. With the new enforcement tools of section 3813, it seems reasonable to conclude that if a debtor is pursued unsuccessfully for the twenty-year period, it is unlikely that additional enforcement efforts would prove fruitful. A number of unproductive clerical tasks will thus be eliminated by this provision.

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[4] *Smith* v. *United States*, 143 F.2d 228 (9th Cir.), cert. denied, 323 U.S. 729 (1944).

The period for collection may be extended by a written agreement entered into by the defendant and the Attorney General prior to the expiration of the period. This allowance for an extension is similar to that existing in the tax area.[5]

Subsection (b) also provides that the running of the twenty-year statute of limitations is to be suspended "during any interval for which the running of the period of limitations for collection of a tax would be suspended" pursuant to the following provisions of law:

(A) 26 U.S.C. 6503(b), relating to cases where the assets of the taxpayer are in the control or custody of a court in a proceeding before any United States, District of Columbia, or State court; the suspension of the limitations period is also extended for six months after the court proceeding ends;

(B) 26 U.S.C. 6503(c), relating to cases where the taxpayer is outside the United States if the absence is for a continuous period of at least six months;

(C) 26 U.S.C. 6503(f), relating to cases where the property of a third person has been wrongfully seized;

(D) 26 U.S.C. 7508(a)(1)(I), relating to cases where the person is serving in the armed forces of the United States, or in support of such forces, during time of war, or is in a hospital as a result of a combat injury, and for 180 days thereafter; and

(E) section 513 of the Act of October 17, 1940, 54 Stat. 1190, relating to cases where the person is serving in the military.

Finally, subsection (b) provides that a lien becomes unenforceable and liability to pay a fine expires upon the death of the individual fined. This is in keeping with present law, and reflects one of the differences between a criminal fine and a tax liability, despite their generally similar treatment in this statute. The word "individual" is used instead of "person" to exclude organizations such as corporations from this provision, and to avoid the argument that a fine against a corporation is extinguished on the dissolution (and therefore "death") of the corporation. In such case, an existing fine will make the United States a creditor against the assets of the dissolved corporation with whatever preferences the provisions of this section grant.

Subsection (c) provides that certain sections of the Internal Revenue Code of 1954, as amended, shall:

> apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities.

Among the provisions of title 26 incorporated by reference into section 3813, the most significant, of course, is the administrative levy power referred to previously. The following is a summary of the provisions of the tax code cross-referenced into section 3813 and made applicable to the collection of a fine:

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[5] See 26 U.S.C. 6501(c)(4).

(i) 26 U.S.C. 6323, other than 6323(f)(4), which contains notice and filing provisions, compliance with which is necessary to insure the validity of a tax lien against certain third persons; priority rules are also set forth;

(ii) 26 U.S.C. 6331, which authorizes the Secretary to collect a tax by levy on the property of a delinquent taxpayer if the lien has not been satisfied; as has been stated, incorporating this power into the scheme for collection of fines is the most significant change wrought by section 3813; it should be noted that 26 U.S.C. 6502, which establishes a six-year limitation period on the use of an administrative levy, has not been included in the section 3813 cross references from title 26; thus, the twenty-year period set forth in section 3813(b) will also apply to the levy power in the area of criminal fine collection;

(iii) 26 U.S.C. 6332, which requires surrender of property subject to levy, and also provides for enforcement of the levy by civil penalty;

(iv) 26 U.S.C. 6333, which provides for demand by the Secretary of books and records relating to the property subject to levy;

(v) 26 U.S.C. 6334, which provides that certain property (including various unemployment benefits, retirement benefits, workman's compensation, and tools of a trade up to a value of $250) is exempt from levy; these exemptions are limited and standard; comparison should be made to the greater and more varied number of exceptions provided for in State laws to which the Federal government is now subject;

(vi) 26 U.S.C. 6335, which sets forth the procedure to be used in the sale of property seized pursuant to levy;

(vii) 26 U.S.C. 6336, which covers the sale of perishable goods;

(viii) 26 U.S.C. 6337, which provides for redemption of property before sale, and, with respect to real property, redemption after sale;

(ix) 26 U.S.C. 6338, which provides that a certificate of sale is to be given to the purchaser of the property sold, and that a deed shall also be given where the property sold is real estate;

(x) 26 U.S.C. 6339, which provides that the certificate of sale and the deed are to have certain legal effects, including their use as conclusive evidence as to the regularity of the proceedings, the transfer of the right, title, and interest of the party delinquent, etc.;

(xi) 26 U.S.C. 6340, which requires records to be kept of all sales;

(xii) 26 U.S.C. 6341, which requires the Secretary to determine which expenses are to be allowed in all cases of levy and sale;

(xiii) 26 U.S.C. 6342, which sets forth the order in which the proceeds of the levy and sale are to be applied to the taxpayer's liability;

(xiv) 26 U.S.C. 6343, which authorizes the Secretary to release the levy and to return the property, or proceeds, where the property has been wrongfully levied;

(xv) 26 U.S.C. 6901, which relates to the liability of a transferee in certain instances for a tax of the transferor in order to prevent a successful transfer to avoid liability;

(xvi) 26 U.S.C. 7402, which grants jurisdiction to the Federal courts in tax collection matters;

(xvii) 26 U.S.C. 7403, which allows the filing of an action to enforce a lien, or to subject property to the payment of a tax, whether or not a levy has been made; the court may appoint a receiver to enforce the lien;

(xviii) 26 U.S.C. 7405, which allows a civil suit to be brought to recover erroneous refunds;

(xix) 26 U.S.C. 7423, which authorizes the Secretary to allow repayment to an officer or employee of the United States of the full amount of sums that may be recovered against him in any court, for any taxes collected by him or any damages recovered against him in connection with anything done by him in the performance of his official duty;

(xx) 26 U.S.C. 7424, which permits intervention by the United States in any civil action to assert any lien on property which is the subject of the suit;

(xxi) 26 U.S.C. 7425, which provides for the discharge of a lien where the United States is not a party to the suit, unless notice of the lien was filed in the place provided for by law, according to the law of the place where the property was situated; where a judicial sale discharges a lien, the United States may claim the proceeds (before their distribution is ordered) with the same priority that the lien had; the United States may also redeem real property sold to satisfy a lien, under certain conditions;

(xxii) 26 U.S.C. 7426, which provides for suits against the United States by persons claiming an interest in the property levied, where the levy is claimed to be wrongful, or where the person claims an interest in surplus proceeds; an exception is provided for the person against whom the tax was assessed, out of which the levy arose;

(xxiii) 26 U.S.C. 7505(a), which provides that any personal property acquired by the United States in payment of, or as security for, debts arising out of the internal revenue laws may be sold by the Secretary in accordance with prescribed regulations;

(xxiv) 26 U.S.C. 7506, which provides that the Secretary shall have charge of all real estate acquired by the United States pursuant to the internal revenue laws, and may sell or lease the property, or, if the debt has been paid, release it to the debtor;

(xxv) 26 U.S.C. 7508, which provides that certain acts relating to the operation of the internal revenue laws shall be postponed because of service in a combat zone;

(xxvi) 26 U.S.C. 7602, which authorizes the Secretary to examine books and records, summon the person having the custody of books and records to appear with them, and take testimony under oath for the purpose of determining liability under the internal revenue laws;

(xxvii) 26 U.S.C. 7603, which provides for service of an administrative summons;

(xxviii) 26 U.S.C. 7604, which provides for enforcement of the summons;

(xxix) 26 U.S.C. 7605, which covers the time and place of the examination authorized in section 7602 and provides for certain restrictions on the examination;

(xxx) 26 U.S.C. 7622, which authorizes employees of the Treasury Department, designated by the Secretary, to administer oaths and affirmations and certify papers;

(xxxi) 26 U.S.C. 7701, which defines terms used throughout the rest of the title;

(xxxii) 26 U.S.C. 7805, which gives the Secretary authority to issue regulations governing enforcement of title 26, unless such authority is expressly granted to another person;

(xxxiii) 26 U.S.C. 7810, which establishes a revolving fund for the redemption of real property, as provided in section 7425; and

(xxxiv) section 513 of the Act of October 17, 1940, 54 Stat. 1190, which provides for the suspension of the statute of limitations, and the collection of taxes, for persons in military service.

The Committee intends that the specialized terminology relating to tax collection in the cross-referenced provisions of the Internal Revenue Code be read, for purposes of this subchapter, as relating to the collection of a criminal fine. Thus, the term "Secretary of the Treasury" would be read as "Attorney General" and the term "tax" would be read as "fine." To carry out this intention, section 3813(c) authorizes the substitution of those terms and, in addition, authorizes the Attorney General to issue regulations for administration of fine collection which utilize appropriate terminology.

Section 3813(d) provides that a notice of a lien imposed under subsection (a) is to be considered a notice of a lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. Because the lien created by a criminal fine is to be treated as if it were a tax lien, the filing provisions of 26 U.S.C. 6323 will apply to fines. If the Attorney General declares that State or local officials have determined that such filing is unacceptable, then 28 U.S.C. 1962, which provides for the registration, recording, docketing, or indexing of Federal court judgments, will apply instead.

SUBCHAPTER C.—IMPRISONMENT

(Sections 3821-3825)

Subchapter C contains the provisions for implementation of a sentence of imprisonment imposed under chapter 23. The subchapter generally follows existing law, except that custody of Federal prisoners is placed in the Bureau of Prisons directly rather than in the Attorney General, thus giving the Bureau of Prisons direct authority to determine matters, such as the place of confinement of a prisoner, which are presently determined by the Attorney General. Provisions relating to the organization and responsibilities of the Bureau of Prisons have been moved to chapter 37 of title 28, United States Code.[1]

SECTION 3821. IMPRISONMENT OF A CONVICTED PERSON

This section is derived from existing law.

Section 3821(a) is derived from 18 U.S.C. 4082(a) except that the new provision places custody of Federal prisoners directly in the Bureau of Prisons rather than in the Attorney General. This change is not intended to affect the authority of the Bureau of Prisons with regard to such matters as place of confinement of prisoners, transfers of prisoners, and correctional programs, but is designed only to simplify the administration of the prison system. Direct custody of prisoners will be in the Bureau of Prisons, but the Director of the Bureau of Prisons will remain subject to appointment by the Attorney General[2] and subject to his direction.[3] In addition, it is made clear that the custody of the Bureau of Prisons continues until the expiration of the term of imprisonment, or until release at the expiration of his term less any time credited toward service of his sentence pursuant to section 3824(b).

Section 3821(b) follows existing law[4] in providing that the authority to designate the place of confinement for Federal prisoners rests in the Bureau of Prisons.[5] The designated penal or correctional facility need not be in the judicial district in which the prisoner was convicted and need not be maintained by the Federal government.[6] Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3821(b) continues that discretionary authority with a new requirement that the facility meet minimum standards of health and habitability established by the Bureau of Prisons. In determining the availability or suitability of the facility selected, the Bureau is specifically required to consider such factors as the resources of the facility considered, the nature and circumstances of the offense, the history and characteristics of the prisoner, the statements made by the sentencing court concerning the purposes for imprisonment in a particular case,[7] any recommendations as to type of facility made by the court, and any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2). After considering these factors, the Bureau of Prisons may designate the place of imprisonment in an appropriate type of facility described in chapter 37 of title 28, United States Code, added to title 28 by section 123 of the reported bill, or may transfer the offender to another appropriate facility. If, however, it is believed that an offender who is serving a term of imprisonment should be placed in a facility suitable for care or treatment of a mental disease or defect that requires his custody in such a facility, this can be done in the situation where the defendant objects to transfer to a facility by the Bureau of Prisons by court order under section 3615 (Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect).

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[1] 28 U.S.C. 571 *et seq.*, as added to title 28 by section 123 of the reported bill.

[2] 28 U.S.C. 571, as added by section 123 of the reported bill.

[3] *Ibid.*

[4] 18 U.S.C. 4082(b).

[5] *United States* v. *McIntyre*, 271 F. Supp. 991, 999 (S.D.N.Y. 1967), aff'd, 396 F.2d 859 (2d Cir 1968), cert. denied, 393 U.S. 1054 (1969).

[6] See 28 U.S.C. 572 and 573, added to title 28 by section 122 of the reported bill.

[7] Section 2003(b) requires a statement of reasons for imposing a sentence.

If a prisoner seeks voluntary commitment from the Bureau of Prisons or the Bureau of Prisons seeks transfer of a person to a mental facility and he does not object, no hearing is necessary. In addition, if the term of imprisonment of a prisoner committed to a facility for treatment or care of a mental disease or defect is about to expire, and the director of the facility certifies that the prisoner is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, the person may be committed pursuant to court order under section 3616 (Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect) if no suitable State arrangements can be made.

In the absence of unusual circumstances, Federal courts currently will not review a decision as to the place of confinement.[8] The Committee, by listing factors for the Bureau to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the Bureau in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the Bureau, but simply to set forth the appropriate factors that the Bureau should consider in making the designations.

Section 3821(c), dealing with delivery of the order of commitment to the person in charge of a penal or correctional facility, is drawn from existing 18 U.S.C. 4081 with little change.

Section 3821(d), which is derived from 18 U.S.C. 3012, provides that the Bureau of Prisons shall, without charge, deliver a prisoner into court or return him to a prison facility on order of a court of the United States or on request of an attorney for the government.

SECTION 3822. TEMPORARY RELEASE OF A PRISONER

Section 3822 is derived from 18 U.S.C. 4032(c), and permits temporary release of a prisoner by the Bureau of Prisons for specified reasons. The only criterion for such release in current law is that there be "reasonable cause to believe . . . [the prisoner] will honor his trust." Under section 3822, the release would also have to appear to be consistent with the purpose for which the sentence was imposed and with any pertinent policy statements of the Sentencing Commission, and the release would have to appear to be consistent with the public interest. This places emphasis on factors important to the overall correctional program for the defendant, rather than limiting the factors to be considered to the probability of the prisoner's return to the facility at the appropriate time.

Section 3822(a) carries forward from current law the list of purposes for which a prisoner may be released for a period not to exceed thirty days, including visits to a dying relative, to attend the funeral of a relative, to obtain medical treatment not otherwise available, to contact a prospective employer, and to preserve or reestablish family or community ties. Authority for a limited release is also to be found in the catch-all clause at the end of the subsection, carried forward from current law, permitting release for any other significant purpose consistent with the public interest.

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[8] See *Darcey* v. *United States*, 318 F. Supp. 1340 (W.D. Mo. 1970).

Sections 3822 (b) and (c) carry forward the provisions of 18 U.S.C. 4082(c)(2) permitting temporary release of an offender, while continuing in official detention at the penal or correctional facility, for work at paid employment or participation in a training program in the community on a voluntary basis. Section 3822(b) adds a new provision permitting temporary release to participate in an educational program, to make it clear that release may be for such things as pursuing a course of study in college as well as for vocational training. Subsection (c), relating to employment, modifies current law (18 U.S.C. 4082(c)(2)) by dropping the requirement that local unions be consulted and a provision barring work release where other workers might be displaced. While the Bureau of Prisons needs to be sensitive to the impact of its programs on the community, the Committee believes that it should have more flexibility than provided in current law in developing work programs in appropriate cases. The Committee believes that the long-range gain to the prisoner and to the community from a well-conceived work program should not adversely affect the community interests in adequate employment opportunities.

The Committee does not intend that work release under this subsection be expanded to the extent that it develops into a device for early release from prison. A sentence to imprisonment means confinement in an appropriate correctional facility with a program designed to meet the needs of the particular prisoner, considering the purposes of his sentence and his particular needs.

Subsection (c)(1) carries forward the provisions of current law that require that work in the community must be at the same rates and under the same conditions as for similar employment in the community involved. Subsection (c)(2) requires that the prisoner agree to pay costs incident to his detention as a condition of work release. Under current law, 18 U.S.C. 4082(c)(2), the prisoner may be required to make such payments.

As with subsection (a), temporary release under subsection (b) and (c) is within the discretion of the Bureau of Prisons and there is no absolute right to work release or other outside privileges.[9] Failure to remain within the confines permitted by the release, and failure to return to the corrections facility as required, would, as under current law,[10] be treated as an escape.[11]

SECTION 3823. TRANSFER OF A PRISONER TO STATE AUTHORITY

Section 3823 delineates the circumstances under which the Director of the Bureau of Prisons must order the transfer of a Federal prisoner to a State facility prior to his release from the Federal facility. The section is derived from 18 U.S.C. 4085(a), except that language relating to appropriations is omitted as unnecessary.

Like 18 U.S.C. 4085, section 3823 provides that the Director of the Bureau of Prisons must order that a prisoner be transferred to an official detention facility within a State prior to the prisoner's release from the Federal prison if certain requirements are satisfied. First, the prisoner must have been charged in an indictment or an information with a felony or have been convicted of a felony in that State. Second, the transfer must have been requested by the governor or other executive authority of the State. Next, the State must send to the Director, usually along with the request, a certified copy of the indictment, information, or judgment of conviction. Finally, the Director must find that the transfer would be in the public interest.

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[9] See *Green* v. *United states*, 481 F.2d 1140 (D.C. Cir. 1973).

[10] 18 U.S.C. 4082(d).

[11] See section 1313(a)(2).

The last requirement of public interest places the entire transfer procedure directly within the discretion of the Director of the Bureau of Prisons. This granting of discretion to the Director follows closely section 3821(b) which permits the Bureau to designate the place of the prisoner's confinement, whether or not such place is maintained by the Federal government. Under both statutes, the exercise of discretion by the Bureau will not be disturbed save in exceptional circumstances.[12] It should be noted that at no time is it necessary for the prisoner to consent to the transfer to State authorities. Moreover, generally, a prisoner can have no valid objection to a transfer.[13]

In addition, the Committee clearly intends that the Federal government will not lose jurisdiction of any prisoner whose Federal sentence has not expired simply because it permits a State to take the prisoner into custody under this section.[14] In most circumstances, however, the Federal government may have to await the completion of State proceedings before regaining custody of the prisoner.

This section provides, and common sense dictates, that if more than one request from a State is presented with respect to a certain prisoner, the Director must determine which request, if any, should be given priority. This procedure, too, is within the discretion of the Director.

Finally, the section provides that the costs of transferring a prisoner to a State authority will be borne by the State requesting the transfer.

The Committee has deleted section 4085(b) of present title 18, which provides that the section does not limit any other lawful authority to transfer prisoners, based upon a belief by the Committee that the provision is surplusage. The Interstate Agreement on Detainers is retained in chapter 32 of this title and general principles of statutory interpretation require that each statute be read in conjunction with the other.

SECTION 3824. RELEASE OF A PRISONER

Section 3824(a) describes the method by which the release date of a prisoner is determined.

Section 3824(a) replaces a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner. Perhaps the most confusing aspect of the current law provisions is the fact that, for a regular adult prisoner[15] whose term of imprisonment exceeds one year, there are two mechanisms for determining the release date, each of which requires recordkeeping and constant evaluation of prisoner eligibility for release. The prisoner is ultimately released on the earlier of the two release dates that result from the parallel determinations.

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[12] See *Little* v. *Swanson*, 282 F. Supp. 333 (W.D. Mo. 1968).

[13] Cf. *Konigsburg* v. *Ciccone*, 285 F. Supp. 585 (W.D. Mo. 1968), aff'd, 417 F.2d 161 (8th Cir. 1969), cert. denied, 397 U.S. 963 (1970).

[14] See *Potter* v. *Ciccone*, 316 F. Supp. 703 (W.D. Mo. 1970).

First, 18 U.S.C. 4163 requires that a prisoner who has not been released earlier, for example on parole, must be released at the expiration of his sentence less credit for good conduct.[16]

Under 18 U.S.C. 4164, if a prisoner released at the expiration of his sentence less good time has accumulated 180 days or more of good time credit, he is released as if on parole[17] and supervised for the remaining period of his sentence less 180 days.

For a prisoner whose term of imprisonment exceeds one year in length, at the same time that the Bureau of Prisons is keeping records on good time allowances, the United States Parole Commission is periodically evaluating whether the prisoner should be released on parole.

A prisoner sentenced to a term of imprisonment of not less than six months nor more than one year is released at the expiration of sentence less credit for good time, except that the judge may specify that the prisoner will be released as if on parole after serving one-third of his sentence.[18]

If the sentence of a regular adult offender is less than six months long, he is ineligible for either parole[19] or receipt of a good time allowance[20] (other than industrial or meritorious good time[21]), and his release date is set by operation of law at the expiration of his term of imprisonment less any accumulated industrial or meritorious good time.[22]

There are also specialized sentencing statutes for certain young offenders for release dates to be set by the Parole Commission for all offenders who come within their terms, thus making the provisions of 18 U.S.C. 4163, relating to the release of the prisoner at the expiration of sentence less good time, inapplicable.[23]

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[15] See 18 U.S.C. 4161 and 4162.

[16] Similar mechanisms for setting release dates would result for drug addicts sentenced pursuant to title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251, even though the Act provides specialized sentencing for those prisoners. While the sentence is indeterminate (with a maximum of 10 years so long as it does not exceed the sentence otherwise available for the offense), with eligibility for conditional release as if on parole after six months, it is still possible that the prisoner will serve the full term of imprisonment less good time and be released pursuant to the provisions of 18 U.S.C. 4163.

[17] In other words, the prisoner will be subject to parole supervision upon release but his release date will not be determined by the Parole Commission.

[18] 18 U.S.C. 4205(f).

[19] 18 U.S.C. 4205 (a) and (b).

[20] See 18 U.S.C. 4161.

[21] 18 U.S.C. 4162.

[22] 18 U.S.C. 4163.

[23] However, the good time statutes may still play a role in the determination of when to release these prisoners on parole since the prisoner is deemed by the Parole Commission to have "violated the rules of the institution to a serious degree" if he has forfeited good time that has not been restored (28 C.F.R. § 2.6(a)), and thus to be ineligible for parole within the requirements of 18 U.S.C. 4206(a). However, the specialized sentencing statutes do not permit a defendant sentenced under them to be released except on parole. If the prisoner is ineligible for parole on the date on which he would ordinarily be released on parole because of forfeited good time that has not been restored, his parole release date is merely extended to any period up to the time that the law requires release on parole.

A "youth offender"[24] given an indeterminate sentence under the Federal Youth Corrections Act[25] is immediately eligible for parole,[26] and must be released on parole before the expiration of four years from the date of conviction.[27] If the youth offender is sentenced under the Federal Youth Corrections Act to a sentence up to that permitted for the offense for a person sentenced as an adult,[28] he is likewise immediately eligible for parole,[29] and must be released at least two years before the expiration of his term of imprisonment.[30]

Similar requirements for release on parole apply to young adult offenders (between 22 and 26 years old at the time of conviction) whom the judge decides to sentence pursuant to the Federal Youth Corrections Act.[31]

Section 3824(a) replaces the multiplicity of release date statutes with a single provision that describes the mechanism for setting the release date. Unlike current law, two mechanisms will never be used simultaneously, thus eliminating the unnecessary confusion caused by this requirement.

Section 3824(a) provides that a prisoner is to be released at the expiration of his term of imprisonment less any credit toward the service of his sentence for satisfactory prison behavior accumulated pursuant to subsection (b). Thus, as discussed in the introduction of part III and in connection with chapter 23, every sentence to a term of imprisonment will represent the actual time to be served less good time. There will be no artificially high sentences to allow for the operation of the parole system, which has no role as to prisoners sentenced under the revised Criminal Code.

A prisoner may be subject on release to a term of supervised released pursuant to section 2303 if his term of imprisonment exceeded one year in length.

Section 3824(a) also contains a provision which permits the Bureau of Prisons to release the prisoner on the last preceding weekday if the date of the expiration of his term of imprisonment falls on a weekend or a legal holiday. This early release is discretionary with the Bureau; nevertheless, the Bureau may not keep the prisoner incarcerated longer than his term. Therefore, if the prisoner is not released on the last preceding weekday, he must be released on the Saturday, Sunday, or holiday. This subsection carries forward existing law.[32]

Section 3824(b) contains the provisions concerning the earning of credit toward early release for satisfactory prison behavior. It applies only to persons who are sentenced to terms of imprisonment longer than one year, except those sentenced to life imprisonment. The duplication of effort in current law, requiring computation of good time allowances for every prisoner whose term of imprisonment is six months long or longer[33] even if the prisoner will ultimately have his release date set by the Parole Commission,[34] of course does not occur under the Committee's determinate sentencing system.

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[24] 18 U.S.C. 5006(d) defines a "youth offender" as a person who is under 22 years of age at the time of conviction.

[25] 18 U.S.C. 5010(b).

[26] 18 U.S.C. 5017(a).

[27] 18 U.S.C. 5017(c).

[28] 18 U.S.C. 5010(c).

[29] 18 U.S.C. 5017(a).

[30] 18 U.S.C. 5017(d).

[31] See 18 U.S.C. 4216.

[32] 18 U.S.C. 4163.

Computation of credit toward early release pursuant to section 3824(b) will be considerably less complicated than under current law in may respects. Current law provides a different rate of credit for good behavior for different lengths of prison terms,[35] while section 3824(b) provides a uniform maximum rate of 36 days a year for all time in prison beyond the first year. In addition, current law permits forfeiture or withholding of any amount of good time that has been earned up to the time of the forfeiture or withholding, and the restoration of any amount of the forfeited or withheld good time.[36] Section 3824(b) provides for automatic vesting of credit toward early release at the end of each year of satisfactory behavior, with the result that only a single year's worth of credit toward early release can be affected by a violation of the prison rules.[37]

The result of the complexity of current law provisions concerning good time allowances is to increase the uncertainty of the prisoner as to his release date, with a resulting adverse effect on prisoner morale.

Current law also probably fails to have the intended effect on maintaining prison discipline.[38] Prisoners tend to expect that good time will be restored, and it usually is. Thus, only the prisoner who has forfeited good time that has not been restored, and who is thus ineligible for parole, is actually affected by the provisions for forfeiture.

It is the belief of the Committee that the simplified provisions of section 3824(b) will have a positive effect on prisoner behavior. The credit toward early release is earned at a steady and easily determined rate that will have an obvious impact on the prisoner's release date. The rate is sufficiently high (approximately 10 percent of the part of a term of imprisonment that exceeds one year) to provide an incentive for good institutional behavior, yet not so high that it will carry forward the uncertainties as to release dates that occur under current law.

The new provisions will also be easier (and probably cheaper) to administer than those under current law. The credit toward early release will vest automatically unless the Bureau of Prisons determines that a violation of the prison rules should result in withholding of some or all of the credit toward early release for a particular period. In addition, the Bureau of Prisons will have to determine the release dates for credit toward early release only for those prisoners whose time in prison will actually depend upon the credit they have earned, rather than also making this determination for prisoners whose release date will be set by the Parole Commission.

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[33] 18 U.S.C. 4161.

[34] The Parole Commission considers whether to release on parole any prisoner whose sentence exceeds one year in length. 18 U.S.C. 4205(a).

[35] Under 18 U.S.C. 4161, good time allowance are credited at rates of from five to ten days a month, with three rates in between, depending upon the length of the term of imprisonment.

[36] 18 U.S.C. 4165.

[37] Of course, if a violation of rules is a criminal offense, the offense can be prosecuted in appropriate cases.

[38] See Hearings, pp. 8882 and 8894.

It should be noted that subsection (b) permits the withholding of credit toward early release only for violation of institutional disciplinary regulations that have been approved by the Attorney General and given to the prisoner. Thus, the prisoner will be put on notice as to the actions that may result in his failure to earn credit toward early release.

Section 3824(c) is new. It provides that, to the extent practicable, the last ten percent of a term of imprisonment, not in excess of six months, should be spent in circumstances that afford the prisoner a reasonable opportunity to adjust to and prepare for reentry into the community.

It is intended that the Bureau of Prisons have substantial discretion in determining what opportunity for reentry needs to be made available to each particular prisoner under the circumstances of his case. The Probation System is required, to the extent practicable, to offer assistance to prisoners at this pre-release stage. This will permit probation officers to assist prisoners in seeking employment and medical or social services as needed.

Section 3824(d), relating to the allotment of clothing, transportation, and funds to a prisoner released at the expiration of his term of imprisonment, is derived from 18 U.S.C. 4281 and 4284, with several changes. The amount of money to be furnished a prisoner has been raised to a maximum of $500 rather than $100, and the provision of 18 U.S.C. 4284 for loans to prisoners has been omitted. The Committee has concluded that a small amount of financial assistance may be sufficient to get an offender started in the right direction, but that the $100 maximum sum permitted under existing law may often be inadequate. The loan provisions in existing law have not proved successful, having caused greater administrative costs and difficulties than the amount of money involved justifies. Accordingly, the total amount of money which can be given a prisoner has been raised to $500 with no provision for a small loan. The determination of the amount to be given each prisoner under section 3824(d) is to be made by the Director of the Bureau of Prisons, rather than the Attorney General, in keeping with other amendments to the Code placing day-to-day control of the operations of the Bureau of Prisons in the Director. A new provision has been added to specify that the Director shall make the determination of the amount to be given to a particular prisoner according to the public interest and the needs of the prisoner. The language has also been clarified to require the Director to provide a prisoner with some money unless he determines that the prisoner's financial situation is such that no money should be provided.

Finally, as under current law, the prisoner must be furnished transportation to one of three places: (1) the place of conviction; (2) his bona fide residence within the United States; or (3) any other place authorized by the Director of the Bureau of Prisons.

The Bureau of Prisons could, of course, provide transportation expenses rather than actually providing transportation, but the funds for transportation are to be in addition to the amount of money provided the prisoner under section 3824(d)(2) to assist him upon his release. This provision is essentially the same as that contained in 18 U.S.C. 4281, except that under that provision the determination of the place to which a prisoner would be transported was made by the Attorney General. In making this determination the Director will necessarily have to take cognizance of the terms and conditions of supervised release if such a term is imposed pursuant to section 2303.

Subsection (e) provides that a prisoner whose sentence includes a term of supervised release shall be released to the supervision of a probation officer. It also specifies that the term begins on the date of release and that it runs concurrently with any other term of supervised release, probation, or parole unless the person is imprisoned other than for a brief period as a condition of probation or supervised release.

SECTION 3825. INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

This section makes clear that certain of the provisions of the Administrative Procedure Act do not apply to any determination, decision, or order of the Bureau of Prisons.[39] This result is in accord with recent case law,[40] and will assure that the Bureau of Prisons is able to make decisions concerning the appropriate facility, corrections program, and disciplinary measures for a particular prisoner without constant secondguessing.[41] The provision, of course, would not eliminate, and is not intended to eliminate, constitutional challenges by prisoners under the appropriate provisions of law. Constitutional requirements in personal disciplinary actions have been established by the Supreme Court.[42] The Committee feels that there is no need to add additional due process procedures to those specified by the courts. The sections of the APA made inapplicable to the Bureau of Prisons are parallel to those currently made inapplicable to the Parole Commission.

The phrase "determination, decision, or order" is intended to mean adjudication of specific cases as opposed to general rule making.

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[39] 5 U.S.C. 554 and 555 and 701 through 706. The APA continues to apply to regulationmaking authority of the Bureau of Prisons. See *Ramer* v. *Saxbe*, 522 F.2d 695 (D.C. Cir. 1975).

[40] See *Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976) (APA not applicable to prison discipline proceedings); *Wolfish* v. *Levi*, 573 F.2d 118, 125 (2d Cir. 1978) (determinations of Bureau of Prisons are discretionary agency action so no need to reach question whether APA applies to them), reversed on other grounds *sub nom. Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[41] Full implementation of this concept requires that the APA also be made inapplicable to the provisions added to title 28 by the subject bill on establishment of Bureau of Prisons.

[42] See *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

PART V.—ANCILLARY CIVIL PROCEEDINGS

Part V of the Criminal Code provides for supplementary civil proceedings in connection with criminal matters. Chapter 40 is designed to give law enforcement authorities greater flexibility in their fight against crime. It authorizes the civil forfeiture of property used, intended for use, or possessed in the commission of certain enumerated crimes. Furthermore, it permits the Attorney General to seek restraining orders to prevent and restrain victim and witness intimidation and racketeering type offenses and to seek injunctions against acts or practices that constitute or could constitute a fraudulent scheme in violation of section 1734. It also places restrictions on imposition of civil disabilities on Federal employment of persons convicted of Federal offenses unless the restrictions are reasonably related to the offense.

Chapter 41 is designed to compensate persons who have been injured by the commission of specific Federal crimes. It provides a civil cause of action for persons injured as a result of racketeering activities or who have had their oral private communications unlawfully intercepted. It also establishes a victim compensation fund whereby a victim of an offense set forth in chapter 16 will be compensated for his injuries. Part of the funds used for this program will be obtained from the payment of criminal lines.

CHAPTER 40.—ANCILLARY PUBLIC CIVIL PROCEEDINGS

Chapter 40 is comprised of four subchapters. Subchapter A provides for civil forfeiture proceedings against property used, intended for use, or possessed in the commission of certain specified offenses. Civil forfeiture is distinguished from criminal forfeiture in that the action is taken against the property and is not intended to penalize the offender. For the most part, the provisions in subchapter A are consistent with current law.

Subchapter B makes available certain civil remedies applicable in racketeering type offenses. The purpose of these provisions is to give law enforcement authorities greater flexibility in the fight against organized crime. These provisions reenact provisions contained in the Organized Crime Control Act of 1970.

Subchapter C authorizes the Attorney General to seek an injunction against acts which constitute or could constitute a fraudulent scheme in violation of section 1734. The purpose of this provision is to protect innocent victims from being victimized by fraudulent practices while the criminal process is running its course.

Subchapter D contains two new provisions. The first is designed to prevent imposition of civil disabilities on Federal offenders unless the disability relates to the offense or the circumstances of the offense indicate that the person probably would abuse the right, privilege, or opportunity withheld because of the disability. The second bars denial of Federal employment solely because of a criminal conviction unless there is a reasonable relationship between the offense and the employment.

SUBCHAPTER A.—CIVIL FORFEITURE

(Sections 4001–4005)

This subchapter consolidates in one place all of the civil forfeiture provisions applicable to offenses committed under the new Code, and establishes one common procedure for the execution of a civil forfeiture.

1. Present Federal Law

At present, there are twenty-two statutes in title 18 which authorize civil forfeiture of illegal property or of property used illegally.[1] Section 4001 will consolidate and replace the bulk of these statutes with the remaining forfeiture statutes currently in title 18 being moved to title 18 Appendix of the United States Code.[2] The Committee has also extended civil forfeiture to several other offenses where that remedy seemed particularly appropriate. There are numerous other statutes in the United States Code which authorize the forfeiture of property,[3] but this section will have no effect on those statutes.[4] In sum, this subchapter merely continues existing title 18 civil forfeiture provisions with some extension of the provisions.

Civil forfeiture, unlike criminal forfeiture under section 2002 of the Code, is an *in rem* proceeding. The concept of an *in rem* action is that the property is the offender and thus the action is brought against the property.[5]

Statutes authorizing the civil forfeiture of illegal property or of property used illegally have withstood constitutional challenge.[6] Since the action is taken against the property, the rights of innocent owners, lienors, conditional vendors, and chattel mortgagors are subject to forfeiture procedures where the property is illegal or has been illegally used.[7] In addition, the government is not barred from bringing a forfeiture proceeding by the fact that the owner was acquitted of the criminal charge.[8] While a civil forfeiture proceeding is civil in form, courts have held that its nature is criminal and thus evidence obtained in violation of the Fourth Amendment may not be used to support a forfeiture proceeding.[9] However, the government is not required to prove the allegations of the action beyond a reasonable doubt but only by a preponderance of the evidence.[10]

SECTION 4001. CIVIL FORFEITURE OF PROPERTY

Section 4001 provides that the Attorney General may proceed in an *in rem* civil proceeding to have seized and forfeited to the United States any property or, where applicable, the value thereof, used, intended for use, or possessed in violation of twenty-four enumerated sections or groups of sections. These sections largely carry forward forfeiture provisions found in existing law. This section thus sets forth in one place all of the sections of title 18 where a civil forfeiture of the property involved will be permitted.[11] The Committee has used the phrase "in addition to a proceeding under any other Act of Congress" in subsection (a) to emphasize the fact that the listing of these specific civil forfeiture provisions in title 18 in no way affects or limits other forfeiture provisions set forth in other titles of the United States Code. For the most part, those offenses which have been included within the civil forfeiture provision have traditionally been subject to forfeiture provisions because they invariably involve the illegal use of property or the illegal possession of property. Those that have been added relate to analogous offenses and illegal usage of property. While twenty-three of the listed paragraphs in section 4001 (a) name the specific property which is subject to forfeiture,[12] subsection (a)(23), which deals with property used in the violation of the statute on engaging in a gambling business,[13] excludes only real property from forfeiture and permits forfeiture of all other property used in the commission of the offense. This subsection carries forward the forfeiture provisions, as interpreted,[14] presently found in title 18 which provides that "any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States." [15] Thus, with the exception of real property, subsection (a) (23) will cover all property, including money, used in a gambling business in violation of section 1841.

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[1] In order, they are contained in sections 43, 44, 492, 544, 545, 548, 550, 844, 924, 962, 963, 964, 965, 966, 967, 969, 1082, 1165, 1762, 1955, 2274, and 2513 of title 18.

[2] For example 18 U.S.C. 43 and 44, and 962 have been transferred to title 18 Appendix.

[3] Examples of such provisions are those contained in title 19 concerning the customs laws: title 21 concerning the drug laws: and title 26 concerning the revenue laws.

[4] See section 104 which preserves any civil forfeitures that exist outside title 18.

[5] See generally *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[6] *Id.; Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931); *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321 (1926).

[7] See *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra* note 5.

[8] *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232 (1972).

[9] See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965); *Boyd* v. *United States*, 116 U.S. 616 (1886).

[10] See *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237 (1877); *Compton* v. *United States*, 377 F.2d 408 (8th Cir. 1967); *Martin* v. *United States*, 277 F.2d 785 (5th Cir. 1960).

[11] In addition, subsection (a)(3) reflects a forfeiture provision found outside title 18 in 8 U.S.C. 1324(b). Legislation in part designed to amend the current title 8 forfeiture provision to the approximate scope of subsection (a)(3) in this bill has been introduced by Senator Thurmond on behalf of the Administration as S. 1765.

Special note should be taken of subsections (a)(12), which deals with the forfeiture of property used in violation of section 1734 (Executing a Fraudulent Scheme), and (a)(24), which deals with the forfeiture of property resulting from an offense under section 1842 (Disseminating Obscene Material). These are the only offenses set forth in section 4001(a) where the forfeiture order is intended to reach the proceeds of an offense. Both these crimes are normally committed for the purpose of acquiring, and frequently generate, large sums of money. The Committee deems it appropriate to deprive the offender in a fraudulent scheme, or in an obscenity distribution, of his ill-gotten gains. As will be noted in the discussion of section 4003, restitution to the victim of a fraudulent scheme of the forfeited proceeds where possible is contemplated.

Two types of property are enumerated in subsection (a)(22) for forfeiture in connection with the offense of executing a fraudulent scheme. The first type is property consisting of the proceeds of the scheme or artifice. In combination with the injunction provision in section 4021, this provision will serve to put the fraud offender out of business quickly. Second, property that consists of the instrumentalities used in, and designed to be primarily useful for, the execution of the scheme or artifice can be ordered forfeited. An example of such an instrumentality would be a computerized mailing list used in the execution of a mail fraud or the manufacturing equipment used to make goods sold as part of the fraudulent scheme. Third, as noted, the order of forfeiture may reach the proceeds of the scheme or artifice. The Committee is aware that tracing the proceeds of an offense can be very difficult and often impossible. It is not intended that such orders of forfeiture concerning proceeds be entered in cases where the proceeds cannot be readily traced. Rather, it is expected that this provision will be reserved for those cases where the proceeds are available, identifiable, and subject to seizure.

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[12] Included are such offenses as those involving smuggling, eavesdropping, counterfeiting, and firearms.

[13] Section 1841 of the Code.

[14] See *DiGiacomo* v. *United States*, 346 F. Supp. 1009 (D. Del. 1972).

[15] 18 U.S.C. 1955.

It should be noted in relation to subsections (a)(20) and (a)(21) dealing with explosives and firearms that the summary forfeiture provisions of current law enforceable through the Internal Revenue Code have been maintained as parallel provisions by moving the existing title 18 sections [16] to title 15 of the United States Code.

Subsection (b) permits the entry of an order of forfeiture under section 4001 if the court finds by a preponderance of the evidence that the property that is the subject of the forfeiture proceeding is property used in violation of an offense listed in subsection (a) and consists of the specific property set forth in the specific paragraph in question. Some statutes use a "probable cause" rather than a preponderance standard. While there appears to be little practical difference between the two standards, the Committee prefers the preponderance test and has adopted it uniformly for provisions covered by this section.

SECTION 4002. PROTECTIVE ORDERS

This section provides that any time after the initiation of a proceeding under section 4001, the court may enter restraining orders or prohibitions or take other action, including the acceptance of performance bonds. These provisions are intended to protect the interests of the United States in the property subject to forfeiture.

SECTION 4003. EXECUTION OF CIVIL FORFEITURE

This section provides for the seizure and disposition of forfeited property. The subsection directs the Attorney General to issue regulations to provide for the sale, retention, or destruction of such property, or to make any other appropriate disposition of the seized property. The regulations are to make due regard for the rights of innocent persons. The seized property should be ordered sold under the regulations if commercial sale is feasible under the circumstances. Some property cannot ordinarily be disposed of commercially (for example, obscene material or counterfeited money) and the regulations are expected to provide for their destruction as a general practice. The Committee does not intend that such dangerous items as explosives and firearms be sold commercially as a general course. The regulations might provide that these items be disposed of by the General Services Administration through destruction or their sale or transfer to a government agency for official use.

Section 4003 also contains a provision directing the Attorney General to establish procedures so that property seized as proceeds of fraudulent schemes under section 4001(a)(12) may, to the extent possible, be turned over to the victims of the fraudulent activity. The Committee deems it appropriate to restore the fraudulently obtained property to the victims wherever possible and considers this provision to be within the concept of making due provision for the rights of innocent persons. There may often be occasions where the victims cannot be located or identified. The language that modifies the directive to the Attorney General to establish these procedures that states "insofar as practicable" is an attempt to take this potential difficulty into account. All that is required is that the procedures that are established (by means of regulations) are reasonably designed to find and identify the victims. The provision also makes it clear that the payment to the victim from the proceeds is not to exceed the value of the loss suffered by the individual victim.

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[16] See 18 U.S.C. 844(a) and 18 U.S.C. 924(d).

The section also makes it clear that property that is not disposed of for value does not revert to the defendant.

SECTION 4004. APPLICABILITY OF OTHER CIVIL FORFEITURE PROVISIONS

Section 4004 incorporates by reference the long tested customs law provisions concerning the disposal of forfeited property, the distribution of the proceeds from the sale of such property, and the remission or mitigation of forfeiture orders. As under the customs laws, a person may petition the Attorney General for the remission of the forfeiture and sale of any property in which he has an interest where he alleges that the forfeiture occurred without his knowledge and that it occurred without his neglect or intent to defraud the United States.[17] The Attorney General may honor such claims in whole or in part after the payment of the costs of seizing the forfeited property and the costs of disposing of the property if it has been disposed of.[18] In addition, the section provides that the Attorney General is to perform the duties imposed upon the collector of customs concerning the seizure, forfeiture, and disposition of property under the customs law with respect to any property forfeited pursuant to section 4001(a).

SECTION 4005. DEFINITIONS FOR SUBCHAPTER A

This section provides the definitions for terms used in this subchapter. It incorporates the specific definitions for some eight terms which are defined in the subchapters in which they are primarily used.

SUBCHAPTER B.—CIVIL RESTRAINT OF RACKETEERING OR WITNESS OR VICTIM INTIMIDATION

(Sections 4011–4014)

This subchapter reenacts the civil remedies statutes enacted by the Congress to fight organized crime in the passage of the 1970 legislation, and adds a new provision in section 4014 that creates a civil action to restrain victim or witness intimidation.[1]

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[17] See 19 U.S.C. 1613.

[18] *Ibid.*

SECTION 4011. CIVIL ACTION TO RESTRAIN RACKETEERING

1. Present Federal Law

In the Organized Crime Control Act of 1970, Congress recognized that organized criminal activity generally, but particularly the infiltration of legitimate organizations by organized crime, presented more than a problem in the administration of criminal justice. In a real sense what was at stake was the viability of the free enterprise system. With this in mind, Congress enacted 18 U.S.C. 1964 which provided for civil remedies in the organized crime field. These civil remedies were patterned after the time-tested machinery of the antitrust laws.

In discussing civil remedies in general, and 18 U.S.C. 1964, in particular, the Senate Committee Report states:[2]

> The use of such remedies as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these remedies are not exclusive, and that Title IX seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil. Punishment as such is limited to the criminal remedies, noted above.
>
> Ample precedent exists in the antitrust laws for these procedures. In the landmark decision *United States* v. *Du Pont & Co.*, 366 U.S. 316, 326–27 (1961), the Supreme Court said of the remedy of divestiture:
>
> "The key to the whole question of antitrust remedy is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violators, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest."
>
> "If the Court concludes that other measures will not be effective to redress a violation and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result."
>
> It must be remembered that the Court here was speaking of remedying an economic concentration of power, which potentially might have an adverse effect upon our economy. Title IX attacks a far more heinous threat, the

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[1] See Organized Crime Control Act of 1970, title IX, 18 U.S.C. 1964–1968, 84 Stat. 943. See generally, G.R. Blakey and B. Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies*, 53 Temple Law Q. 1009 (1980), reprinted in Hearings, Part XVI at 12432.

[2] S. Rept. No. 91-617, 91st Cong., 1st Sess., pp. 81–83 (1969).

use of force, threats of force, enforcement of illegal debts, and corruption in the acquisition or operation of business. If DuPont and other related companies can be forced to rid themselves of General Motors ownership, almost without regard for the economic consequences, then it must surely follow that the removal of criminal elements from the organizations of our society by divestiture is justified. The situation may be said to cry for legislation to accomplish that result. The criminal surely can lose his right to own or hold office in a business or other enterprise as easily as can the essentially honest, but potentially too powerful, businessman.

These provisions should effectively remove the criminal figure from the particular corrupt organization. In a like manner, through a remedy such as the prohibition of engaging in the same kind of activity in the future, the criminal element will not only be removed from an area of activity, they will also be prohibited from using the know-how acquired to start the same type of business or other organization again under a different name.

Here, too, the antitrust laws furnish ample precedent for the use of this sort of civil remedy. In *United States* v. *Grinnel Corp.*, 384 U.S. 563, 579 (1966), the district court had decreed that one Fleming should be enjoined from working for any of the corporate defendants to an antitrust suit because of constant flouting of the antitrust laws, even though no predatory practices were found to exist. The Court, while it reversed on a factual aspect of the case, acknowledged that the remedy was available if appropriate facts were found:

"Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record."

If predatory conduct may be made the basis for such a prohibition, then surely murder, extortion, and other crimes are more than equal grounds for the prohibition.

In each of these illustrative cases, the courts have emphasized that the prohibition is not a penalty against any individual. It is instead a protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In the spirit of this background, Title IX, it must be again emphasized, is remedial rather than penal. It is based upon the judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.

Finally, the Department of Justice had this to say of the civil aspects of Title IX:

> "These time-tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity. Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated." (Footnotes omitted.)

The Committee specifically endorses these views.

In the first case litigated under 18 U.S.C. 1964, the Seventh Circuit in *United States* v. *Cappetto,*[3] upheld the constitutionality of 18 U.S.C. 1964. The court in *Cappetto* stated:[4]

> It has thus been settled . . . that acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

The court recognized that the relief authorized by 18 U.S.C. 1964 is similar to the relief granted in antitrust cases under the Sherman and Clayton Acts.[5] While the conditions under which an injunction will be issued pursuant to section 1964 are to be determined by the principles that govern the granting of equitable relief,[6] the court found that Congress intended to dispense with the government's requirement of showing irreparable injury or inadequacy of the remedy at law.[7] Furthermore, since an action under 18 U.S.C. 1964 is civil in nature, the burden of proof for the government is the lesser standard of preponderance of the evidence as opposed to the higher standard of beyond a reasonable doubt required in criminal cases.[8] Similarly, the government has a right to discovery under the Federal Rules of Civil Procedure and where the government grants use immunity pursuant to 18 U.S.C. 6002 and 6003,[9] the defendant cannot refuse to comply with the discovery orders on the ground that this violates his Fifth Amendment right against self-incrimination.[10]

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[3] 502 F. 2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

[4] *Id.* at 1357.

[5] 15 U.S.C. 4, 25; see *United States* v. *Cappetto, supra* note 3 at 1357.

[6] *Id.* at 1358.

[7] *Id.* at 1358–1359.

[8] *Id.* at 1357.

[9] See subchapter B of chapter 31.

[10] *United States* v. *Capetto, supra* note 3 at 1359.

2. Provisions of the Bill, as Reported

Section 4011, for the most part, carries forward the provisions presently found in 18 U.S.C. 1964.

Subsection (a) provides that the Attorney General may initiate a civil proceeding to prevent and restrain offenses under three organized crime offenses set forth by the Code.[11]

Subsection (b) grants jurisdiction to the United States district courts to hear proceedings brought under this section. In addition, it provides that any such action is to be handled in an expeditious manner by the court.

Subsection (c) authorizes the court to enter restraining orders or injunctions, require performance bonds, or take other appropriate action to prevent frustration of the aims of this subchapter.

Subsection (d) provides for collateral estoppel as between related criminal judgments and civil actions. Thus, where a defendant has been convicted of violating section 1801, 1802, or 1803 of the Code, the conviction, operating as a final judgment or decree rendered in favor of the United States,[12] estops the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States or by a person under section 4101.[13]

Subsection (e) contains broad remedial provisions which the court may utilize in cleansing organizations from the influences of organized crime. Although certain specific remedies are enumerated, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence while making due provisions for the rights of innocent persons.

SECTION 4012. CIVIL RESTRAINT PROCEDURE

1. Present Federal Law

This section combines into one provision statutes that are presently contained in sections 1965, 1966, and 1967 of title 18 and sets out the rules concerning venue, the issuance of process, and the service of process for proceedings brought under section 4011. These provisions are patterned after similar provisions in the antitrust field.[14] In addition, the section provides a procedure for expediting actions brought under section 4011.

2. Provisions of the Bill, as Reported

Subsection (a) establishes venue wherever the defendant resides, is found, has an agent, or transacts affairs, without regard to the amount in controversy, and subsection (b) provides nationwide service of process on parties, if the ends of justice require it.

Subsection (c) provides nationwide subpoena power for witnesses. However, a court order on good cause shown is required for issuance of a subpoena if the witness resides more than 100 miles from the court. In addition, this subsection provides for service of process wherever the person is found, resides, has an agent, or transacts affairs.

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[11] Section 1801 (Operating a Racketeering Syndicate), 1802 (racketeering), and 1803 (Washing Racketeering Proceeds).

[12] *United States* v. *NYSO Laboratories*, 215 F. Supp. 87, 89 (S.D. N.Y.), aff'd, 318 F.2d 817 (2d Cir. 1963); see *Huron Corp*. v. *Lincoln Co.*, 312 U.S. 176, 189 (1941).

[13] *Wolfson* v. *Baker*, 444 F. Supp. 1124, 1127-31 (M.D. Fla. 1978), affd, 623 F.2d 1074, 1077-81 (5th Cir. 1980), cert. denied, 101 Sup. Ct. 1483 (1981); *SEC* v. *Everest Management Corp.*, 466 F. Supp. 167, 172-74 (S.D. N.Y. 1979).

[14] See 15 U.S.C. 5, 15a, 23. 1314(a).

Subsection (d) provides a procedure whereby the Attorney General may obtain the expeditious processing of those cases which are, in his opinion, cases of general public importance. The judge designated to hear such a case is directed to hold a hearing as soon as practicable and to participate in the hearing and determination of the cause.

Subsection (e) provides that the court in its discretion may conduct the proceedings, including the taking of depositions, in open or closed session after taking into consideration the rights of the persons affected.

The Committee believes that the broad provisions set out in section 4012 are required by the nationwide nature of organized crime activities and its widespread efforts to infiltrate legitimate business organizations.

SECTION 4013. CIVIL INVESTIGATIVE DEMAND

1. Present Federal Law

This section carries forward one of the innovative approaches established by the Organized Crime Control Act of 1970. In that act, Congress recognized that the infiltration of legitimate businesses by organized crime presented more than a problem in the administration of criminal justice. To attach this problem, Congress decided that the traditional criminal remedies were not sufficient and that new remedies were needed. Congress thus provided for civil remedies in the organized crime field which were patterned after the time tested remedies in the antitrust laws. One of these remedies which has proved particularly successful in the antitrust field is the civil investigative demand which is the civil counterpart of the grand jury. Congress thus enacted 18 U.S.C. 1968 which provides for a civil investigative demand in organized crime cases if the Attorney General has reason to believe that any person or enterprise under investigation may be in possession of documentary material relevant to a civil racketeering investigation. In such cases, he may, prior to the institution of a civil proceeding, issue in writing and cause to be served on the person or enterprise, a civil investigative demand requiring such person or enterprise to produce the material for examination.

2. Provisions of the Bill, as Reported

Section 4013 substantially reenacts 18 U.S.C. 1968. Except for minor word changes, there are only two substantive changes. 18 U.S.C. 1968(c)(2), which provides that no demand shall "require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena *duces tecum,*" has been eliminated since such a demand would obviously be unreasonable and is thus covered by 18 U.S.C. 1968(c)(1), now subsection (b) of 4013. In addition, 18 U.S.C. 1968(d)(7), which provides for the appointment of a successor custodian in the event of the death or disability of the designated custodian, is eliminated since it is implicit in the power of the Attorney General to designate a custodian that he has, in addition, the authority to designate a substitute custodian if the need should arise.

Subsection (a) of section 4013 sets forth the circumstances in which the Attorney General may issue a civil investigative demand and designates the material that the demand is to contain, and subsection (b) provides that no civil investigative demand is to contain any requirement that could be held to be unreasonable if contained in a subpoena *duces tecum*. This subsection will cover the limitations which were formerly in 18 U.S.C. 1968(c) (1) and (2).

Subsection (c) contains broad provisions for service of process and permits not only personal service, but service upon the person's agent or any other person authorized by law to receive service of process on behalf of the person as well. Service can be made at the principal office or place of business of the person or an executed copy can be sent by registered or certified mail to the person's principal office or place of business.

Subsection (d) directs the Attorney General to appoint a person to serve as document custodian. This section also provides that the person to whom a civil investigative demand was issued must make the material available for inspection by the custodian at the person's place of business or some other place mutually agreed upon. The custodian is responsible for any material delivered to him, and no one except the Attorney General is permitted to inspect the material without the consent of the person who produced the material.[15] Upon the completion of the investigation or any proceedings arising therefrom, the custodian is to return to the person any material which has not passed into control of a court or grand jury. If no proceeding has been instituted within a reasonable time after completion of the examination and analysis of the evidence, the person who produced the material is entitled, upon written demand made upon the Attorney General, to the return of all the material produced by him.

Subsection (e) provides a procedure and the circumstances under which the Attorney General may seek an enforcement order when the person who is the subject of a civil investigative demand refuses to cooperate. In addition, the subsection provides that a person who has received a civil investigative demand may seek to have it modified or set aside within twenty days after receiving the demand.

Subsection (f) grants jurisdiction to the United States district courts to hear and determine any matter arising under the provisions of this section.

SECTION 4014. CIVIL ACTION TO RESTRAIN WITNESS OR VICTIM INTIMIDATION

Section 4014 is new to Federal law and permits the Attorney General to initiate a civil proceeding to obtain a court order prohibiting intimidation or harassment of a witness or victim. The provision is part of the recommendations of Senator Paul Laxalt for reducing victim and witness intimidation. Also, an American Bar Association report[16] made it clear that there is an existing problem of witness and victim intimidation in the nation's criminal justice system. This provision is one of a series contained in the Code to address this problem.

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[15] Under section 111, the term "Attorney General", unless used in conjunction with a reference to another specified officer of the Department of Justice, includes any officer of the Department of Justice authorized to act for or on behalf of the Attorney General.

Under subsection (a) the Attorney General can initiate a civil proceeding to restrain the type of offenses that are set forth in section 1323 (Tampering with a Witness, Victim, or an Informant). If the court makes a finding that an offense described in section 1323 has occurred or is reasonably likely to occur, the court can take any of three actions. It can order that the defendant, a witness, any other person connected with the case, or any other person in the courtroom not violate section 1323; it can order that any such person maintain a prescribed distance from a specified witness or victim; and it can order that any such person not communicate with a specified witness or victim, except under such conditions as the court may impose. These orders are intended to place those who might intimidate witnesses or victims on notice that the court will not tolerate such activities. In order to assure that appropriate action can be taken to restrain such activity, which is inherently threatening not only to the witnesses but to the court itself and to its duty to ensure that its proceedings are fair and just, the court may base its findings upon credible hearsay or the representation of the attorney for the government or the defense counsel. The provision permitting the court to issue an order restraining those in the courtroom from violating section 1323 is in recognition of the fact that many persons in the courtroom, other than the accused, may pose possible intimidation problems as when numbers of family members or friends appear in the courtroom although the defendant, himself, may be in custody.[17]

An earlier provision delineating the remedies available for violating a court order under this section has been deleted only because it is redundant at this point. The remedies available under this Code include prosecution for a violation of section 1323 (including, of course, attempts and conspiracies) or section 1335 (Disobeying a Judicial Order). A violator is also subject, where appropriate, to revocation of pretrial release, forfeiture of any bail posted, and the issuance of a bench warrant for his arrest. All persons being released are required to be warned of the provision of section 1323[18] and a defendant is subject to revocation of release and contempt penalties for violation of release conditions.[19] The courts also have the inherent power to protect witnesses who are the victims of threats from the defendant by ordering that the defendant be held in custody pending trial.[20]

Subsection (b) grants jurisdiction to the United States district courts to hear and determine proceedings under section 4014 and to prevent and restrain section 1323 offenses.

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[16] Report of ABA Section of Criminal Justice Committee on Victims: *Reducing Victim/Witness Intimidation: A Package,* Model Statute 37 (1979).

[17] *Id.* at 10.

[18] Section 3502(h).

[19] Section 3506.

[20] *United States* v. *Wind,* 527 F 2d 672 (6th Cir. 1975); *United States* v. *Gilbert,* 425 F 2d 490 (D.C. Cir. 1969).

SUBCHAPTER C.—INJUNCTIONS

(Section 4021)

During its early history, the English court of chancery issued injunctions to restrain the commission of certain criminal acts.[1] However, with the increasing stability of the English government, the need for the enforcement of the criminal laws by the chancellors diminished until by the end of the 15th century it had ceased entirely.[2] Thus, the rule became established under the common law that equity would not interfere by the issuance of an injuction to prevent the commission of crimes. Exceptions, however, soon developed to this general rule. Thus, if an act endangered property rights or was inimical to public health or safety, equity could enjoin such act regardless of whether the act was also made criminal by a statute.[3] Today it is generally conceded that a legislature has the authority to authorize the enforcement of a criminal statute by injunction.[4]

Congress has not, as a general practice, provided injunctive relief for the prevention of crimes about to take place. In certain fields, however, Congress has permitted the issuance of injunctions to restrain certain acts which may constitute criminal conduct or facilitate criminal conduct. Thus, injunctive relief has long been available for violation of the fraud provisions of the Securities and Exchange Act,[5] and these provisions have been used by the Securities and Exchange Commission on numerous occasions with excellent results. In the Organized Crime Control Act of 1970[6] Congress authorized the issuance of injunctions and restraining orders in an effort to free interstate commerce from the corrupt control of organized crime. Similarly, the use of injunctions to prevent acts deemed detrimental to the economy is widespread in the antitrust field.

Another area where there is a great need for injunctive relief is in fraudulent scheme cases. While present law provides limited injunctive relief,[7] this relief is inadequate. First, the relief is restricted to the detention of incoming mail. It does not reach the situation where letters continue to be sent to further a scheme and remittances are collected personally from the customer or to fraudulent schemes which do not entail the use of the mails. Second, the required administrative proceedings entail considerable delay which is compounded by the extra time and energy necessary to bring an injunctive suit in the district court while the administrative proceedings are pending. Since the investigation of fraudulent schemes often takes months, if not years, before the case is ready for criminal prosecution, innocent people continue to be victimized while the investigation is in progress. For these reasons, the Committee has concluded that prior to the commencement of a criminal action the Attorney General should be empowered to bring suit to enjoin acts or practices which would constitute a violation of section 1734.[8] This injunctive procedure is similar to that used in S.E.C. cases and will provide a quick and effective remedy while the criminal process is taking its course.

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[1] Holdsworth. *A History of English Law* 405, 406 (7th ed. 1956).

[2] See Mack, *The Revival of Criminal Equity*, 16 Harv. L. Rev. 390, 391 (1903).

[3] Pomeroy, *Equity Jurisdiction*, p. 949 (5th ed. 1971).

[4] See Case Comments, *Equity's Power to Enjoin Criminal Acts*, 16 Wash. and Lee L. Rev. 303, 305 (1959).

[5] 15 U.S.C. 77t.

[6] 18 U.S.C. 1964; see subchapter B of chapter 40.

[7] See 39 U.S.C. 3005(a).

SECTION 4021. INJUNCTIONS AGAINST FRAUD

This section provides that the Attorney General may bring an action in a district court of the United States to enjoin a violation of section 1734 (Executing a Fraudulent Scheme). It is left to the discretion of the Attorney General to determine whether he has received sufficient evidence for the initiation of the action. While this section is designed to enable the Attorney General to seek such relief prior to the commencement of a criminal action, the Attorney General can institute such action at any time. As a civil action, the proceeding is governed by the applicable Federal Rules of Civil Procedure. One exception to the application of the civil rules of procedure is provided for. If an indictment has been returned the more limited discovery rules of the Federal Rules of Criminal Procedure are made applicable. If the evidence is sufficient, the court may issue a permanent or temporary injunction or restraining order together with such other relief as is appropriate to prevent a continuing and substantial injury to the United States or to any person.

SUBCHAPTER D.—RESTRICTION ON IMPOSITION OF CIVIL DISABILITIES

(Sections 4031-4033)

1. In General

This subchapter consists of two sections placing restrictions on the extent to which disabilities may be imposed on a person by reason of a conviction.

Section 4031 places a general restriction on imposition of civil disabilities under color of Federal law, absent statutory authority. Section 4032 places restrictions on employment disabilities by a Federal government agency because of conviction for a Federal, State, or local offense.

Section 4033 requires the Attorney General to issue regulations to carry out the purposes of the subchapter.

2. Present Federal Law

The civil and employment disabilities imposed on offenders extend widely throughout Federal statutes and regulations. The Federal government has adopted provisions through which occupational licenses must or may be denied to ex-offenders.[1] Numerous Federal statutes preclude employment of ex-offenders by private persons or associations.[2] In addition, there is a statutory bar against ex-offenders' enlistment in the armed forces of the United States[3] and the potential exclusion of persons convicted of felonies and misdemeanors from all Federal civil service positions.[4] Similarly, social security rights and other Federal benefits may be lost upon conviction.[5]

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[8] Executing a Fraudulent Scheme.

At the State level, at least 1,948 separate statutory provisions affecting the licensing of persons with an arrest record have been disclosed.[6] Only three States, New York, Wisconsin, and Hawaii, have explicitly prohibited unreasonable employment discrimination against offenders.[7]

These disabilities often constitute a lasting punishment of the offender. They are not likely to be considered by a court in determining the sentence for a particular offender. Although these provisions usually provide some discretion in their application,[8] there is no assurance that they will be applied only when reasonable. Such civil and employment disabilities may frequently serve to frustrate an ex-offender who is making a serious effort to become integrated into society.

In the area of employment disabilities, due process and equal protection would seem to require that some reasonable relationship exist between the nature of the job sought and the governmental basis for denying it. In *Schware* v. *Board of Bar Examiners,*[9] the Supreme Court found New Mexico's refusal to admit Schware into the bar unconstitutional. The Court required a reasonable relationship between New Mexico bar requirements and the applicant's fitness. The Court found that an automatic exclusion because of a past record, without consideration of the nature of the offense and occupational qualification, violates the due process and equal protection clauses of the Fourteenth Amendment.[10]

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[1] E.g., 7 U.S.C. 12a(2)(B) (Secretary of Agriculture authorized to deny convicted felon's registration as futures commission merchants and floor brokers); 46 C.F.R. §10.02-1 (convicted narcotics laws violators ineligible for deck or engineering officer's licenses for a period of 10 years).

[2] E.g., 29 U.S.C. 504(a) (prohibiting labor organizations from employing any person who has within five years been convicted of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of a narcotics law, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, a violation of specific labor statutes, or conspiracy to commit any of the cited offenses, in any non-clerical or non-custodial position); 12 U.S.C. 1785(c) (prohibiting federally-insured credit unions from employing in any capacity whatever, any person convicted of an offense involving dishonesty or a breach of trust unless written authorization for the hiring is obtained from the Administrator of the National Credit Union Administration); 21 U.S.C. 467(a), 671 (authorizing the Secretary of Agriculture to deny or to terminate federally required poultry or meat inspection services where the applicant for or recipient of the services "or anyone responsibly connected with the applicant or recipient" has within 10 years been convicted of one of various listed felonies or "more than one misdemeanor" involving particular types of fraud or deception).

[3] 10 U.S.C. 504 ("No person . . . who has been convicted of a felony may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies").

[4] 5 C.F.R. §731.202(b) (Office of Personnel Management may deny employment to an applicant or current employee guilty of "criminal, dishonest, infamous, or notoriously disgraceful conduct").

[5] See, e.g., 5 U.S.C. 8312, prohibiting retirement benefit payments to an individual or his survivor or beneficiary, convicted of enumerated offenses; 42 U.S.C. 402(u), providing that court may withhold old-age and survivors insurance benefits payments as additional penalty for enumerated offenses; 24 U.S.C. 50, excluding soldiers convicted of felonies from the benefits of the Soldiers' Home; 38 U.S.C. 3505, excluding any individual convicted of any offense from benefits administered by the Veterans' Administration.

[6] American Bar Association, *Removing Offender Employment Restrictions,* Clearinghouse on Offender Employment Restrictions (1976).

[7] U.S. Department of Labor, A *Study of the Number of Persons with Records of Arrest or Conviction in the Labor Force,* Technical Analysis Paper #63 (1979).

[8] 10 U.S.C. 504, which restricts enlistment of ex-felons into any armed force, provides that ". . . the Secretary concerned may authorize exceptions in meritorious cases. . . ."

[9] 353 U.S. 232 (1956).

SECTION 4031. GENERAL RESTRICTIONS ON IMPOSITION OF CIVIL DISABILITIES

Section 4031 restricts imposition of Federal civil disabilities (other than those provided by statute) unless "(a) the offense occurred in connection with the particular right, privilege, or opportunity withheld by reason of that disability; or (b) there is a substantial probability, in light of the offense and other relevant circumstances, that the person so convicted will abuse the right, privilege, or opportunity withheld by reason of that disability."

Section 4031 is a general provision, requiring that no civil disability not expressly provided by statute be applied without rationale. If a statute requires the imposition of a civil disability, or if a statute applies such a disability automatically, this section does not affect that imposition or application. If a statute permits the imposition of a disability, or if a disability is sought to be imposed under color of law without statutory authority, then this section establishes the requisites to such imposition.

SECTION 4032. RESTRICTION ON EMPLOYMENT DISABILITIES

Subsection (a) of section 4032 prohibits a Federal government agency from applying blanket denials of employment or access to employment to an ex-offender, whether convicted of a Federal, State, or local offense, solely on the basis of that conviction. Existing provisions of Federal law which allow automatic rejection of ex-offender job applicants are superseded by this provision except to the extent that they meet the requirements of subsection (c). Section 4032(a) is framed to avoid constitutional due process objections to blanket employment disabilities by requiring a reasonable relationship between employment denial and the offense. A Federal agency may not decline to consider an application or deny access to employment solely because the application or employment is that of an ex-offender unless, under section 4032(a)(1), there is a reasonable relationship between the conduct constituting the offense and the employment. The passage of time since the offense may mitigate a relationship that might have existed if only a short time had passed since the commission of the offense. No time period is set and no presumption is intended that passage of time alone severs the relationship. The existence of a reasonable relationship will not always be as clear as, for example, denying a person with a conviction for embezzlement an employment opportunity as disbursement officer. Thus, subsection (a)(2) allows the employing agency to consider "other circumstances that, in combination with the conduct constituting the offense, suggest convincingly that the person is unsuitable to engage in the employment or that others may be more suitable."

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[10] See also *Miller* v. *D.C. Board of Appeals and Review*, 294 A.2d 365 (D.C. App. 1972) (court finding that the District of Columbia arbitrarily refused to grant a street vendor's license because of the applicant's criminal record); *DeVeau* v. *Braisted*, 363 U.S. 144 (1969) (upholding the denial of office in a waterfront union to a member with a larceny conviction on the ground that a relationship between ex-offenders holding union office and organized crime on the waterfront exists). Cf. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973).

Subsection (b) of section 4032 provides that where denial was wholly or substantially because of conviction for a Federal offense, the agency shall provide the person a statement of the reasons for denial. The statement shall be in writing. The statement will assure the development of a reviewable record for an applicant who believes he has been denied employment or access to employment in violation of this section.

In recognition that government security and welfare require stringent personnel standards for certain positions, subsection (c) of section 4032 makes section 4032 provisions inapplicable to "(1) an applicant for admission to the bar of a Federal or State court, or for employment with a Federal law enforcement agency; (2) a candidate for appointment by the President to a Federal office; (3) an applicant for a Federal position that requires a security clearance; or (4) a person as to whom the disability is imposed "under" certain enumerated statutes, or under a court order pursuant to a statute. This last provision is included to assure that any disability imposed by a court in the sentencing process (in which full consideration is given to the appropriateness of the disability, and from which an appeal may be taken) will not be affected.

The Committee believes that the approach of this section provides a more forthright means of protecting both Federal and individual interests than does expungement of conviction records—a remedy that forces an offender to fabricate explanations for the "holes" in an employment record and that places the government in the untenable position, in effect, of sanctioning lying. Expungement moreover may often prove ineffective–especially in these days of computerized information—in that supposedly expunged records would surface from secondary sources.

SECTION 4033. ATTORNEY GENERAL REGULATIONS

Section 4033 requires the Attorney General to issue regulations to carry out the purposes of subchapter D of chapter 40. The regulations can articulate more thoroughly the relationship between current law disability provisions and the provisions of the subchapter.

CHAPTER 41.—ANCILLARY PRIVATE CIVIL REMEDIES

Chapter 41 consists of two subchapters. Subchapter A provides a civil cause of action for persons injured as a result of racketeering activities. It also provides a civil cause of action for persons whose oral private communications have unlawfully been intercepted. These provisions are reenactments of similar provisions in current law.

Subchapter B is new and provides compensation for victims of crime. The concept of compensating victims of crime is rapidly gaining favor in the States, and the Committee believes that this is an important step forward in the criminal law field. The funds used to pay the victims will come from a special revolving fund set up in the Treasury of the United States. Part of the funds used for this program will be obtained from the payment of criminal fines.

SUBCHAPTER A.—PRIVATE ACTIONS FOR DAMAGES

(Sections 4101–4103)

This subchapter provides for a private civil action by which a person may seek civil damages as a result of a defendant's violation of sections 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), 1803 (Washing Racketeering Proceeds), or 1521 (Eavesdropping). Such private actions exist under current law.[1] The authorization of such actions is in recognition of the fact that violation of the enumerated sections in this subchapter can have far greater consequences to the victim than in the ordinary criminal cases—consequences that often can readily be redressed through money damages. In addition, it is hoped that the knowledge that a person will be subject to substantial civil damages will serve as an effective deterrent to the commission of these offenses. The purpose of the provision, however, is remedial, not penal; adequate relief or compensation is the main goal.[2]

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[1] See 18 U.S.C. 1964(c), 2520.

[2] See 84 Stat. 947 (1970) ("remedial purposes"); *United States* v. *Borstein*, 423 U.S. 303, 313–16 (1970); *Schwarsel* v. *Holershade*, 121 Fed. Cases 772 (No. 12, 506 S.D. Ohio 1866); *Burnett* v. *Ward*, 42 Vt. 80, 93 (1869).

SECTION 4101. CIVIL ACTION AGAINST A RACKETEERING OFFENDER

This section provides that a person may bring a civil suit in a district court of the United States against a defendant for damages caused to his person, business or property as a result of the defendant's violation of sections 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds)—the basic organized crime offenses set forth in the Code.[3] The injured person may recover three-fold the damages sustained as well as reasonable attorney's fees and investigation and other litigation costs.

SECTION 4102. CIVIL ACTION AGAINST AN EAVESDROPPING OFFENDER

This section authorizes a civil damage suit for a person whose private oral communication is intercepted, disclosed, or used in violation of section 1521. Such action may be brought in a district court of the United States against any person who intercepts, discloses, uses, or procures another person to intercept, disclose, or use such a communication. An injured person may recover actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is higher. In addition, such person is entitled to punitive damages and reasonable attorney's fees and other investigation and litigation costs.

A defendant who has reasonably relied on a court order or legislative authorization and who believed in good faith that his conduct did not constitute an offense is afforded a defense to any action brought under this section or under any other law for the interception, disclosure, or use.

The predecessor of this section is 18 U.S.C. 2520.

SECTION 4102. TIME LIMITATIONS FOR CIVIL ACTIONS

Section 4103 establishes, in subsection (a), a Federal statute of limitations for those civil actions authorized to be brought under this subchapter. It establishes a period of limitations of four years, subject to suspension of the period, after the cause of action accrued. The four year limitation is parallel to the limitation period for suits authorized under the Sherman Antitrust Act.[4]

Subsection (b) establishes a method to suspend the limitation period. The statute will be suspended by the filing of a complaint, an information, or an indictment exercising Federal jurisdiction over an offense that is based on the same events that gave rise to the civil cause of action.[5] The limitation period will be suspended until the criminal action results in a final judgment of conviction or an order of dismissal and for one year thereafter.[6] This suspension provision is in recognition of the difficulties in bringing a civil action in the middle of a pending criminal case.

A specific statute of limitations for civil actions permitted by this subchapter, with a period of suspension as set forth in subsection (b), is necessary to avoid unfair results to those granted rights to bring these actions. Absent a Federal statute the general rule is to apply the applicable State statute of limitations to govern actions brought under a Federal law creating a wholly Federal right.[7] State statutes vary and it is unlikely that in all cases the filing of a Federal criminal action will be sufficient to suspend a State statute of limitations. Absent this provision those afforded rights under this subchapter could effectively be frustrated in exercising those rights.

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[3] See *Reiter* v. *Sonotone*, 442 U.S. 330, 337 (1979) (scope of property).

[4] 15 U.S.C. 15b.

[5] See *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 316–17 (1965).

[6] *Russ Togs, Inc.* v. *Grinnell Corp.*, 426 F.2d 850, 356–57 (2d Cir. 1970).

Subsection (c) provides that a civil action brought under this subchapter is barred if it was commended after the applicable period established by this section.[8]

SUBCHAPTER B.—ACTIONS FOR COMPENSATION OF VICTIMS OF CRIME

(Sections 4111–4115)

Although there is no Federal statute concerning compensation of victims of Federal offenses, Federal legislation to compensate victims of crime has passed the Senate in the 92d, 93d, 94th, and 95th Congresses, largely through the efforts and interest of former Senator Mike Mansfield. The 93d Congress passage by the Senate of crime victim compensation legislation occurred on April 3, 1973, with the passage of S. 800, 93d Cong., 1st Sess., by a vote of 93 to 1.[1] That bill, in turn, incorporated as title I the provisions of S. 300, 93d Cong., 1st Sess., introduced by Senators Mansfield and Mondale, which had passed, the Senate on March 28, 1973.[2] On July 19, 1976, the Senate adopted an amendment offered by Senator Mansfield to attach such legislation to H.R. 366. The victim compensation provisions were dropped in conference to give the House time to consider separate legislation on the subject. The House passed a crime victim compensation bill (H.R. 7010) on September 30, 1977. Although the Senate passed an amended version of H.R. 7010 on September 11, 1978, no legislation on this subject was enacted in the Ninety-Fifth Congress.

Subchapter B contains the basic concept, set forth in the Senate-passed bills, that the Federal Government should provide a means of financial assistance to victims of Federal crimes which involve bodily injury or death. While retaining this basic concept, however, the Committee has reconsidered some of the details of the application and administration of those bills, and has in this subchapter made the compensation program applicable to victims of any offense described in chapter 16 (Offenses Against the Person) for which there is Federal jurisdiction [3] rather than limiting jurisdiction to offenses committed within the special maritime and territorial jurisdiction, the District of Columbia, and the Indian Country.[4]

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[7] *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971). See also *Hildebrand* v. *Firemans's Retirement System of St. Louis*, 527 F. 2d 587 (8th Cir. 1975)

[8] It is relevant that these civil actions uniformly survive as a matter of Federal common law. See *Carlson* v. *Green*, 446 U.S. 14, 23–25 (1980).

[1] 119 Cong. Rec. S 6557 (daily ed.).

[2] 119 Cong. Rec. S 6261 (daily ed.).

The Committee notes that the President has announced his intention to appoint a task force on victims to address, among other things, issues related to victim compensation. Recommendations of the task force that might improve this bill can be evaluated during the period between the bill's date of enactment and its effective date.

SECTION 4111. ESTABLISHMENT OF A VICTIM COMPENSATION FUND

Section 4111 creates in the United States Treasury a Victim Compensation Fund consisting of all criminal fines collected by the United States courts through the new fine collection process,[5] money reimbursed to the Victim Compensation Fund by a victim or dependent who receives money damages from another source,[6] funds collected from Federal offenders pursuant to suits for subrogation under section 4114, and contributions to the Fund from public or private sources. The Committee believes that the moneys from these sources will be more than adequate to cover orders for payment of compensation under this subchapter and that no appropriations will be needed. This is especially true because of the higher authorized fines available under chapter 22 and because of the improved procedures for collecting unpaid criminal fines provided in subchapter B of chapter 38. To ensure that the Fund is indeed the sole source, the section provides that compensation under this subchapter can only be made from this Fund. To ensure that the amount expended by the Fund is not unreasonable and in order to assure congressional oversight of Fund expenditures, the bill also provides that no payment of compensation from the Fund may exceed amounts provided in advance in appropriation Acts.

SECTION 4112. CLAIM FOR COMPENSATION

Section 4112(a) creates a procedure by which the victims or surviving dependents of a victim of a Federal offense, or an attempt to commit a Federal offense, if there is Federal jurisdiction over the offense under chapter 16 (Offenses Against the Person), may seek compensation for personal injury by means of a claim filed with the United States Victim Compensation Board. The establishment and composition of the Board is set out in chapter 40 of title 28,[7] United States Code, and it is intended to serve as the agency through which victims of crime will receive compensation from the Victim Compensation Fund. The procedures called for by section 4112 carry forward, in large measure, the provisions of the previously Senate-passed measures.

Claims could be for personal injury resulting from any offense, or attempted offense, over which there is Federal jurisdiction under chapter 16 (Offenses Against the Person). That chapter covers all Federal offenses which could result in personal injury or death,

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[3] But see the definition of "offense described in chapter 16" set forth in section 4115(d).

[4] See the discussion of section 4112(a).

[5] Section 3812(b) of the Code.

[6] Section 4113(e)(2) of the Code.

[7] 28 U.S.C. 595, *et seq.*, as added to title 28 by section 124 of the reported bill.

either directly or by providing jurisdiction for offenses against the person which occur during the commission of other specified Federal offenses. More Federal offenses will be covered under this subchapter because of a broader range of applicable Federal jurisdiction than under some of the prior bills, which contained lists of crimes covered and limit the lists to those crimes committed in the special maritime and territorial jurisdiction, the District of Columbia,[8] and the Indian country. In reconsidering this jurisdiction, the Committee has concluded that it was preferable to give similar treatment to all victims of a particular offense over which there was Federal jurisdiction rather than to give compensation to a victim only if the offense were committed in a particular segment of the Federal jurisdiction over the offense. If, however, jurisdiction over the offense is based on the fact that the offense affects, delays, or obstructs commerce, or that an article or commodity moved in interstate or foreign commerce, or that the offense occurred during commission of an offense over which Federal jurisdiction existed only because of such a commerce connection, the victim or dependent is eligible for compensation only if an indictment or information is filed in Federal court.

Section 4112(b) provides that a hearing on a claim filed under this subchapter must be public unless the Board finds that the hearing or a portion of the hearing should, in the interest of justice, be closed to the public. For example, the Board could order the hearing closed if there had not yet been a trial in the case in order to avoid problems of pretrial publicity. If the investigation of the offense were not completed, the Board might also wish to conduct the hearing in private in order to avoid interfering with the investigation. The Board might also wish to close part of a hearing to the public in the interest of protecting the privacy of a claimant, such as the taking of testimony from a young rape victim.

Section 4112(c)(1) provides that if personal injury results from an offense, the victim is entitled to compensation, under the guidelines of section 4113, and subsection (c)(2) provides that there is a right of survivorship to his estate for the personal injury claim if the victim dies, not necessarily as a result of the offense, before the case has been concluded. Section 4112(c)(3) provides for compensation, under the guidelines of section 4113, to a surviving dependent of a victim who died as a result of the offense. It is possible under certain factual situations that compensation will be awarded under both paragraphs (1) and (3) if, for example, an offense has resulted in prolonged hospitalization and ultimately has resulted in death. If death resulted from a cause other than the offense, then the estate could receive compensation under appropriate circumstances under paragraph (2), but the dependents would not be entitled to compensation under paragraph (3). The reason for permitting a right of survivorship to the claim even if the death did not result from the offense, is to assure that the family of the victim does not suffer undue financial stress from such expenses as hospitalization of the victim as a result of the offense.

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[8] Under the bill, as reported, compensation for offenses committed in the District of Columbia will be limited under this bill to compensation for offenses in the Federal Criminal Code, thus leaving the election of compensation for other offenses to legislation for the District of Columbia alone. This is consistent with the coverage of Federal jurisdiction provided elsewhere in the Code. Similarly, the subchapter has not carried forward the provisions for grants for State compensation programs.

Section 4112(d) provides that the Board is to determine the amount of compensation for pecuniary loss and is to order the payment to the claimant for that pecuniary loss. If the pecuniary loss is the loss of anticipated earnings or support and that loss continues for ninety days or more, then the payments for loss of anticipated earnings or anticipated support can be made periodically during the period during which the loss continued, for a maximum period of ten years. If the victim died as a result of causes other than the offense, his estate would still be entitled to loss of anticipated earnings for the time the victim would have been unable to work full time as a result of the offense, subject to the provisions of section 4113.

Section 4112(e) permits the Board to grant emergency compensation, up to $1500, pending final action on a claim if the claim is one for which payment will probably be ordered. The amount of emergency compensation would be deducted from a final payment, and, if the amount of the emergency payment exceeds the amount finally awarded, the claimant may be ordered to reimburse the fund.

Section 4112(f) permits reconsideration of a claim by the Board at any time and modification or rescission of orders based upon changes in the circumstances of the claimant.

Section 4112(g) bars any claim under this subchapter for injury or death unintentionally caused by vehicular accidents in the course of an offense, unless the vehicle was an implement used in the commission of an offense to which the subchapter applies.

Section 4112(h) provides that if a claim would otherwise be allowed, it will not be barred if the person who committed the offense could not be convicted of the offense because of immaturity, incompetency, or otherwise. Thus, if there is Federal jurisdiction over the offense, a claim may be allowed even if no person is actually prosecuted for the offense.

Section 4112(i) provides that this subchapter does not affect the right of a victim or his survivors to bring a civil action for damages against a person for the injury or death.

Section 4112(j) prohibits execution or attachment against an order for payment entered under this subchapter.

SECTION 4113. LIMITATION ON COMPENSATION

Section 4113(a) provides that a victim or his surviving dependents must satisfy three prerequisites in order to obtain an order for payment under this subchapter. The first requirement is intended to encourage cooperation with law enforcement officials. Thus, this section requires that the offense giving rise to the claim must be reported to a law enforcement officer within seventy-two hours after its occurrence unless the Board finds the failure to do so to be justified by good cause. The second requirement is that the claim be filed within one year after the offense occurred. It is necessary to set such a time limit in order to avoid stale claims. This time limitation may, of course, also be waived if the Board finds the failure to comply to be justified by good cause. The third prerequisite requires the Board to find that the offense giving rise to the claim was the proximate cause for the pecuniary loss claimed and, in order to discourage frivolous claims and to avoid multiple small claims, a claim for less than $100 or a week's earnings or support, whichever is less, is not permitted. S. 300 in the 93d Congress included a fourth prerequisite that banned a payment unless the claimant could show financial stress from the pecuniary losses caused by the offense. Financial stress was defined in terms of undue financial strain. The Committee has rejected the concept of financial stress as a prerequisite to the payment of a claim. The essence of the system established by this subchapter is compensation for losses incurred. The introduction of the concept of financial stress being caused to the victim moves the central question from the issue of compensation to one more akin to welfare considerations and is fundamentally unfair to the victim. In addition, a requirement of establishing financial stress as a threshold question in every case will unnecessarily complicate the recovery procedure. It should be noted that a recent model act drafted by the Commissioners on Uniform State Laws also rejects financial stress as a prerequisite to recovery.[9]

Section 4113(b) limits awards for compensation for pecuniary loss to a maximum of $50,000 for each incident involving an offense against a victim giving rise to a claim. Thus, if several dependents were claiming losses for the death of a single victim, the total amount of compensation for the aggregate claims could not exceed $50,000. The total amount ordered to be paid under claims made for the same victim of an offense would not necessarily be equal since the Board would have to consider the actual pecuniary loss of each claimant and split the award accordingly. Of course, if a person were the victim of more than one offense, he would be entitled to file a claim for each of them.

Two subsections set forth in section 4113 delineate the lack of personal culpability and the cooperation with law enforcement authorities necessary to recover an award under this subchapter. Subsection (c) permits the Board to reduce the amount or deny compensation where the victim or claimant shared responsibility for the offense. Subsection (d) authorizes the Board to reduce, deny, or withdraw an award because of the victim's or claimant's failure to cooperate substantially with law enforcement agencies.

Section 4113(e)(1) provides that damages recovered from sources other than a claim under this subchapter will be considered to first, offset losses that do not qualify as pecuniary losses, unless the damages clearly compensate for pecuniary losses, and then second, to offset pecuniary losses. For example, if the victim of an offense recovered from an insurance claim for the personal injury and the payment included funds for pain and suffering (not included in the definition of "pecuniary loss" in section 4115), the payment would be offset against the loss for pain and suffering before it would be offset against the losses covered within the definition of "pecuniary loss."

If damages are paid to the claimant from a source other than the Victim Compensation Fund after the claimant has received payment under this subchapter, he will be ordered under section 4113 (e)(2) to reimburse the Fund in the amount which would have been offset against his compensation from the Fund if he had received the damage payment before being compensated from the Fund.

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[9] See Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A.J. 1531 (1974).

SECTION 4114. SUBROGATION

Section 4114 permits the Attorney General, to the extent practicable, to institute a suit against an offender convicted of an offense giving rise to the claim under this subchapter to recover the compensation paid under this subchapter. A recovery by the Attorney General pursuant to this section does not affect the obligation of the defendant to pay a fine for the offense giving rise to the claim for compensation. On the other hand, by implication the defendant would not be liable under this section if he has already made restitution to the victim. A suit is permitted even if the offender is convicted under State or local law of the act for which Federal jurisdiction existed under chapter 16 but which was not exercised because of the frequently used practice of deferring to State and local prosecutions even though an act may in fact constitute a Federal offense. In the event that the defendant has been convicted in a Federal court of an offense giving rise to a compensation claim under this subchapter, he will be estopped from denying the essential allegations of the offense in a subsequent civil proceeding under section 4114. A suit under this subchapter must be brought within three years of the entry of an order for payment of compensation.

SECTION 4115. DEFINITIONS FOR SUBCHAPTER B

This section contains four definitions for this subchapter. Section 4115(a) defines "dependent" to include a spouse, a posthumous child, or a dependent as defined in section 152 of the Internal Revenue Code of 1954,[10] which is the section describing dependents for purposes of Federal income taxes.

Section 4115(b) defines "pecuniary loss" in the case of personal injury as consisting of medical and related expenses resulting from personal injury, including psychiatric care, and non-medical care and treatment rendered pursuant to a recognized method of healing, expenses reasonably incurred for physical and occupational therapy and rehabilitation, and actual loss of past earnings and anticipated loss of future earnings at a rate not to exceed $150 per week. "Pecuniary loss" in the case of death from the offense is defined to consist of reasonable funeral and burial expenses and loss of support to a surviving dependent at a rate not to exceed a total of $150 per week for all dependents. These limitations are, of course, further subject to the provisions of section 4112(d) that the payment for anticipated earnings or support is only available if the loss continues for a period longer than ninety days and that payments may not be continued for a period longer than ten years. The payments are further limited to the restriction of $50,000, contained in section 4113(b), on the total amount which may be paid on account of a single offense against a single victim.

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[10] 26 U.S.C. 152.

"Personal injury" is defined in section 4115(c) to mean bodily injury, or mental distress or nervous shock connected with bodily injury.

Finally, section 4115(d) defines the term "offense described in chapter 16" in a restrictive way to exclude offenses where it is possible to assert Federal jurisdiction but where that connection is based on broad jurisdictional concepts and where actual jurisdiction has not been asserted by the Federal government. Thus, even if Federal jurisdiction could be asserted because the offense affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce, or where the offense occurs in the course of another offense for which Federal jurisdiction would exist for one of these reasons, no claim will be permitted unless a Federal indictment or information charging such an offense has been filed in a court of the United States. The Committee believes this limitation is necessary in due regard for proper Federal and State relations and to avoid a broad construction of Federal jurisdiction based solely on claims made by victims of crime.

TITLE II—AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THE FEDERAL RULES OF EVIDENCE

FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

INTRODUCTION

This title of the reported bill contains a substantial number of amendments to the Federal Rules of Criminal Procedure. These rules, the bulk of which have been promulgated by the Supreme Court, set forth the basic procedures to be followed by the Federal courts in the trial of a criminal case. Their importance to the Federal court system and to its operation in an effective and efficient manner is self-evident.

Several new Rules have been added and several others have been amended substantively, although the majority of the existing Rules have been retained.[1] The Committee reaffirms confidence in the existing method for promulgation of these Rules through the Supreme Court and the Committees of the Judicial Conference. The work of these Committees is invaluable, and the Committee expects that they will continue to carefully scrutinize, modify, and modernize the Rules in the years to come.

The Committee has used as its working text the latest version of the Federal Rules of Criminal Procedure.

It is not intended that any of the amendments to the Federal Rules of Criminal Procedure contained in this recodification should in any way preempt the rule-making procedures of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States or its Advisory Committee on Criminal Rules. The Advisory Committee, which consists of representatives of the defense bar, judges, and legal scholars, is vested with the primary responsibility for initiating revisions in and amendments of rules of criminal procedure in response to new developments in statutory and case law. The considered proposals of the Advisory Committee are then sent to the Committee on Practice and Procedure of the Judicial Conference, which in turn circulates such proposals to the legal and judicial communities of the nation for comment. Rule change proposals found acceptable then go to the Judicial Conference and ultimately to the Supreme Court of the United States and to the Congress. The delegation of rulemaking authority to the Federal courts in fact goes back almost to the beginning of the Republic.

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[1] Rule 27, dealing with proof of an official record, has been repealed because it is adequately covered in Rule 803 (8) and (10) of the Federal Rules of Evidence. No other rules have been repealed.

Accordingly, it should be recognized that the amendments to the Criminal Rules of Procedure contained in this Act are included primarily for technical reasons; that is, to ensure that the revision of the substantive criminal laws be accompanied where necessary by simultaneous adjustments in the procedural criminal laws. Such amendments are not intended to limit or otherwise interfere with the traditional rule-making function of the Supreme Court or the painstaking research by the Judicial Conference through its committees which gives rise to proposals for amendment or revision. The Committee recognizes that there might in fact be subsequent changes through the rule-making process of specific rules included in this legislation.

The decision was made by the Committee to transfer certain provisions of existing law into the Federal Rules of Criminal Procedure rather than to retain them as sections of title 18. This choice was dictated by consideration of the close relationship between the subject matter of these existing provisions and the subject matter of particular rules. It was necessary, in addition, to change some of the terminology and some of the substance of the present rules to conform them with provisions of the revised Code. In a few places, changes in wording, punctuation, capitalization, and the like were made simply for purposes of clarification or of stylistic conformity. In only a few instances were substantial changes made in the content of the sections moved into the rules and in the content of the existing rules. Most of the rules (as now in effect) have either not been changed at all or were changed only in minor matters of form.

Changed only in very insubstantial ways are Rules 1, 20, 24, 43, 46, 50, and 53. The changes in these rules are generally in conforming citations to the revised title 18 and in the use of commonly defined terms, and the changes to these rules generally are not further discussed in this report.

One other change of overall significance has been made. The general definitions for the Code as set forth in section 111 have been made applicable to the Federal Rules of Criminal Procedure. The Committee has made these definitions applicable to the rules purely to achieve greater unity and conformity.[2] Rule 54 still retains specific definitions applicable to the rules only.

The additions of the provisions of existing law and the other substantial changes that have been made to the Federal Rules of Criminal Procedure will be discussed below in the numerical order of the rules.

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

The principal change made in Rule 5 is an addition at the end of the rule of a provision stating that if a defendant is entitled to but is not accorded a preliminary hearing within the time prescribed (including any authorized extensions of time), he is to be discharged from custody or from any condition of release, without prejudice to the institution of further criminal proceedings against him upon the charge for which he was arrested. This simply brings into Rule 5, as an addition to subdivision (c) thereof, the provisions now found in 18 U.S.C. 3060(d).

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[2] See the definitions of "subdivision", "paragraph", and "subparagraph" in section 111.

Three other changes were made, all of a minor nature. Citation to 18 U.S.C. 3041 was deleted from subdivision (a) of the rule, and, while not replaced, the same matter is now treated essentially as before in section 3303 of the Code. Also, the citation to 18 U.S.C. 3401 was replaced in subdivision (b) of the rule by citation to section 3302 of the Code. Finally, subdivision (c) was amended, in conformity with the provisions of chapter 35 of title 18, to provide that the magistrate shall detain or conditionally release the defendant at his initial appearance, rather than providing that the magistrate "shall admit the defendant to bail".

RULE 6. THE GRAND JURY

This Rule has been given a substantive addition that, while having no exact counterpart in existing law, is warranted upon a parity of the reasoning underlying relatively recent legislation.

It has long been established under subdivision (g) of Rule 6 that a grand jury may not serve more than eighteen months after its members have been sworn. No exceptions are made. This rule, however, bars the extension of regular grand juries only; different provisions were made for special grand juries. Under title I of the Organized Crime Control Act of 1970,[3] special grand juries may be extended beyond their basic terms of eighteen months if their business has not been completed.[4] To allow for special grand juries to be extended to complete the public business, while barring any extension of regular grand juries, whatever the circumstances, is an anomaly. An inflexible rule for regular grand juries could mean either the wastage of a significant amount of work or the prompting of precipitous action by the jurors to bring their work to fruition before the expiration date.[5] Neither situation is tolerable. Some difference of approach is justified, however, by differences between special and regular grand juries, and the Committee also intends that the extension of regular grand juries beyond eighteen months is to be the exception and not the norm.

For the foregoing reasons, Rule 6(g) has been changed so that the court may extend the service of a regular grand jury for a period of six months or less, beyond the initial eighteen month period, upon a finding that such an extension is in the public interest. The Committee intends thereby to allow a regular grand jury sufficient extra time to wind up an investigation when such extension becomes necessary for such reasons as the unusual nature of the case, unforeseen developments, or even a lack of foresight about the time required for an investigation. An extension may be ordered, however, only if the district court finds an extension of time would be in the public interest.

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[3] 18 U.S.C. 3331-3334.

[4] The provisions of 18 U.S.C. 3331-3334 have been moved to Rule 6.1.

[5] In a case upholding the dismissal of an indictment returned nine days after the expiration of the 18 month period but during an attempted extension, the Second Circuit noted that under the current inflexible rule, "it may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape trial and conviction." *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974).

RULE 6.1. THE SPECIAL GRAND JURY

This is a new rule, the content of which is derived from title I of the Organized Crime Control Act of 1970.[6] A few changes of substance have been made in existing law, but, in the main, existing provisions have simply been rewritten in the style employed by the Code and the rules.

Subdivision (a) of the rule concerns the summoning of special grand juries, which may occur automatically or at the instance of the executive branch of government. The subdivision provides that in a judicial district (1) having more than four million inhabitants, or (2) concerning which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge that in his judgment a special grand jury is necessary because of criminal activity in the district, the court is to order a special grand jury summoned at least once every eighteen months unless another special grand jury is then serving. If the court at any time determines that the volume of business of the special grand jury exceeds its capacity to discharge its obligations, the court may order an additional special grand jury to be impaneled in that district.

These provisions are taken from 18 U.S.C. 3331(a) and 3332(b), without substantive change.

Subdivision (b) of the rule concerns the term of special grand juries. It provides that a special grand jury is to serve for a term of eighteen months unless, upon a determination of the special grand jury by majority vote that its business has been completed, an order for its discharge is entered earlier by the court. If, at the end of the term, or any extension thereof, the court determines that the business of the special grand jury has not been completed, the court is permitted to enter an order extending the term for an additional period of six months. If a court fails to extend the term of a special grand jury, or enters an order for its discharge before the special grand jury determines that it has completed its business, the special grand jury may, upon the affirmative vote of a majority of its members, apply to the chief judge of the judicial circuit within which the court is located for an order continuing the term. Upon making of such an application, the term is to continue until entry of an appropriate order by the chief judge of the circuit. No term of a special grand jury, however extended, is allowed to exceed a total of thirty-six months, except as provided in subdivision (f)(1) which permits certain extensions for the purpose of making a report.

Subdivision (c) of the rule concerns the jury's investigation and provides that a special grand jury is to inquire into offenses against the criminal laws of the United States alleged to have been committed within the district. Such alleged offenses may be brought to the attention of the special grand jury by the court or by an attorney for the government. An attorney for the government, upon receipt of information concerning an alleged offense from a person requesting that the information be transmitted to the special grand jury, is to inform the grand jury of the alleged offense and of the identity of such person, and is to make a recommendation on the matter to the special grand jury. This subdivision is simply a rewriting of 18 U.S.C. 3332(a).

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[6] 18 U.S.C. 3331-3334. See S. Rept. 91-617, 91st Cong., 1st Sess. (1969); H. Rept. No. 91-1549, 91st Cong., 2d Sess. (1970).

Subdivision (d) of this rule governs the distinctive matter of special grand jury reports. It provides that a special grand jury may, upon the completion of its term or any extension thereof, and with the concurrence of a majority of its members, submit to the court a report which: (1) concerns noncriminal misconduct, malfeasance, or misfeasance in office by a Federal, State, or local public servant, and recommending removal of, or disciplinary action against, such public servant; (2) states that after investigation of a Federal, State, or local public servant it finds no misconduct, malfeasance, or misfeasance in office by him, and that such public servant has requested the submission of the report; (3) concerns organized crime conditions in the judicial district; or (4) proposes, upon the basis of stated findings, recommendations for legislative, executive, or administrative action in the public interest. These provisions are derived from 18 U.S.C. 3333 (a); however, two substantive additions have been made and one provision has been expanded significantly.

Present law[7] authorizes a special grand jury, under certain circumstances, to submit a report recommending the removal or disciplining of an appointed public official in respect to the conduct of his office. However, no matter how strongly a jury may feel that its investigation has shown the community to be disquieted by false or misleading information or that its own inquiry may have given rise to distorted impressions, the jury is not permitted to submit any kind of noncritical report. Rule 6.1(d)(2) corrects this situation. It will allow a jury to submit a report that it has found no misconduct, malfeasance, or misfeasance by an individual in public office if the individual requests submission of such a report. Present law has recognized the potential value of special grand jury reports in directing public attention to failures and misconduct in public office, and it is simply a corollary to recognize the potential value of reports exonerating officials who have come under a shadow of public charges or criticism.

Another new provision in this rule, subdivision (d)(4), authorizes special grand jury reports recommending legislative, administrative, or executive action in the public interest. In justifying title I of the Organized Crime Control Act of 1970, an analogy was drawn between the reporting functions of a special grand jury and the judicial function performed at times of pointing out statutory defects (and defects in administration) and suggesting appropriate changes. It was remarked that the success of government depends very largely upon the interaction and cooperation of the arms of the government.[8] The special grand juries have much to contribute in this regard. Under the expanded provisions of Rule 6.1(d)(4), which allow for a kind of dialogue between the public (the special grand jurors) and the legislative and executive branches of government, a fuller benefit can be derived from the institution of special grand juries. The responsiveness of government to public wishes can thus be facilitated through the functioning of special grand juries.

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[7] 18 U.S.C. 3333.

[8] See S. Rept. No. 91-617, 91st Cong., 1st Sess., p. 50 (1969).

Subdivision (d)(1) of this rule expands the present provision for reports about noncriminal misconduct, misfeasance, or malfeasance in public office. At present such reports must relate to "organized criminal activity by an appointed public officer or employee."[9] Although "organized criminal activity" is a relatively broad concept and may be the matter of prime interest to the special grand jury, no justification is seen for limiting reports to situations involving such activity. Furthermore, the requirement that reports concern appointive public offices only is too narrow. With such a restriction considerable danger attaches that a grand jury report may distort the situation prevailing in a community, particularly misleading those who are not alert to the limitation upon the jury. It is also simply inequitable for a grand jury report to urge disciplinary action against one public employee without so much as a mention of the culpability or role of other officials who may be involved. Accordingly, there is no requirement retained in this rule that a report on noncriminal misconduct, malfeasance, or misfeasance in office be based upon any underlying "organized criminal activity" nor that the public official involved has been appointed as opposed to being elected.

Also, under the existing provision authorizing special grand jury reports about noncriminal misconduct, malfeasance, or misfeasance in office, the term "public officer or employee" is defined to mean an officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.[10] This rule uses the different operative term, "public servant." "Public servant" is defined in section 111 of the Code to mean an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government, and includes a person who has been elected, nominated, or appointed to be a public servant. This definition is somewhat broader than that in 18 U.S.C. 3333(f) and it is somewhat clearer in that more concrete terms have been used.

The submission by a special grand jury of any report made pursuant to subdivision (d) of this rule looks toward the acceptance of the report by the court as provided in subdivision (e) of the rule. Subdivision (e) requires that, upon the receipt of a report submitted under subdivision (d), the court is to examine the report and the minutes of the special grand jury and, except as otherwise provided in subdivisions (f) and (g), is to issue an order accepting and filing the report as a public record if it is satisfied that: (1) the report complies with the provisions of subdivision (d); (2) the report is based upon facts revealed in the course of an investigation authorized by subdivision (c) and is supported by a preponderance of the evidence; (3) to the extent that the report is submitted under subdivision (d)(1), each person named in the report, and a reasonable number of witnesses in his behalf who were designated by him to the foreman of the special grand jury, were afforded an opportunity to testify prior to the filing of the report; and (4) to the extent that the report is submitted under subdivision (d)(3) or (d)(4), the report is not critical of an identified person. These provisions carry out unchanged the provisions of 18 U.S.C. 3333(b).

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[9] 18 U.S.C. 3333(a).

[10] 18 U.S.C. 3333(f).

Subdivision (f) of the rule prescribes the procedures to be followed after the submission of a report critical of a public servant. The subdivision provides that if the court to which a report is submitted under subdivision (d)(1) is not satisfied that the report complies with the provisions of subdivision (e), the court may return the report to the special grand jury and direct that additional testimony be taken. The term of a special grand jury may be extended by the court beyond thirty-six months in order that such testimony may be taken and the provisions of subdivision (e) met. Upon the taking of additional testimony, the special grand jury is permitted to resubmit the report, or a modified version of the report, to the court. Subdivision (f)(1) is a reenactment of 18 U.S.C. 3333(e). The added provisions for modification of the report after the taking of additional testimony is deemed implicit in existing law but is spelled out here to avoid any argument that the authority to modify a report does not exist.

Subdivision (f)(2) provides that a report submitted under subdivision (d)(1), and the order accepting the report, are to be sealed by the court and not to be filed as a public record, produced under subpoena, or otherwise made public: (1) until at least thirty-one days after a copy of the order and report are served upon each public servant named in the report, and until an answer has been filed or the time for filing an answer has expired; or (2) if an appeal is taken, until all rights of review of the public servant named in the report have expired or terminated in an order accepting the report. In any event, no order accepting a report submitted under subdivision (d)(1) is to be entered until thirty days after the delivery of the report to the public servant or government agency under subdivision (f)(4). The court is authorized to issue such orders as it deems appropriate to prevent unauthorized publication of the report. These provisions essentially rewrite 18 U.S.C. 3333(c)(1). The last sentence of section 3333(c)(1), to the effect that unauthorized publication of the report may be punished as a contempt, has been deleted as unnecessary, the substantive law of contempt being controlling.[11]

Subdivision (f)(3) allows for the answering of a report by the public servant. A public servant who is named in a report is authorized to file with the clerk of the court a verified answer to the report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court is permitted to grant the public servant an extension of time within which to file a verified answer and may also authorize a limited publication of the report as is necessary for him to prepare an answer. The answer is required to plainly and concisely state the facts and law constituting the public servant's defense to the charges in the report. Except for those parts that the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, the answer is to become an appendix to the report. This continues the provisions of 18 U.S.C. 3333(c)(2).

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[11] See Subchapter D of chapter 13 (Contempt Offenses).

Subdivision (f)(4) of Rule 6.1 requires that, upon the expiration of the times set forth in subdivision (f)(2)(A) and (B), the attorney for the government is to deliver a copy of the report, with any appendix, to the public servant or government agency having jurisdiction, responsibility, or authority over each public servant named in the report. This continues the provision of 18 U.S.C. 3333(c)(3).

Subdivision (g) provides that, if the court finds that the filing as a public record of a report submitted under subdivision (d) may prejudice fair consideration of a pending criminal matter, the report is to be sealed by the court and is not to be filed as a public record, produced under subpoena, or otherwise made public during the pendency of the criminal matter, except upon order of the court. This continues the provision of 18 U.S.C. 3333(d).

Subdivision (h) provides that the provisions of the Federal Rules of Criminal Procedure applicable to regular grand juries are also to apply to special grand juries to the extent that they are not inconsistent with Rule 6.1. This subdivision simply reenacts the provisions of 18 U.S.C. 3334.

RULE 7. THE INDICTMENT AND THE INFORMATION

A provision has been added to Rule 7 requiring that the indictment or information allege the grade of the offense charged[12] and contain a citation, when Federal jurisdiction over the offense charged exists only under specified circumstances, notifying the defendant of the particular jurisdictional provision alleged to be applicable. The latter simply extends the existing requirement that the provisions of law upon which the charges are based be cited in the indictment or information.[13] The rule also codifies the doctrine that the indictment need not negate the existence of a defense.[14]

The Criminal Code bill in the 95th Congress also amended Rule 7(c)(2) so that it would require that the indictment or information allege the extent of interest or property subject to forfeiture only when "an offense charged may result in a forfeiture as a part of the sentence." This was intended to clarify the meaning of this Rule, which was added in 1972 to provide procedural implementation of the then recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970 and the Comprehensive

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[12] For example, in a theft prosecution if a Class D felony offense is charged predicated upon the fact that the property stolen was a firearm, such facts would have to be alleged in the indictment. See *United States* v. *Moore*, 540 F.2d 1088 (D.C. Cir. 1976); cf. Rule 25.1(a)(4). The allegation could be phrased simply in the words of the statutory provision grading the offense, and could be in the alternative. For example, it would be sufficient to allege theft "of a destructive device having a value in excess of $100,000, a Class C felony." If the proof established the truth of that entire allegation, or of the phrase concerning value, the offense would be a Class C felony. If it established that the property stolen either was a "destructive device," or had a value between $500 and $100,000, the offense would be a Class D felony. If, however, it established only that the property had a value between $100 and $500, the offense would be a Class A misdemeanor, since that value is less than the value alleged and included therein. Likewise, in a criminal trespass case, an allegation that the defendant entered "a building, which was a dwelling, and as to which notice prohibiting trespass was posted in a manner reasonably likely to come to the attention of intruders" permits conviction for a Class A misdemeanor if the second allegation is proven alone or along with one or more of the other allegations, Class B if only the first, or first and third, allegations are proven, Class C if only the third allegation is proven, and an infraction if none of those allegations is proven but a trespass is proven.

[13] The Committee intends to perpetuate the doctrine that a miscitation of the controlling statute is not necessarily a ground for dismissing the charge or overturning a conviction. See, e.g., *United States* v. *Kahn*, 472 F.2d 272, 283-284 (2d Cir.), and cases cited therein, cert. denied, 411 U.S. 982 (1973); *United States* v. *Gudger*, 472 F.2d 566, 568 (5th Cir. 1972).

[14] See *Hockenberry* v. *United States*, 422 F.2d 171, 173 (9th Cir. 1970), and cases cited therein.

Drug Abuse Prevention and Control Act of 1970.[15] These provisions reestablished a limited common law criminal forfeiture resulting automatically upon conviction of the underlying offense, and necessitated the addition of subdivision (c)(2) since at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture. Subdivision (c)(2) was not intended, however, to apply to forfeiture proceedings under (for example) 18 U.S.C. 43, 44, 544, 545, 548, 550, 844, 924, 963-967, 969, 1082, 1165, 1465, 1762, 1955, 2274, or 2513, carried forward in this bill in section 4001, or any other provision under which a separate *in rem* proceeding (which itself affords the necessary notice and opportunity to defend) is necessary before the property in question is forfeited. Some confusion in this regard has resulted from the present wording of subdivision (c)(2).[16] This amendment is no longer needed since a similar proposal submitted to the Congress by the Supreme Court on April 30, 1979, went into effect on August 1, 1979.[17]

RULE 8. JOINDER OF OFFENSES AND DEFENDANTS

Subdivision (a) of this rule on joinder of offenses has been made applicable to charges of infractions, as well as to charges of felonies or misdemeanors. This change in existing law is simply to accommodate the new category of offenses denominated as "infractions."

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

The provisions of present Rule 9(c)(1), concerning service of summons upon corporations, are too narrow since other business associations besides corporations are prosecutable as legal entities, both under existing law and under the revised title 18.[18] Thus the more commonly used word in the Code "organization" is substituted for the word "corporation." Also, where Rule 9(c)(1) now reads in terms of delivering a copy of a summons to a corporate "officer or to a managing or general agent," this subdivision has been made to read in terms simply of delivering a copy of the summons to "an agent of the organization."

"Agent" is then defined in section 111 in terms broad enough to comprehend the specifics used in present Rule 9(c)(1), and, in fact, in somewhat broader terms; but it is also specifically provided that, when used in connection with service of process, "agent" is not to include a person who is merely a servant or employee and is not also covered by that part of the definition of an "agent" which precedes clause (b) of that definition.

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[15] 18 U.S.C. 1963; 21 U.S.C. 848. These statutes are carried forward in section 2004 of the bill, as reported.

[16] See *United States* v. *Hall*, 521 F.2d 406 (9th Cir. 1975), holding (incorrectly in the Committee's view) that an indictment under 18 U.S.C. 545 was defective for not setting forth the extent of smuggled merchandise subject to forfeiture.

[17] See the communication from the Chief Justice of the United States transmitting to the Congress, among other things, an amendment to Rule 7(c)(2), H. Doc. 96-112, 96th Cong., 1st Sess., pp. 17-18, 72-73 (1979). Unlike a number of the proposed amendments to the Criminal Rules, the effective date of this change in Rule 7(c)(2) was not delayed. See Public Law 96-42, July 31, 1979.

[18] "Organization" is included within the definition of "person" which is defined in section 111.

RULE 11. PLEAS

Three minor changes are made to Rule 11. First, in subdivision (a) the term "organization", as defined in section 111, is used in lieu of the current term "corporation". Second, Rule 11(e)(1)(A) is amended to acknowledge that plea bargaining may include an agreement to refrain from bringing or seeking charges. Third, the term "crime" is replaced each time it appears in subdivision (e)(6) by the term "offense" which is also defined in section 111.

RULE 12.2. NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

Only minor conforming changes are made in Rule 12.2.

RULE 15. DEPOSITIONS

Rule 15 is one of the rules changed only in the most minor of aspects. It should be pointed out, however, that careful consideration was given to the question of whether Rule 15 should be changed to incorporate any provision of present 18 U.S.C. 3503.[19] The decision was to rely on Rule 15, and 18 U.S.C. 3503 has not been carried over either in the rules or in the revised title 18 because it would be redundant in the face of Rule 15.

A most persuasive explanation for the latest version of Rule 15 is found in the Advisory Committee Note. The Note explains the changes made to depart from former Rule 15 and from 18 U.S.C. 3503. As emphasized in the Note, the legislative history of 18 U.S.C. 3505[20] shows that the intent of the Congress was to deal with the subject matter of depositions only in their more serious aspects while at the same time allowing the Advisory Committee on the Rules to address other aspects of the subject and even to adopt a broader approach than was set forth in 18 U.S.C. 3503. The result was a changed and broadened Rule 15, the provisions of which seem well justified. Therefore, the special and more limited provisions of 18 U.S.C. 3503 are not perpetuated in the Code. Rule 15 is left to stand as the comprehensive provision on the taking and use of depositions in Federal criminal cases.

Rule 15 is also extensive enough in its scope to cover the existing provisions of 18 U.S.C. 3491–3494 dealing with the authentication of foreign documents and business records. The present statutes are antiquated and awkward.[21] The Committee intends that the phrase "whenever due to exceptional circumstances of the case it is in the interest of justice" be interpreted to cover the taking of the deposition of a foreign national who is in a foreign country and thus not subject to the process of an American Federal court.

RULE 16. DISCOVERY AND INSPECTION

Minor changes have been made in Rule 16. the word "organization" has been used in subdivision (a)(1)(A) in lieu of "corporation, partnership, association, or labor union," since the present language may be insufficient to cover all the types of businesses and other entities that are prosecutable as criminal defendants, and since "organization" has been given a comprehensive meaning in section 111 of the Code. In addition, in the same subparagraph the Code—defined term "agent" has been substituted for "officer or employee". A change has also been made in subdivision (a)(2). The present provision has been rewritten to make it clear that witness statements are not subject to pretrial discovery but are obtainable by defendants only pursuant to the provisions of Rule 26.2. This is essentially the equivalent of a provision of present 18 U.S.C. 3500 which is moved into the rules as Rule 26.1. In addition, the Committee notes its strong disagreement with the panel of the Second Circuit in *United States* v. *Cannone* [22] holding that, even after vigorous consideration and rejection by the Congress in 1975 of pretrial disclosure of government witnesses, a district court has "inherent" power to order the pretrial disclosure of government witnesses. The Committee has re-examined this issue and reiterates what Senator McClellan, as manager of the bill, made clear at the time, that Rule 16 governs discovery and inspection for criminal trials and that, apart from this rule or other statutory authority, the power of a Federal court to order the disclosure of government witnesses is limited to that required by the constitutional rights of defendants pretrial.[23]

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[19] See generally, as to this statute. *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976).

[20] Title VI of the Organized Crime Control Act of 1970, 84 Stat. 934.

[21] They date from 1936 when they were enacted as title II of the Federal Business Records Act, 49 Stat. 1462.

A new subdivision (f) has been added incorporating, virtually *verbatim*, the special provisions of 18 U.S.C. 3432 with respect to the supplying to a defendant in a capital case of a pretrial list of jurors and witnesses and a copy of the indictment.

RULE 17. SUBPOENA

Subdivision (d) of this rule is new and has been inserted in order to carry over the provision in 18 U.S.C. 3500(a), prohibiting the subpoenaing of statements and reports within the purview of 18 U.S.C. 3500 (now Rule 26.2). The new subdivision corresponds with subdivision (a)(2) of Rule 16 on pretrial discovery.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA OR SENTENCE

Rule 20 is retained without significant change, except for the addition of a sentence making clear that, in accordance with the Committee's understanding and present practices, its provisions are applicable to a charge under the District of Columbia Code.

RULE 25.1. BURDENS OF PROOF

This rule, as a codified statement of the law, is entirely new both to current title 18 and the current Federal Rules of Criminal Procedure. As such it will be discussed in more detail than are the other rules which largely reflect changes in style or a movement from statutes to rule.

The purpose of Rule 25.1 is to codify and clarify the various burdens that are assumed at the trial of a criminal matter. The literature of the law is replete with synonyms for these various burdens and so, for purposes of uniformity, the following phrases shall be used by the Committee. "Burden of coming forward" will be used to describe the burden placed on a party to put a subject in issue. "Burden of persuasion" will be used to describe the ultimate burden of convincing the trier of fact. "Standard of proof" will be used to describe the degree to which the party carrying the burden of persuasion must convince the trier of fact.

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[22] 528 F.2d 296 (2d Cir. 1975).

[23] Cong. Rec., pp. S14300–14301 (daily ed.), July 30, 1975.

1. Proof of Offenses

A. Current Federal Law

Current Federal law is simple, direct, and constitutional in dimension. The prosecution has the burden of persuasion as to each element of the offense and it must carry that burden by proof beyond a reasonable doubt.[24]

The elements of the offense include every material and necessary fact upon which a conviction depends.[25] However, the separate bits of evidence which may be part of the proof of an element are not themselves the element and need not be established "beyond a reasonable doubt."[26]

While exceptions to statutory coverage would appear to be in the nature of defenses, it is usually the case that where such exceptions are found within the enacting clause of a criminal statute the burden is on the prosecution to prove that the defendant did not fall within the exception, thus impliedly making such exceptions negative elements of the offense.[27]

B. Provisions of Rule 25.1.

In subdivision (a)(1) the rule places upon the government the burden of persuasion as to each element of the offense and requires that such persuasion meet the standard of proof of "beyond a reasonable doubt."[28] The subdivision merely restates current law.

2. Proof of Defenses

A. Current Federal Law

Certain types of defenses necessarily are dependent on facts which are peculiarly within the knowledge of the defendant. These defenses, for example the existence of an alibi, have the effect of negating an element of the offense and, as such, the burdens of persuasion and proof cannot be placed upon the defendant. However, it is permissible to place upon the defendant the burden of raising the issue and coming forward with some level of evidence in order to establish that the matter has been truly placed in issue.[29]

The chief question then is what amount of evidence should be required before the defendant can be said to have satisfied his burden of coming forward. The courts have answered in a wide variety of ways. The Ninth Circuit has held that evidence that "fairly raises the issue" is required;[30] in the Fifth Circuit the standard is

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[24] *In re Winship*, 397 U.S. 358, 361–364 (1970).

[25] *State* v. *Green*, 228 A.2d 792 (Vt. 1967).

[26] *See United States* v. *Hall*, 198 F.2d 726 (2d Cir. 1952); *Gariepy* v. *United States*, 189 F.2d 459 (6th Cir. 1951); *United States* v. *Valenti*, 131 F.2d 362 (2d Cir.), cert. denied, 319 U.S. 761 (1943); see also *Lego* v. *Twomey*, 404 U.S. 477 (1972).

[27] *United States* v. *Vuitch*, 402 U.S. 62 (1971); but see *Morrison* v. *California*, 291 U.S. 82 (1934); 21 U.S.C. 885(a)(1).

[28] The term "element of the offense" is defined in section 111 of the Code.

[29] *Davis* v. *United States*, 160 U.S. 469 (1895).

[30] *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966).

"slight evidence;"[31] the First Circuit has adopted a standard of "some evidence but more than a mere scintilla."[32]

B. Provisions of Rule 25.1

Subdivision (a)(2) of proposed Rule 25.1 treats the subject of burdens as to defenses. It should be pointed out initially that the term defenses, as used herein, does not refer to those items labeled affirmative defenses but only to those separate sections or subsections describing an individual defense not otherwise denominated.[33] Nor does the rule purport to govern the burdens as to bars to prosecution, for such matters should properly be raised before trial and are governed by the ordinary rules as to burdens in motions.[34]

The rule in subdivision (a)(2) places the burden on the defendant of coming forward with sufficient evidence to support a reasonable belief that the specific defense exists. Defenses generally involve what might be termed exceptions to the statutory coverage. The effect of subdivision (a)(2) of Rule 25.1 then is to place upon the defendant the burden of coming forward and establishing a colorable claim that his case fits within the exception. Upon such a showing the exception is, for practical purposes, treated as an additional element of the offense and the burden is then placed upon the government to establish its non-applicability beyond a reasonable doubt. The trial court's task is to view the evidence presented by the defendant and to determine whether a reasonable person would have sufficient evidence before him to believe that the defendant fit within the terms of the defense. Upon such a determination the burdens of persuasion and proof fall upon the government.

3. Proof of Affirmative Defenses

A. Present Federal Law

Existing Federal law makes little use of statutory affirmative defenses.[35] The case law, however, indicates that it is constitutionally permissible and indeed often desirable for a criminal code to place the burden of proof in the case of a defense upon the defendant in circumstances where the matter to be proved is not merely a denial of guilt, as would be the case in an alibi defense,[36] but where, for example, it constitutes a justification or excuse.[37] Of course, the latter are closely akin to a confession and avoidance and may require an assumptive admission of guilt as to the basic elements of offense.[38] Such an admission of guilt is not, however, necessary where the government's evidence establishes the basis for asserting the defense and the defense is raised as a motion for acquittal at the close of the government's case.[39]

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[31] *Howard* v. *United States*, 232 F.2d 274 (5th Cir. 1956).

[32] *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967).

[33] See e.g., section 1327(b) and section 1803(b).

[34] See Underhill's *Criminal Evidence*, section 56 (6th ed. 1973).

[35] But see, e.g., 26 U.S.C. 7208(4)(C).

[36] *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.), cert. denied, 393 U.S. 1001 (1968); *United States* v. *Marcus*, 166 F.2d 497 (3d Cir. 1948). Such defenses as intoxication and insanity may also under given fact situations be said to amount to denials of guilt rather than justification and excuse where they serve to deny the *mens rea* requirement. Then, of course, the prosecution has the burdens of persuasion and proof though not necessarily that of coming forward. See *Commonwealth* v. *Rose*, 321 A.2d 880 (Pa. 1974).

[37] See *Patterson* v. *New York*, 432 U.S. 197 (1977); *United States ex rel. Crosby* v. *State of Delaware*, 346 F. Supp. 2 13. 216 (D. Del. 1972).

[38] *United States* v. *Shameia*, 464 F.2d 629 (6th Cir.), cert. denied, 409 U.S. 1076 (1972); *United States* v. *Rogrigues, 433 F.2d 760 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971); United States* v. *Pickle*, 424 F.2d 528 (5th Cir. 1970); *United States* v. *Johnston*, 426 F.2d 112 (7th Cir. 1970); *United States* v. *Rodriguez*, 446 F.2d 859 (9th Cir. 1971), cert. denied, 404 U.S. 1021 (1972). But see *Hansford* v. *United States*, 303 F.2d 219 (D.C. Cir. 1962) (*en banc*).

Although until recently there was some doubt as to the constitutionality of the use of affirmative defenses, the Supreme Court has resolved this question and has sustained the validity of shifting the burden of proof to the defendant when applied to a factor not included as an element of the offense.[40] The Court observed that a constitutional rule requiring the prosecution to prove any fact affecting the degree of criminal culpability beyond a reasonable doubt would leave legislatures with an inflexible set of alternatives in drafting offenses and would be unwise. In a specific reference to S. 1 in the 94th Congress, the Court noted, for example, that such an application of due process might "discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony."[41]

B. Provisions of Rule 25.1

The rule in subdivision (a)(3) does little more than state that the defendant has the burden of persuasion as to affirmative defenses and must meet that burden by a preponderance of the evidence. This is a less exacting standard than that which has been held to be permissible.[42]

The chief question raised by the subdivision is what constitutes an affirmative defense. The question is not designed for ready answer for, in large part, the nature of the defense rests not on its being labeled as such, but upon its application to a particular statute and a particular fact situation. Given the basic premise that the burden of persuasion may not be placed upon a defendant to disprove an element of the offense, it is readily discerned, for example, that while the defense of public duty might generally be denominated as "affirmative" this cannot be so where it is applied to a statute which on its face forbids certain conduct when performed "without authority."[43]

Similarly, while the conventional form of the insanity defense is generally seen as an affirmative defense constituting a justification or excuse, it would be improper and impermissible to place upon the defendant the burden of proving his insanity where he raises the issue of his mental state solely as a means of denying the requisite culpability level.[44]

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[39] *Sendejas* v. *United States*. 428 F.2d 1040 (9th Cir.), cert. denied, 400 U.S. 879 (1970); *Sears* v. *United States*, 343 F.2d 139 (5th Cir. 1965). The cases cited here and in the preceding footnote are largely entrapment cases. Whether or not entrapment in all cases serves as excuse or may in some cases, because of the emphasis on predisposition, constitute a denial of the *mens rea* required, the case law dealing with it as a form of justification or excuse is applicable to all such defenses.

[40] *Patterson* v. *New York*, *supra* note 37.

[41] *Id.* at 215, n. 15.

[42] See *Leland* v. *Oregon*, 343 U.S. 790 (1952) (requiring the defendant to establish his insanity beyond a reasonable doubt); see also reaffirming *Leland*, *Patterson* v. *New York*, *supra* note 37. And see *Buzynski* v. *Oliver*, 538 F.2d 6 (1st Cir. 1976); *United States* v. *Greene*, 489 F.2d 1145, 1155–1156 (D.C. Cir. 1973); *Phillips* v. *Hacker*, 473 F.2d 395 (9th Cir.) cert. denied. 411 U.S. 939 (1973).

[43] See *United States* v. *Vuitch*, *supra* note 27.

[44] *In re Winship*, *supra* note 24.

Once it has been determined that, within the framework of the Code and of the applicable constitutional requirements, a defense is properly affirmative, then this subdivision of Rule 25.1 operates in the same fashion as does current law.

4. Proof of Grading

Subdivision (a)(4) provides that if an offense carries more than one grade, the lowest grade is applicable unless the government proves the elements of a higher grade beyond a reasonable doubt and that in a jury trial determination of the grading elements is a matter for the jury. The government's burden of proving the elements of any higher grade will sometimes mean proving the nonexistence of factors in a lower grade. If the government proved all the elements of the offense of theft, section 1731, beyond a reasonable doubt and failed to prove beyond a reasonable doubt all the elements of a grade in subsections (b)(1), (b)(2), or (b)(3), the theft would only be punishable under (b)(4), the lowest grade of the offense. Note that the lowest grade of the offense is applicable even if *no* grading elements are proved (assuming, of course, that the elements of the offense are proved). With regard to theft, this means that if no specific value of the property is proven, subsection (b)(4)(A) will apply.

Implicit in this section is the general principle that any higher grade which can be proved beyond a reasonable doubt is applicable. Thus, in theft, again, if the government can prove that the value of the property was in excess of $100,000, the offense is punishable as a Class C felony, notwithstanding the fact that the property might also have been a piece of mail under section 1731(b)(2)(B)(vi), which alone would make the offense only a Class D felony.

5. Presumptions

A. Present Federal Law

An examination of the state of Federal law with regard to criminal presumptions must begin with *Tot* v. *United States.*[45] In that case it was held that in order for a presumption to be valid there must be a "rational connection between the fact proved and the ultimate fact presumed."[46] The case law since *Tot* has developed in a somewhat hesitant manner.

In *United States* v. *Gainey,*[47] the Court followed the test devised in *Tot* but went on to note that the statute involved did not prevent the court from instructing the jury on the necessity of proof beyond a reasonable doubt. In *Leary* v. *United States*[48] the Court once again approached the question of the possibility of a conflict between presumptions and the "proof-beyond-a-reasonable-doubt" requirement when, in invalidating a presumption for failure to satisfy a "more likely than not" test, it stated that it "need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard."[49] Then in *Turner* v. *United States*[50] the Court dealt with four presumptions: two involving the importation of heroin and two regarding the importation of cocaine. In dealing with one of the former, the Court noted that under either the "more likely than not" test or the usual "beyond a reasonable doubt" requirement the presumption was valid, and stated that it "had little doubt that (the presumption) . . . was a sound one."[51] However, while discussing one of the presumptions dealing with cocaine the Court found the presumption invalid because there existed a "reasonable possibility" that the presumed fact was untrue.[52]

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[45] 319 U.S. 463 (1943).
[46] *Id.* at 467.
[47] 380 U.S. 63 (1965).
[48] 395 U.S. 6 (1969).
[49] *Id.* at 36 n.64.
[50] 396 U.S. 398 (1970).

As the Supreme Court itself has noted in a discussion of the matter: "(T)he teaching of the foregoing cases is not altogether clear."[53] However, in its most recent decision on the subject, *County Court of Ulster County* v. *Allen,*[54] the Court seems finally to have resolved the issue, by holding that the "more likely than not" test fashioned in *Leary* is sufficient to sustain a "permissive presumption"—one "on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof"—while the "reasonable doubt" test is required as to a "mandatory presumption"—one "which the jury must accept even if it is the sole evidence of an element of an offense."[55] The provision in Rule 25.1(a) relating both to presumptions and to prima facie evidence qualify, under the *County Court of Ulster County* decision's distinction, as "permissive" rather than "mandatory" types of presumptions, since in either instance the jury is permitted to disregard the effect of the provision and find that the presumed fact is not sufficiently proved. Indeed, even as to the provision on "presumptions", the judge is obligated to withhold the issue from the jury notwithstanding the presumption if the "evidence as a whole clearly precludes a reasonable juror from finding the presumed fact beyond a reasonable doubt". In the Committee's judgment, in the context in which the concepts of "presumption" and "prima facie evidence" are applied in the Code,[56] there is no question that the provisions of Rule 25.1 are consistent with constitutional criteria as announced by the Supreme Court.

B. Provisions of Rule 25.1

Subdivision (a)(5) of Rule 25.1 places two restrictions on the use of presumptions which render the treatment of presumptions in the Code well within the boundaries of current law. The first defines the circumstances under which a presumption may be submitted to the jury; the second requires certain instructions when the presumption is so submitted.

The rule requires that before a presumption may be submitted to the jury, the court must find that "there is sufficient evidence of the fact that gives rise to the presumption to support a reasonable belief as to the fact's existence beyond a reasonable doubt." In addition, and as a corollary to this first determination, the court must find that the evidence as a whole in the particular case before it does not preclude a reasonable juror from finding the presumed fact beyond a reasonable doubt. Thus, the court must first find that the evidence justifies submission to the jury of the question whether the fact giving rise to the presumption has been established "beyond a reasonable doubt", and it must also find that the evidence as a whole does not clearly preclude a reasonable juror from finding the presumed fact beyond a reasonable doubt. Having made this determination the court must then instruct the jury that the presumed fact must be established beyond a reasonable doubt but that, since the law regards the fact giving rise to the presumption as strong evidence of the fact presumed, the jury may arrive at that judgment on the basis of the presumption alone. Since the court has already determined as a matter of law that the presumption is supported by facts which would allow a reasonable juror to find the presumed fact beyond a reasonable doubt, the instruction that the presumption alone may be relied upon does not impair the required standard of proof.

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[51] *Id.* at 417.

[52] *Id.* at 423–424.

[53] *Barnes* v. *United States,* 412 U.S. 837, 843 (1973).

[54] 442 U.S. 140 (1979).

[55] *Id.* at 166–167.

[56] See primarily sections 1414(b) and 1739(b).

When the court sits as the trier of fact, the presumption has the same effect as it does in a jury trial except, of course, that the court need not make an initial determination as to sufficiency and no instructions are involved. As an example of how the rule might operate in such a situation, section 1739(b)(4) creates a presumption that property was part of an interstate or foreign shipment where the way bill or other shipping documents so indicate. Testimony by a shipping manager might indicate that goods by this carrier were always shipped in accordance with the way bill. Absent some evidence casting doubt as to this fact in the particular case, the judge would then be free to find the requisite interstate or foreign aspect from the existence of such an indication on the way bill alone. Of course, the government may feel no need to utilize the presumption in a case where the direct evidence establishes the interstate or foreign shipment, and in such a case would not request that the presumption be considered by the judge in his fact-finding capacity.

6. Prima Facie Evidence

A. Present Federal Law

While presumptions are based on empirical evidence that may be outside the expected knowledge of the average juror, *prima facie* evidence merely formalizes a natural inference which one might expect reasonable jurors to draw on their own. Thus, where a witness makes two statements which are so inherently contradictory that one of them must of necessity be false, it can be expected that having been provided with all of the evidence most jurors would come to the conclusion that the witness lied in one of the instances. However, left without instruction as to the permissibility of drawing the inference, the jurors might abandon their own experience and acquit because it was not established which of the two statements was false. The use of the *prima facie* evidence device in such a situation[57] serves to bolster the ultimate independence of the jury as fact finders since it leaves them freer to utilize their own knowledge and experience.

The purpose of the *prima facie* evidence concept then is to allow Congress the opportunity of informing the jury that a certain inference is a logical one to draw even though the inference might not be immediately obvious, especially where there might be a tendency for jurors to hesitate in drawing the inference because of a reluctance to act beyond the explicit scope of the instructions given them.

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[57] See section 1346(b)(3).

While there may be some dispute as to whether a certain device constitutes a presumption or merely declares a certain matter to be *prima facie* evidence[58] there are presently several instances of a device labeled as *prima facie* evidence in Federal law.[59] An examination of one of these might serve to clarify their nature and functions.

18 U.S.C. 42 deals in part with the shipment of animals under inhumane or unhealthful conditions. The statute also holds that the presence on a vessel of "a substantial ratio of dead, crippled, diseased, or starving wild animals or birds shall be deemed *prima facie* evidence of the violation of the provisions of this subsection." The section obviously states a valid inference, for evidence of the type stated would ordinarily lead to the conclusion that the animals were improperly treated or shipped. Evidence of other causes of the injuries may, however, dispel the inference since such evidence reduces the inference to only one of two or more possibilities and, if the contradictory evidence is strong enough, the inference may be the least likely of options.[60]

In short, the use of *prima facie* evidence does little more than emphasize to the jury that which they are likely to have discovered on their own—that a certain known fact ordinarily, and in the absence of contradictory evidence, justifies an inference as to the existence of a second fact.

B. Provisions of Rule 25.1

Subdivision (a)(6) of Rule 25.1 operates in much the same fashion as does subdivision (a)(5) with regard to presumptions. Prior to submitting the issue to the jury, the judge must first determine that there is sufficient evidence of the underlying fact to support a reasonable belief as to its existence beyond a reasonable doubt. He must also determine that the evidence as a whole does not preclude the jury from finding the existence of the inferred fact beyond a reasonable doubt. Upon request of the government or the defendant, and assuming that the previous conditions have been met, he must then instruct the jury as to the reasonable doubt standard with regard to the existence of the inferred fact and that the jury may consider that "the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn." In a nonjury trial, the court is permitted to draw the inference in the same manner as a jury would. Accordingly, the rule operates well within the boundaries of current law.

7. Proof of Jurisdiction

A. Present Federal Law

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[58] See Working Papers, pp. 28-31.

[59] *Ibid.*

[60] See *United States* v. *States Marine Lines Inc.*, 334 F. Supp. 84 (S.D.N.Y. 1971).

Most current Federal criminal statutes contain as an element of the offense the basis for Federal jurisdiction.[61] Typically these will involve a requirement that the crime be on an Indian reservation, on the high seas, by use of interstate commerce, and the like. Since the jurisdictional statement is written as an element of the offense, Federal jurisdiction must be found to exist beyond a reasonable doubt[62] and, under the Sixth Amendment, the determination must be made by the jury, or by the judge where a jury trial is waived.

However, these requirements follow only because the statute is written to include jurisdiction among the elements. Where the issue of jurisdiction is not made an element of the offense, a different result has followed. Indeed, in *Perez* v. *United States,*[63] the Supreme Court sustained a Federal statutory scheme defining crimes related to loan-sharking where Congress removed from the trial completely the issue of jurisdiction by itself "finding" that the class of activities proscribed affected commerce. In addition, some courts of appeals recently, in holding that the government need not prove *scienter* by a defendant as to the jurisdictional element contained in most Federal criminal enactments, have recognized that the jurisdictional element is in reality no part of the crime.[64]

B. Provisions of Rule 25.1

Subdivision (b) of Rule 25.1 requires that the government prove the existence of Federal jurisdiction beyond a reasonable doubt. However, since the structure of the Code removes the existence of Federal jurisdiction as an element of the offense,[65] the existence of jurisdiction is treated as a matter to be determined by the court unless, in a case before a jury, the defendant elects before trial to have the issue decided by the jury. This is a compromise position between treating jurisdiction solely as a matter for the court or a matter always to be determined by a jury, although the Committee believes either approach would be constitutional. Determination by a court is entirely proper under current case law discussed *supra.* As the court in *United States* v. *Blassingame, supra,* noted, the existence of Federal jurisdiction "is logically no part of the crime itself. . . . Nothing is added to the guilt of the violator of the statute by reason of his having used an intrstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used."[66]

Moreover, the fundamental purpose of the common law jury trial guarantee in criminal prosecutions is to provide an independent body that can guard against possible governmental oppression.[67] It is this purpose which the Framers sought to perpetuate through the Sixth Amendment guarantee of jury trial—not any notion that the jury, as opposed to the court or an administrative body, is a superior finder of facts.[68] Given this purpose, it is clear that the jury's function of expressing the community's judgment upon the defendant's conduct is logically limited to determining culpability.

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[61] But see, e.g., 18 U.S.C. 1955.

[62] See *In re Winship, supra* note 24, at 361-364.

[63] 402 U.S. 146 (1971).

[64] See *United States* v. *Blassingame.* 427 F. 2d 329, 330 (2d Cir. 1970), cert. denied. 402 U.S. 945 (1971); *United States* v. *Jennings,* 471 F. 2d 1310, 1312, 1313, (2d Cir.). cert. denied, 411 U.S. 935 (1973); *United States* v. *Pacheco,* 489 F. 2d 554, 558-559 (5th Cir. 1974). cert. denied, 421 U.S. 909 (1975). Indeed, in some instances, the courts have found that the existence of Federal jurisdiction may be an appropriate subject for judicial notice. See *United States* v. *Miller,* 499 F. 2d 736, 739-740 (10th Cir. 1974), and cases cited therein.

[65] See the discussion of the Code's treatment of Federal jurisdiction appearing herein in the analysis of the chapter 2 provisions.

[66] *Supra* note 64, at 330. For a discussion of the constitutional issue and the appropriate role of the jury in proof of jurisdiction, see R. Pauley. *An Analysis of Some Aspects of Jurisdiction under S. 1437, the Proposed Federal Criminal Code,* 47 Geo. Wash. L. Rev. 475, 479-482 (1979).

Finally, there can be no doubt as to the competence of the Federal courts to make factual determinations. The district courts today commonly decide hotly contested issues of fact in criminal prosecutions with regard to the voluntariness of confessions, the validity of searches and seizures, and claims of privilege.[69] Consequently there is little basis for challenging their ability to determine the facts bearing on jurisdiction.

It is clear from the above that no impediment exists to the drafting of statutes permitting jurisdiction to be determined by the court, by the jury, or by the Congress. The Committee, while not in any way intending to foreclose future consideration of the option of vesting the jurisdictional issue in the court, has chosen essentially to preserve the prevailing tradition by giving the defendant a right to elect a jury resolution of the matter.

In a case in which the existence of Federal jurisdiction is to be decided by the jury, subdivision (b)(3), consistent with the recommendation of one legal commentator,[70] provides for the return of a special verdict on the issue. This will create the opportunity for the government to appeal for reinstatement of a conviction in the event of a finding that the defendant committed all the elements of the offense charged but that Federal jurisdiction was lacking.

Subdivisions (b)(4) and (5) deal with presentation of the issue to the court. The procedure envisioned by this part of the Rule is flexible; the evidence as to jurisdiction may be heard either before or during trial. This scheme has two principal advantages. First, in the unusual case where the issue of jurisdiction is a close one, a pre-trial determination serves to resolve the issue without the time and energy consuming process of trial and, in the case of a determination that the existence of jurisdiction has not been adequately established, permits the government the opportunity to appeal from the adverse ruling on an issue that is wholly collateral to guilt or innocence. Second, in the usual case where the evidence as to jurisdiction is largely duplicative of the evidence as to guilt, the matter may be presented during the course of the trial by means of trial evidence as supplemented, if necessary, with evidence presented outside the presence of the jury.

The rule contemplates a determination as to jurisdiction prior to the presentation of the defendant's case. It may be, however, as a matter of convenience, in order to avoid duplication of testimony, or for some other proper reason, that the court and the defendant may wish to waive an earlier determination in order that the defendant may present evidence as to jurisdiction during his case in chief. The rule is not intended to bar such a deferral upon a proper showing. Nor would the rule bar subsequent government rebuttal of evidence presented at that time.

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[67] E.g., *Williams* v. *Florida*, 399 U.S. 78, 86–67 (1970); *Duncan* v. *Louisiana*, 391 U.S. 145, 155–156 (1968); *Singer* v. *United States*, 380 U.S. 24, 31 (1965); see also *Sparf* v. *United States*, 156 U.S. 51 (1895).

[68] See *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543 (1971), and cases cited therein; Note, *Trial by Jury in Criminal Cases*, 69 Colum. L. Rev. 419 (1969).

[69] E.g., *Jackson* v. *Denno*, 378 U.S. 368 (1964).

[70] See R. Pauley, *supra* note 66 at 482.

RULE 30. INSTRUCTIONS

Rule 30 is amended to require that the judge instruct the jury, if the defendant requests in writing that he do so, that the defendant is presumed to be innocent of the crime or crimes alleged him until proven guilty beyond a reasonable doubt.

RULE 32. SENTENCE AND JUDGMENT

Several changes have been made in this rule, mostly to conform it to changes in the Code. Certain provisions now found in 18 U.S.C. 3653 have been added to this rule in a revised form.

Subdivision (a)(1) of the rule, relating to the sentencing hearing, modifies the current provision that a sentence shall be imposed without unnecessary delay by permitting the court, upon a joint motion of the defendant and the Government, to postpone the imposition of sentence for a period reasonably necessary to resolve an unresolved factor important to the sentencing determination. Such factors as cooperating with the Government, testifying against a codefendant, acting as an undercover agent, as well as unavailable information, may be important to the sentencing decision. This modification recognizes the interests of all concerned to resolve such factors prior to the sentencing hearing whenever possible. In addition, subdivision (a)(1) is amended to require that the court specify in open court and before imposing sentence the categories established in the sentencing guidelines promulgated by the Sentencing Commission that it believes apply to the defendant, and that counsel for the defendant and for the Government be permitted to comment on them in addition to commenting generally on the sentence.

Subdivision (a)(2) of the rule, as now in effect, imposes a duty upon the court to advise the defendant of his right to appeal in a case which had gone to trial on a plea of not guilty, but does not impose any such duty to advise after a plea of guilty or nolo contendere. The basic approach is continued in subdivision (a)(2) of this rule with an addition to cover the matter of advice regarding his right, if any, to obtain review of his sentence pursuant to section 3725 of title 18 or Rule 35 (b)(2) of the Federal Rules of Criminal Procedure.

Subdivision (c) of the rule as now in effect governs the making of presentence investigations and reports prior to the imposition of sentence or "the granting of probation." It is no longer appropriate to treat sentencing and the granting of probation separately. Under chapter 21 of the Code, the procedure of suspending the imposition or execution of sentence before placing a defendant on probation[71] has been abolished—probation has become a sentence in and of itself. Accordingly, Rule 32(c) has been rewritten to delete references to the granting of probation. However, the law is unchanged in that "sentence" is used in the rule to the same effect. For similar reasons this revised rule omits the reference now appearing in subdivision (d) to suspending the imposition of sentence.

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[71] Current 18 U.S.C. 3651.

Subdivision (c) is also amended to delete the provision in the current rule for waiver by the defendant of a presentence report, leaving instead a provision that the judge may find that he does not need a presentence report in a particular case in order to exercise his sentencing authority pursuant to section 2003. It is expected, however, that the sentencing judge will ordinarily find the use of a presentence report extremely helpful in applying the sentencing guidelines. That part of Rule 32(c) relating to the contents of the presentence report has been substantially expanded from current law to provide that the report will contain, in addition to the information concerning the history and characteristics of the defendant (including his prior criminal record, if any, his financial condition and any behavior characteristics pertinent to sentencing), the classification of the offense and defendant under the sentencing guidelines that the probation officer believes are applicable to the defendant, the kinds of sentence and the sentencing range under the guidelines that apply to those classifications, any aggravating or mitigating circumstances the probation officer believes may indicate that a lower or higher sentence or a sentence of a different kind than that specified in the guidelines should be imposed, and verified information as to the financial, social, psychological, and medical impact of the offense on the victim. The presentence report would also contain any policy statement of the Sentencing Commission pertinent to imposition of sentence on the defendant.

Subdivision (c)(3)(A) has been amended to assure that the information relating to the requirements of revised subdivision (c)(2) contained in the presentence report are made available to the defendant, but that the probation officer's final recommendation as to sentence is not made available. This assures that the defendant will receive information such as the probation officer's conclusions as to which guidelines apply to the defendant and whether there are aggravating or mitigating circumstances that may indicate that the sentence should be outside the guidelines, but will not receive the final sentencing recommendation of the probation officer. The latter provision represents a Committee amendment to S. 1630 made at the suggestion of Judge Tjoflat,[72] who expressed concern that disclosure of the final sentencing recommendation might inhibit the probation officer in making the recommendations.

The rule has been updated by deleting from subdivision (c)(3) (E) the reference to the Youth Correction Division of the Board of Parole which is not continued under the Code and by substituting new citations for the existing citations to title 18.

RULE 35. CORRECTION OF SENTENCE

Rule 35 is reorganized to more clearly show the different functions it performs. Subdivision (a) carries forward the provisions permitting a court to correct an illegal sentence at any time.

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[72] Hearings, Part XVI, pp. 11921-22.

Subdivision (b)(1) retain the current provision for correction of a sentence imposed in an illegal manner within 120 days.[73]

Subdivision (b)(2) is new with the introduction of sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a). It permits the court within 120 days to correct a sentence imposed within the range recommended in the guidelines in a case in which the incorrect guideline was used. An appeal of action on a motion under this section is limited by 28 U.S.C. 1291, as amended by this Act, to a petition for leave to appeal. See sections 3723(b) and 3724(d). This opportunity for appellate consideration is complementary to the new appellate review of sentences provided in section 3725 of title 18 of the Code, which covers appeal of sentences outside the guidelines. The Committee amended the language of subdivision (b)(2) as it appeared in S. 1630, as introduced, in order to make clear the line between the use of Rule 35(b)(2) and section 3725. The Committee intends that Rule 35(b)(2) motions be used for any sentence which in the view of the sentencing judge is a sentence within the guidelines if the party thinks the judge applied the guidelines incorrectly. On the other hand, the Committee intends that the appeal provisions of section 3725 be used whenever the judge indicated that he intended to impose a sentence outside the guidelines even if part of the party's appeal is based on an allegation that the judge sentenced outside the incorrect guideline. Subdivision (b)(3) also is new. It permits the correction of a sentence of restitution as a result of the use of an inappropriate procedure to determine the amount of restitution, and appellate review by a petition for review.

The general authority of a court to reduce a sentence within 120 days, without demonstrating some error in the imposition of the sentence, is not retained. The extensive provisions for presentence investigations, reports, and recommendations, taken in conjunction, with the increased rationality and uniformity provided by sentencing guidelines, makes such a general grant of discretion to reduce a sentence unnecessary. The Code does make specific provisions for modification, at any time, of a sentence of probation (sections 2103(c) and 2104(c) through (e)) and a fine (section 2203). A sentence of a term of imprisonment may also be modified in certain narrow instances pursuant to section 2302(c). The need for uniformity, credibility, and certainty in sentencing, which underlies the move toward determinate terms of imprisonment reflected in the Code, makes a general grant of discretion to reduce an imposed term of imprisonment inappropriate. Under subsections (a) and (b), of course, a court may reduce, as well as increase, a sentence.[74]

Subdivision (c) is an addition required by the appellate review of sentence provision added to the Code in section 3725 of title 18 and the petition for review procedure applicable to Rule 35 motions noted above. When a sentence is found, on appeal, to be unreasonable, or on petition for review to be the result of incorrect application of the guidelines, the appellate court may remand the case for resentencing or imposition of a different sentence. Subdivision (c) authorizes the district court to resentence or impose a different sentence, as ordered.

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[73] However, the 120 days run, under the proposed Rule, only from the time of sentence and not, as under present Rule 35, from the date of court action on direct appeal upholding the judgment of conviction.

[74] "Correction of sentence," as used in Rule 35, means not only changing the length of a term of imprisonment, but making any other modification of a sanction authorized by the Code.

RULE 38. STAY OF EXECUTION

At present, Rule 38 provides for the staying of sentences of death, imprisonment, the payment of a fine, and of an order placing a defendant on probation, "if an appeal is taken." The new provision for review of sentences, by logical extension, require changes in Rule 38. Accordingly, each of the relettered subdivisions of Rule 38 has been written to allow for stay of sentence if an appeal is taken "from a conviction or a petition for review of sentence is filed." Moreover, since probation has been made into a sentence, as such, under the Code, the phrase, "sentence of probation." has been used in subdivision (d) instead of "an order placing the defendant on probation." A new subdivision (f) has been added providing for a stay of sentence under section 2004 (Order of Criminal Forfeiture), 2005 (Order of Notice to Victims), or 2006 (Order of Restitution) if an appeal or petition for review of the sentence is filed. The subdivision permits the court to issue reasonably necessary protective orders. Finally, a new subdivision (g) is added to stay a civil or employment disability arising under a Federal statute if it is appealed and to permit the court to take action necessary to protect the interest represented by the disability pending disposition of the appeal.

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL

Rule 40 has been changed to update the citation in subdivision (d)(1) and to add a new subdivision (g). Subdivision (g) provides that, in removing a person from one district to another, only one warrant of removal is necessary, and a copy of that warrant may be given to the officer from whose custody the person is taken, with another copy given to the officer to whose custody the person is committed, and the original warrant, with the executed return thereon, being returned to the clerk of the district court in the district to which the person is removed. This carries over in revised form, without substantial change, 18 U.S.C. 3049.

RULE 41. SEARCH AND SEIZURE

At present, subdivision (c) of Rule 41 provides that the search warrant is to be directed to a "civil officer of the United States authorized to enforce or assist in enforcing any law." In place of the quoted language, this rule uses simply "a federal law enforcement officer," which is defined comprehensively in section 111 of the Code. The sentence in which this change occurs has otherwise been rewritten but without making substantive changes.

Most of subdivision (d) of this rule is new and has been inserted (necessitating a relettering of the subdivisions) simply to reenact the present provisions of 18 U.S.C. 3105 and 3109.[75] While the form of these statutes has been changed in this rule, there is no intention to change the content of the existing statutes or the general case law that has developed in their interpretation.

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[75] Subdivision (d)(3) dealing with the giving of a receipt for property taken is drawn from existing Rule 41(d).

Under subdivision (d)(1) of Rule 41, a warrant may be executed by either the officer to whom it is directed or by any other officer authorized by law to execute such a warrant, and such an officer may be assisted in executing the warrant by other persons acting at his request and in his presence. This restates current 18 U.S.C. 3105, deleting as unnecessary the provision prohibiting the execution of a warrant by any person not mentioned in the provision.

Under subdivision (d)(2) of the rule, the officer is authorized to break open any outer or inner door or window of a building, or any part of a building, or anything in a building to execute the warrant if, after notice of his authority and purpose, he is refused admittance, or if necessary to liberate himself or a person assisting him in the execution of the warrant. This makes stylistic changes only in the present statute,[76] and the provision leaves present law unchanged.[77]

RULE 46. RELEASE FROM CUSTODY

In addition to a number of technical amendments to Rule 46, the bill as reported amends subdivision (e)(2) to provide that forfeiture of a money bond may be set aside in whole or in part if a person released on a surety bond is subsequently surrendered by the surety into custody. The amendment was added by the Committee to provide an incentive to a surety to surrender a defendant after he has failed to appear.

Finally, the bill adds a new subdivision (h) that provides that neither the Rule nor chapter 35 of title 18 precludes the court's disposing of a charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3502(c)(2)(K) or (c)(2)(L) if the value of the property is in an amount that would be appropriate as a sentence following conviction. This provision acknowledges the authority of the court to accept forfeiture of a posted bond in the case of such minor offenses as traffic violations and minor instances of disturbing the peace.

RULE 54. APPLICATION AND EXCEPTION

The changes that have been made in this rule are, in general, to conform the rule to changes that have been made in the Code. Citations have been updated in subdivisions (b)(2), (3), and (5).

Two changes have been made in subdivision (c) of the rule, which consists of a number of definitions. The definition of "magistrate" has been changed by deleting several words at the end as being out of date. "Petty offense" has been redefined in terms of the revised title 18.[78] Finally, a new definition of the term "grade" has been added to include the issue whether, for the purposes of section 2201

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[76] 18 U.S.C. 3109.

[77] See e.g., *United States* v. *Gervato*, 474 F.2d 40 (3d Cir.) cert. denied, 414 U.S. 864 (1973).

[78] It should be noted that the Committee has reviewed the criminal penalties in current law and taken considerable care in determining the appropriate maximum penalty for an offense. Accordingly, when the Committee has set the grade of an offense as a class B or C misdemeanor or an infraction, it intends that the offense (or an offense under chapter 10 with respect thereto) be deemed "petty" for constitutional purposes with respect to the right to a jury trial. Compare *United States* v. *Sanchez-Meza*, 547 F.2d 461 (9th Cir. 1976); and see *United States* v. *Hamdan*, 552 F.2d 276 (9th Cir. 1977).

(Sentence of Fine), a misdemeanor resulted in the loss of human life. Section 2201 provides that a misdemeanor which results in the loss of human life renders the offender liable for felony-level fines. The purpose of the definition of "grade" as including this issue is to assure that, pursuant to Rules 7 and 25.1, the government must allege in its indictment or information, and prove beyond a reasonable doubt, the fact that the misdemeanor resulted in loss of human life if the higher fine levels consequent upon such fact are to be made applicable.

TITLE III—AMENDMENTS TO TITLE 28, UNITED STATES CODE

Title III of the bill, as reported, adds four new chapters to title 28 of the United States Code concerning several agencies whose functions relate to the implementation of the new sentencing provisions of title 18 and the new victim compensation provisions in title 18. Section 123 would enact as chapters 37 and 38 of title 28 [1] provisions relating to the organization and responsibilities of the Federal Bureau of Prisons and to the Federal prison industries program, respectively. Section 124 would enact as chapter 40 of title 28 provisions relating to the establishment, organization, and responsibilities of the new United States Victim Compensation Board in the Department of Justice. Section 125 carries forward contract provisions in current law for the supervisory aftercare of an offender, enacted by the Ninety-Fifth Congress in Public Law 95-537. Section 126 would enact as chapter 58 of title 28 provisions relating to the establishment, organization, and functions of the new United States Sentencing Commission as an independent commission in the judicial branch. Title III also amends 28 U.S.C. 547, relating to the requirement that the United States attorneys prosecute offenses against the United States, and 28 U.S.C. 1291, relating to jurisdiction to review sentences in criminal cases that involve incorrect application of the sentencing guidelines.

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[1] Former chapter 37 of title 28, United States Code, relating to the United States Marshals, is redesignated as chapter 36 by section 122 of the bill, as reported.

CHAPTER 35. UNITED STATES ATTORNEYS

SECTION 547. DUTIES

Section 547, relating to the duties of the United States attorneys, is amended by section 121 to modify the requirement that the United States attorney prosecute for "all offenses against the United States" in order to reflect the new provision in section 205 of title 18 that directs Federal investigators and prosecutors to assess the degree of Federal interest in a concurrent jurisdiction case before proceeding to exercise jurisdiction. Absent a sufficient Federal interest in Federal prosecution, the United States attorney is provided for the first time with statutory authority to decline to exercise Federal jurisdiction.

CHAPTER 37 OF TITLE 28, UNITED STATES CODE.—BUREAU OF PRISONS

Chapter 37 of title 28, United States Code, derived largely from current law, outlines the organization and responsibilities of the Federal Bureau of Prisons. Current law is amended to indicate the role of the Bureau of Prisons in implementing the new sentencing provisions in title 18 as they affect sentences to terms of imprisonment and to increase the flexibility of the Bureau of Prisons in determining appropriate corrections programs for individual prisoners.

SECTION 571. ORGANIZATION, DIRECTOR, AND RESPONSIBILITIES

Section 571 is derived from a number of provisions of current law, with new provisions relating to the qualifications of the Director of the Bureau of Prisons and to functions of the Bureau of Prisons concerning training programs, gathering of statistics, and payment of prisoners for work performed.

Subsection (a) is derived from 18 U.S.C. 4041. It provides for the establishment within the Department of Justice of a Bureau of Prisons in charge of a Director who serves under the direction of the Attorney General. The provision in 18 U.S.C. 4041 for a salary of $10,000 per year has been deleted as obsolete and inconsistent with 5 U.S.C. 5315 (112), which makes Level IV of the Executive Schedule applicable to the Director.

The provision of subsection (b) requiring the Attorney General to appoint the Director of the Bureau of Prisons is derived from 18 U.S.C. 4041. Subsection (b) provides for the first time, in order to assure the continued appointment as Director of the Bureau of Prisons of persons with excellent professional credentials for the position, appointment of persons qualified for the position by their educational background, professional experience in corrections administration or planning, or in a related field, and demonstrated interest in and knowledge of criminal justice administration.

Subsection (c) lists the responsibilities of the Bureau of Prisons and its Director in order to carry out the purposes of the Federal criminal justice system set forth in proposed section 101 of title 18.

Subsection (c)(1), relating to responsibilities of the Director, is derived from 18 U.S.C. 4041 and 4001 (b)(1). It provides that the Director shall promulgate rules for Federal penal and correctional facilities and related services and appoint necessary officers and employees pursuant to the civil service laws. Under current law, these responsibilities are placed in the Attorney General. This change is consistent with the designation in proposed subchapter C of chapter 38 of title 18 of the Bureau of Prisons, rather than the Attorney General, as the custodian of Federal prisoners, and with the provisions of subsection (a) that the Director serves under the direction of the Attorney General. The provision for acceptance of voluntary and uncompensated services is new.

Subsection (c)(2), relating to management by the Bureau of Prisons of Federal penal and correctional facilities other than military or naval facilities, is derived from 18 U.S.C. 4001(b), 4042, and 4125(b).

Subsection (c)(3), relating to classification of offenders and provision of corrections programs, is derived from 18 U.S.C. 4081 and 4125, amended to delete references to "treatment" as outmoded, and to require that classification of offenders be done according to the criteria set forth in section 572(a). It also contains a new provision that authorizes the Bureau of Prisons, as part of the operating expense of a correctional facility or activity, to pay offenders or their dependents pecuniary earnings under rules and regulations prescribed by the Director. This will permit maximum flexibility in the employment and training of prisoners by permitting their employment in the prisons in suitable capacities without loss to them of potential earnings that might otherwise be available to them if they worked, for example, in a Federal Prison Industries program.[2]

Subsection (c)(4) requires that the Bureau of Prisons provide, as far as practical, corrections programs designed to rehabilitate offenders. This provision acknowledges the desirability of continuing rehabilitation efforts even though little has been learned about how to rehabilitate. The Committee believes that the criminal justice system has a responsibility to prisoners and to the public to develop useful corrections programs to the extent possible.

Subsection (c)(5) is derived from 18 U.S.C. 4125(a), which permits employment of Federal prisoners in certain Federal public works projects, and 18 U.S.C. 4002, which permits employment of a Federal prisoner on a State or local public works project if the prisoner is in the State's or local government's prison under contract with the Federal government. Subsection (c)(5) would increase the flexibility of the Bureau of Prisons in seeking suitable employment for prisoners by permitting the Bureau of Prisons to make prisoners housed in Federal penal or correctional facilities available upon mutually agreeable terms for Federal, State, or local projects.

Subsection (c)(6), permitting the Bureau of Prisons to provide consulting services to Federal, State, and local governments concerning the operation of corrections programs and facilities, is derived from 18 U.S.C. 4042(4). Unlike current law, subsection (c)(6) describes in detail the nature of the training programs and technical assistance the Bureau of Prisons is authorized to provide, and specifically provides that the Bureau of Prisons may pay, where appropriate, tuition, travel expenses and other necessary expenses of participants in its seminars, workshops, and training programs.

Subsection (c)(7) is a new provision that requires the Bureau of Prisons to collect, develop, and maintain statistical information concerning offenders, sentencing practices, and correctional programs. The purpose of the provision is to increase the ability of the Federal criminal justice system to conduct research, planning, and evaluation of the effectiveness of different sentencing practices and corrections programs. This requirement is especially important in light of the need for adequate information in formulating and amending sentencing guidelines under the new sentencing provisions in title 18.

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[2] See proposed 28 U.S.C. 584(b)(4).

Subsection (c)(8), also a new provision, would permit the Bureau of Prisons to provide review of applications for grants-in-aid, technical assistance, or other services provided by Federal agencies to State and local governments. This would permit the Bureau of Prisons to review, for example, an application to the National Institute of Justice for a research grant to study the effectiveness of a particular corrections program in a State prison system.

Subsection (c)(9) contains a specific requirement that the Bureau of Prisons provide training for its officers, officials, and employees.

Subsection (c)(10), relating to payment from Department of Justice appropriations, under the direction of the Attorney General, of expenses of official detention and transportation of persons committed to the Bureau of Prisons, maintenance of Federal prison facilities, and conducting of programs for persons committed to the Bureau of Prisons, is derived from 18 U.S.C. 4008 to 4010.

Subsection (c)(11), derived in part from 18 U.S.C. 4001(b)(2), contains general authority for the Bureau of Prisons to exercise its powers through its Director and to perform all duties necessary and proper to carrying out its responsibilities.

New subsection (d) permits an officer or employee of a federal penal or correctional facility to summarily seize any object introduced into such facility by any person or possessed by an inmate of the facility in violation of a rule, regulation, or order promulgated by the Director. The object would be forfeited to the United States. Seizure would be only pursuant to rules and regulations issued by the Director. The provision is designed to obviate the effect of the holding in *Sell* v. *Parratt,* 548 F.2d 753 (8th Cir. 1977), that such seizures are not permitted without specific legislative authority.

New subsection (e) permits an officer or employee of a Federal penal or correctional facility to order an autopsy on the body of a deceased inmate of the facility when it is deemed necessary to detect a crime, maintain discipline, protect the health or safety of other inmates, remedy official misconduct, or defend the United States or its employees from civil liability arising from the administration of the facility. Exercise of such authority should conform to the local laws protecting religious beliefs with respect to autopsies unless inconsistent with the needs of the autopsy or other medical procedure. This subsection also includes a provision for autopsies and other post-mortem operations—in particular the removal of organs and tissue for transplant purposes—when done with the written consent of a person authorized to permit such procedures under the law of the State in which the facility is located.

SECTION 572. CHARACTER OF A PRISON FACILITY

Section 572 carries forward current law concerning the nature of prison facilities and the need for providing facilities appropriate to each prisoner's needs. The section expands the flexibility of the Bureau of Prisons in determining the appropriate facility and program for each prisoner.

Subsection (a) is derived from 18 U.S.C. 4081, relating to classification of prisoners and provision for individualized discipline, care, and treatment programs for them. The provision is changed from current law to provide that, in determining an individual's treatment program, the prisoner should be classified "according to the nature and circumstances of the offense committed, the history and characteristics of the offender, and such other factors as should be considered in providing an individualized system of discipline and care of, and correctional programs for, a person committed to such facility." Subsection (a) does not carry forward the current law provision for segregation, as well as classification, of offenders. Modern prison facilities may provide programs for many classes of offenders without necessarily separating classes.

Subsection (b) is largely new, although it is derived in part from provisions for special categories of offenders. While 18 U.S.C. 4253 provides for special facilities for certain categories of offenders found by the sentencing judge to be narcotic addicts who are "likely to be rehabilitated through treatment," and 18 U.S.C. 5011 provides for special treatment facilities for offenders sentenced as youth offenders or young adult offenders, there is no general provision in current law enumerating other possible specialized prisons facilities. Under the revised code, the provisions of current law under which the judge can sentence a convicted defendant to a particular program as an addict[3] or as a youth offender[4] or young adult offender[5] have been deleted. Instead, under subsection (b) of proposed section 572, the Bureau of Prisons may provide within a prison facility, or within separate facilities, a place for specialized programs for classes of offenders, such as narcotic addicts, drug abusers, alcoholics, youth offenders, or other similar classes of offenders. The Bureau of Prisons would determine under subsection (a) whether any of these specialized facilities was appropriate for a particular person. While the sentencing judge could make recommendations as to the appropriate type of facility,[6] the Bureau of Prisons would be able to determine the best program for a prisoner without being restricted by a sentence under a specialized sentencing statute whose application to a particular prisoner might later prove to be inappropriate.

The Director of the Bureau of Prisons would be authorized to conduct research on these specialized correctional programs, and would be required to report periodically to the Attorney General, the Administrative Office of the United States Courts, and the Congress, on the nature and effectiveness of the research and programs.

Subsection (c) is derived from 18 U.S.C. 4005, amended to permit the Director of the Bureau of Prisons to employ medical personnel or contract with a public or private agency for medical services directly, as well as employing medical personnel of the Public Health Service. In addition, the provision is amended to include dental care among the health services to be furnished in Federal penal or correctional facilities.

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[3] Title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251 *et seq.*

[4] Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*

[5] 18 U.S.C. 4216.

[6] Proposed 18 U.S.C. 2302(a).

SECTION 573. CONTRACTING FOR A STATE OR LOCAL FACILITY

Section 573 provides for contracts for periods not exceeding three years with States, territories and localities for official detention of Federal offenders.

Subsection (a) is derived from 18 U.S.C. 4002, which relates to contracting with States, territories, and municipalities for imprisonment, safekeeping, care, subsistence, and employment of prisoners. Subsection (a) broadens current law by providing, in addition to contracting for these aspects of official detention, authority to contract for correctional programs for Federal offenders. It also includes a provision that permits contracting with private organizations for services or programs for Federal offenders.

Under current law, the rates to be paid when prisoners are placed in State or local facilities are determined according to the nature of the quarters and quality of subsistence provided to the prisoner. Subsection (a) would require that the need for the State or local facilities to improve correctional programs and practices such as educational and vocational training, specialized correctional programs and work release also be taken into account in establishing the rates.

Subsection (b) is derived from 18 U.S.C. 5003, which permits the Bureau of Prisons to contract for the official detention in a federal penal or correctional facility of a person convicted of an offense in a court of a State or territory, if adequate federal facilities and personnel are available.[7] The current law requirement that contracts provide for payment by the state or local government for costs incurred has been expanded to permit reimbursement by exchange of services for prisoners on a "man-day" basis in lieu of cash payment. In other words, services to prisoners would be exchanged not according to the number of prisoners or on a prisoner-by-prisoner basis, but on the basis of one day's credit for each prisoner exchanged for each day, regardless of the number of prisoners exchanged at any given time or the length of time for which each is exchanged. One State prisoner could be sent to federal prison for 360 days in exchange for 12 federal prisoners sent to State facilities for 30 days each. Under such a contract, the federal government might agree, for example, that for every 100 man-days that it provided services, including housing and food and programs, to a State's convicted defendants in a federal maximum security facility, the State would provide 100 man-days in the State's neighborhood corrections facilities for federal prisoners about to complete their sentences. The provision is intended to permit maximum flexibility in the form of the contract, including, for example, a contract that provides in part for an exchange of prisoners on a man-day basis and in part for cost reimbursement. The provision is also expanded to expressly include contractual arrangements for official detention of persons convicted of an offense in a court of an Indian tribe.

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[7] The Supreme Court recently construed this statute as authorizing the transfer of a State prisoner to the Federal system because of the lack of a State maximum security facility deemed appropriate for the prisoner. *Howe* v. *Smith*, ———U.S.——— (1981). The Committee intends the same result under this subsection and, to facilitate this result, has omitted the word "treatment" in carrying forward current 18 U.S.C. 5003 in part in order to avoid the argument made in that case that the only valid reason for a prisoner transfer under the provision was for "treatment" unavailable in the State facility.

Subsection (c) is new. It would permit the Bureau of Prisons to contract with a state, territory, or local government or appropriate private organization or person for appropriate supervisory aftercare of a released offender for the purpose of providing a facility, service, or program not other wise available.

SECTION 574. FEDERAL INSTITUTIONS IN A STATE WITHOUT AN APPROPRIATE FACILITY

Section 574 is derived from 18 U.S.C. 4003, which permits the Bureau of Prisons to erect penal or correctional facilities in or convenient to a State or locality where there is no valid contract with a State or local facility for official detention of a Federal offender and there is no suitable Federal facility.

SECTION 575. APPROPRIATIONS AND ACQUISITIONS

Section 575 relates to the acquisition of property for, and the planning of, penal or correctional facilities.

Subsection (a), which authorizes the expenditure of money for planning penal and correctional facilities and obtaining options on and surveys of land for such facilities, is derived from 18 U.S.C. 4009.

Subsection (b), which permits the acquisition of additional land adjacent to a Federal penal or correctional facility for the protection of the health or safety of the offenders in the institution, is carried forward from 18 U.S.C. 4010.

Subsection (c), derived from 18 U.S.C. 4011, requires deposit of collections for certain services in the Treasury to the appropriation available for the services for which the funds were collected. It amends current law to delete the reference to barber service and to make the deposit of funds in the Treasury mandatory rather than permissive.

SECTION 576. NATIONAL INSTITUTE OF CORRECTIONS

Section 576 carries forward from current law the provisions of chapter 319 of title 18, relating to the establishment and functions of the National Institute of Corrections in the Bureau of Prisons.

Subsection (b), formerly 18 U.S.C. 4351(b), is amended to increase the membership of the Advisory Board from sixteen to seventeen members and to add as an ex-officio member the Chairman of the United States Sentencing Commission or his designee and the chief of the Division of Probation of the Administrative Office of the United States Courts or his designee. The provision is also amended to substitute a reference to the Director of the Office of Justice Assistance, Research, and Statistics for the Administrator of the Law Enforcement Assistance Administration and to delete the reference to the United States Parole Board. Since this bill phasesout the United States Parole Commission five years after the effective date of the sentencing guidelines system (see section 134 of the bill), the phaseout provisions carry forward the Chairman's membership on the Advisory Board for the five year period. Technical amendments are also made in the language throughout the section relating to the pay level of the members of the Advisory Board.

SECTION 577. INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

Section 577 provides that the provisions of 5 U.S.C. 554 and 555 and of 5 U.S.C. 701 through 706, do not apply to the making of a determination, decision, or order under the chapter.[8]

SECTION 578. ADVISORY CORRECTIONS COUNCIL

Section 578 carries forward, with amendments, current 18 U.S.C. 5002, to continue the Advisory Corrections Council. The primary changes relate to membership on the Council. The chairman of the new Sentencing Commission and the Director of the Federal Judicial Center are added as ex officio members while the chairman of the United States Parole Commission is taken out to reflect the five-year phase out of the Parole Commission under this bill. The phase-out provisions (section 134 of this bill) provide for Parole Commission participation on the Council during the five year period. In addition, the new section 578 would provide for appointment of two attorneys from the Department of Justice—one with prosecutorial duties and the other with law reform responsibilities—and a representative from a law enforcement agency of the Department of Justice and a law enforcement agency of the Department of the Treasury. Except for the broader membership, the duties and responsibilities of the Council are essentially the same as under current law.

SECTION 579. CONTRACTING POWER

Section 579 provides that a contract entered into pursuant to this chapter is effective for a fiscal year only to the extent and in such amounts as are provided in appropriation Acts.

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[8] See the discussion of 18 U.S.C. 3825.

CHAPTER 38 OF TITLE 28, UNITED STATES CODE—FEDERAL PRISON INDUSTRIES

The new chapter 38 of title 28 is largely derived from the Federal Prison Industries provisions currently in 18 U.S.C. 4121–4128.

SECTION 581. ORGANIZATION

Subsections (a) and (b) provide that the Federal Prison Industries as a government corporation in the District of Columbia shall be administered by a board of directors made up of representatives of industry, labor, agriculture, retailers and consumers, the Secretary of Defense, and the Attorney General. These provisions are derived from 18 U.S.C. 4121. Subsection (c), derived from 18 U.S.C. 4127, provides for an annual report to the Congress on the conduct of the business of the corporation and its financial status. Subsection (d) is derived from 18 U.S.C. 4128.

SECTION 582. ADMINISTRATION

This section is derived from 18 U.S.C. 4122. Subsection (a) is amended to prohibit sales of goods to the public in competition with private industry unless the Administrator of the Small Business Administration certifies to the Attorney General that the sale of particular types of goods or services would not harm private enterprise, and to incorporate the third paragraph of 18 U.S.C. 4123, relating to the location of prison industries. The reference in subsection (b) to employment for "physically fit" inmates is omitted in order to permit suitable employment for all inmates, and the provision relating to reducing competition to a minimum is amended to refer to "undue" competition. Subsection (c) contains new authority for the board to make, to the extent and in the amounts provided in appropriation Acts, contracts, loans, grants, leases, or other agreements necessary to effectuate the purposes of the chapter. Subsection (d) contains the substance of 18 U.S.C. 4122(c), and is amended to incorporate the requirement in the second paragraph of 18 U.S.C. 4123 that the form of employment of an offender give him to the extent practicable a "maximum opportunity to acquire a knowledge and skill in a trade or occupation that will provide him with a means of earning a livelihood upon release". Subsection (e) contains the substance of 18 U.S.C. 4122(d). 18 U.S.C. 4122(e) is omitted since the District of Columbia Department of Corrections has an independent prison industries system.

SECTION 583. FEDERAL PURCHASE OF GOODS AND SERVICES OF PRISON INDUSTRIES

This section carries forward current 18 U.S.C. 4124 without substantive change.

SECTION 584. PRISON INDUSTRIES FUND

This section is transferred from 18 U.S.C. 4126 and carries forward the Prison Industries Fund. The section would amend current provisions to include payment for educational training among the authorized expenditures from the Fund. Rules and regulations for the Fund would be promulgated by the Director of the Bureau of Prisons rather than the Attorney General. Subsection (b)(3) adds new authority for the Fund to be used for educational as well as vocational training. New subsection (d) provides for review of claims for compensation under subsection (b)(4)(C) by the Director of the Bureau of Prisons in the same manner as provided for review by the Secretary of Labor of claims under the Federal Employees' Compensation Act under 5 U.S.C. 8128.

CHAPTER 40 OF TITLE 28, UNITED STATES CODE—UNITED STATES VICTIM COMPENSATION BOARD

Chapter 40 of title 28, United States Code, is new. It creates the United States Victim Compensation Board that will administer the Federal victim compensation program created by subchapter B of chapter 41 of title 18, United States Code.

SECTION 595. ORGANIZATION AND MEMBERSHIP

Section 595 establishes within the Department of Justice a United States Victim Compensation Board to administer the victim compensation program set forth in subchapter B of chapter 41 of title 18, United States Code. The Board would be composed of not more than three members, appointed by the Attorney General, and the Attorney General would designate one of the members as Chairman.

SECTION 596. POWERS OF THE BOARD

Section 596 specifies the powers of the Board with respect to appointment of employees, contract authority, utilization of services of other agencies, and payment of expenses. It specifically requires that the Board publicize extensively and continually the rights of the public under the victim compensation program.

SECTION 597. PROCEDURES

Section 597 specifies procedures to be utilized by the Board in processing claims against the Victim Compensation Fund.

Subsection (a)(1) provides for subpoena power of the Board and for enforcement of a subpoena through the courts on the application of the Chairman.

Subsection (a)(2) provides authority to the Board to administer oaths and affirmations to witnesses before the Board. It also provides authority to the Board to receive relevant evidence that the Board believes will contribute to its ability to perform its functions, whether or not the evidence could be admissible in a court of law. The question of utilization of privileged information, such as information relating to a medical examination relevant to the claim, is left to regulations of the Attorney General and to decisions of the Board and the courts.

Subsection (a)(3) permits the Board, at the discretion of the Chairman, to appoint an impartial licensed physician to examine a claimant. The Board could require the claimant to pay reasonable fees for that examination.

Subsection (b) makes the Administrative Procedure Act requirements inapplicable to adjudicatory procedures of the Board.[1] This will permit the Board to make a determination on the information presented by the claimant unless it believes there is a need for additional information.

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[1] But see section 598, relating to appellate review.

Under subsection (c), a single member designated by the Chairman may act on a claim. If the claimant is dissatisfied with the disposition of his claim by the member, the claimant would be entitled to a hearing de novo before the full Board.

Under subsection (d), decisions of the full Board would require the acquiescence of a majority of the members and would be required to be based on a preponderance of the evidence.

Subsection (e) provides that a claimant has the right to produce evidence and cross-examine witnesses if his claim results in a hearing before the full board.

Subsection (f) requires that the Attorney General publish regulations concerning attorney's fees for proceedings before the Board. The Board would then award fees, based on a fee statement filed by the attorney, pursuant to section 3403 of title 18.

SECTION 598. REVIEW

Section 598 provides a right of appeal to the United States Court of Appeals for the District of Columbia of final orders of the Board, and provides that the court may not set aside a finding of fact based on substantial evidence.

CHAPTER 41.—ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

SECTION 604. DUTIES OF DIRECTOR GENERALLY

Section 125 of the bill adds to section 604(a) of title 28, which lists the responsibilities of the Director of the Administrative Office of United States Courts, a requirement that the Director contract with any appropriate public or private agency for the supervisory aftercare of an offender. See new 28 U.S.C. 573(c).

CHAPTER 58, TITLE 28.—UNITED STATES SENTENCING COMMISSION

SECTION 991. UNITED STATES SENTENCING COMMISSION; ESTABLISHMENT AND PURPOSE

Subsection (a) establishes the United States Sentencing Commission as an independent commission in the judicial branch. The concept of a sentencing commission was suggested by former Judge Marvin Frankel and developed by the Workshop on Parole and Sentencing at the Yale Law School[1] and was sponsored by Senators McClellan and Kennedy, among others.[2] Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function. At the same time, however, the Committee believes that the other branches of government have a strong interest in assuring fair and effective sentencing. The Executive is, of course, charged with assuring that the laws, including criminal laws, be faithfully executed and it is the legislature that is charged with setting the broad framework in which judicial sentencing is to take place. For these reasons, and to assure a broadly representative membership, the Committee has provided that four of the seven voting members, including the member who is to be Chairman, are to be appointed by the President with the advice and consent of the Senate.[3] The Chairman is to be appointed as such, and will remain Chairman for the duration of his term unless removed from office for malfeasance or neglect of duty.[4] The remaining three voting members are to be designated by the President from a list of ten judges submitted by the Judicial Conference of the United States to the President after the Conference has obtained and considered recommendations of the district judges who are members of the Judicial Councils of the circuits. All voting members are removable from the Commission by the President for malfeasance in office or neglect of duty.

In addition to the seven voting members, the Commission will have one permanent non-voting ex officio member, the Attorney General or his designee, and, under the provisions of section 134 of the bill, one temporary non-voting ex officio member, the Chairman of the United States Parole Commission.

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[1] M. Frankel, *Criminal Sentences: Law Without Order* (1973); P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977).

[2] In addition to S. 1437 (Senators McClellan and Kennedy) and H.R. 6869 (Congressman Rodino) in the 95th Congress, S. 1455, S. 1555, and H.R. 1647, in the 97th Cong.; see S. 1722, S. 1973, and H.R. 6915 in the 96th Congress; S. 181, S. 204, H.R. 470, H.R. 1182, H.R. 2312, and H.R. 5344 in the 95th Congress, and S. 2699, H.R. 11655, H.R. 13492, H.R. 13716, H.R. 13754, H.R. 14014, H.R. 14015, and H.R. 14896 in the 94th Congress.

[3] See Hearings, pp. 8581, 8590, 8871, and 8930. Of course, if a member selected by the President was already a Federal judge, it would be unnecessary for the judge selected to be subject to the advice and consent of the Senate since he had already been confirmed by the Senate and would retain his judgeship under section 992(c).

[4] If the President wished to name another person as Chairman at the expiration of the Chairman's first term, but wished to retain the Chairman as a member of the Commission, he could appoint a new Chairman and reappoint the former Chairman as a member of the Commission.

The Committee rejected suggestions that each of the seven positions be designated to represent a particular interest or aspect of the criminal justice process. The Commission should be a body which can cooperate in the promulgation of clear and consistent sentencing policy. Some degree of diversity in membership is specifically provided by the general direction to the appointing and designating authority in subsection (a) that the "Commission shall have both judicial and non-judicial members and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the criminal justice process", and by the specific requirement that one member must be a Federal prosecutor and one should be an attorney who regularly represents defendants in Federal criminal cases.

The extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole, demand the highest quality of membership. For such a critical position, Presidential appointments based on politics rather than merit, or appointments reflecting the internal politics of the Judicial Conference, would, and should, be an embarrassment to the appointing authority. The Committee is convinced that without superior and professional members the Commission, and indeed sentencing reform, can never achieve the progress so sorely needed.

Subsection (a) is carefully drawn to assure that fair consideration is given to the viewpoints of persons selected by the Judicial and Executive branches. Subsection (a) also assures the fair representation of the views of sentencing judges in the promulgation of guidelines by requiring that the Judicial Conference consult district court members of the circuit Judicial Councils in formulating its list of potential designees to the Commission.

The Committee intends, and the important functions to be served by the Sentencing Commission require, the appointment and designation of highly qualified members to the Commission. Because of the complex nature of the functions of the Commission, and in order to avoid potential schedule conflicts for the members, the voting members' positions are full-time,[5] even if the member is a Federal judge.[6]

The Committee anticipates that the voting members of the Commission will form a number of committees which will have specific delegated responsibilities such as, for example, review of the effectiveness of probation and post-release supervision in carrying out the purposes of sentencing, monitoring of the application of the sentencing guidelines and policy statements, continuing refinement of the guidelines and policy statements, development of legislative proposals in the sentencing area, development and coordination of research studies (including, for example, basic research on sentencing theories as well as applied research on the effectiveness of certain policies), and review of the effectiveness of corrections programs of the Bureau of Prisons in carrying out the purposes of sentences of imprisonment. Such committees could be an invaluable source for developing recommendations for Commission action and for providing the information necessary for informed decisionmaking.

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[5] The judicial and other members may complete work on cases in progress if they are so far involved that it is impractical for the work to be turned over to another person. Of course, if the work was such that there was a potential conflict of interest or appearance of such a conflict, the work would have to be turned over to someone else.

[6] Pursuant to section 992(c), a Federal judge need not resign his appointment as a Federal judge while serving as a member of the Sentencing Commission.

Subsection (b) sets out the two basic purposes of the Sentencing Commission. The most important purpose of the Sentencing Commission is the establishment of sentencing policies and practices for the Federal criminal justice system that are designed to meet three goals.

First, the policies and practices established should assure that to the maximum extent possible the Federal sentencing practices and policies carry out the four purposes of sentencing set forth in section 101(b) of title 18, United States Code. These purposes are deterrence, protection of the public from further crimes by the defendant, assurance of just punishment, and promotion of rehabilitation.

Second, the policies and practices are required to provide certainty and fairness in meeting the purposes of sentencing. In doing so, the policies and practices are required to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." This requirement establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity and therefore avoided unless it is warranted by other factors. The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants in those factors.[7] As discussed in the introduction of the report material on Part III of the Code, the Committee believes that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.

Third, the sentencing policies and practices are required to reflect to the extent practicable advancement in knowledge of human behavior in the context of the criminal justice process. This is an explicit recognition of the fact that we unfortunately do not know very much about how to deter criminal conduct or rehabilitate offenders. It also makes clear that the purposes set forth in subsection (b) are the goals to be reached by the sentencing process and that they cannot be realistically assured in every case. Subsection (b)(1)(C) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches.

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[7] 28 U.S.C. 994(d).

The second basic purpose of the United States Sentencing Commission is to develop means of measuring the effectiveness of different sentencing, penal, and correctional practices in meeting the purposes of sentencing set forth in section 101(b) of title 18, United States Code. This provision emphasizes the importance of sentencing and corrections research in the process of improving the ability of the Federal criminal justice system to meet the goals of sentencing.

SECTION 992. TERMS OF OFFICE; COMPENSATION

Subsection (a) sets up a staggered system of appointments for the chairman and voting members of the Commission such that, once in operation, the Commission membership will be replaced, or reappointed, over a period of six years—at least two members, or one member and the chairman, every two years. This is achieved by making the initial appointments for three members to only four-year terms, and for two other members to only two-year terms, while the first chairman and one member serve full six-year terms. This staggered system should provide a desirable balance between continuity and the innovation and new perspectives that can come with a change in membership. Note that section 134 of the Criminal Code Reform Act of 1981 provides that while the rest of the Act shall become effective thirty months after the date of enactment, the Sentencing Commission is created immediately or on October 1, 1982, whichever occurs later. It also provides that for the purposes of determining when the initial terms end, the terms of the first members of the Commission shall not begin to run until the effective date of the sentencing guidelines; thus the members appointed for the initial abbreviated terms of two or four years will not have their terms expire until two or four years after the new sentencing guidelines go into effect, and the members and chairman appointed to serve full six-year terms will count the effective date of the sentencing guidelines as the beginning of the term even though they may have actually been in office almost two and a half years prior to that date. The delay is also a recognition that the initial appointments may occur at different times in spite of the desirability of expeditious appointments and permits all later appointment terms to run from an anniversary of the effective date of the guidelines.

Subsection (b) provides that a voting member may serve no more than two full terms, and that a member appointed to serve an unexpired term shall serve only the remainder of such a term. This also means that if a voting member is appointed to a term after it begins, and it has been vacant during the expired part, such member will also serve only the remainder of a term. If one of the original Commissioners appointed to an abbreviated two- or four-year term were reappointed, he could be reappointed a second time as well since the initial term was not a full term.

Subsection (c) sets the compensation of voting members at the rate of courts of appeals judges. A Federal judge is specifically authorized to be designated, or appointed, a member of the Commission without having to resign his appointment as a Federal judge. The Committee feels that this is appropriate since the judge will remain in the judicial branch and will be engaged in activities closely related to traditional judicial activities, and that such a provision is necessary to assure that highly qualified candidates are not routinely excluded in practice because of the substantial burden of having to resign a lifetime appointment in order to serve a six-year term. The salary for a Federal judge would be that of a court of appeals judge only so long as he was on the Commission. If this salary is higher than that which he received for the judgeship, the extra salary would be the result of the special assignment and he would not be entitled to continue to receive it after his term as Commissioner. The non-voting ex officio members would, of course, receive no extra compensation for their role on the Commission, but would receive travel expenses authorized by their agency if necessary to the performance of their duties with regard to the Commission.

SECTION 993. POWERS AND DUTIES OF CHAIRMAN

Section 993 provides that the Chairman, who is appointed as such by the President, with the advice and consent of the Senate, pursuant to section 991(a), is to call and preside at meetings, and to direct the preparation of appropriations requests and the use of funds by the Commission.

SECTION 994. DUTIES OF THE COMMISSION

Subsection (a) requires the Sentencing Commission to promulgate sentencing guidelines and policy statements to be used by the sentencing judges in determining the appropriate sentence in a particular case. The sentencing guidelines and policy statements are to be promulgated pursuant to the rules and regulations of the Sentencing Commission[8] and to be consistent with all pertinent provisions of titles 18 and 28. Guidelines and policy statements must be adopted by the affirmative vote of at least four members of the Commission. Under subsection (a)(1)(A), the guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to a sentence to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be one of the most important parts of the guidelines process, since current law provides no guidance or mechanism for guidance to judges on this crucial decision, leading to considerable unwarranted disparity which there is no mechanism to correct.[9] The Parole Commission is now able to alleviate some of the disparity among sentences to terms of imprisonment; it has no jurisdiction to eliminate disparity among decisions whether or not to sentence convicted defendants to terms of imprisonment.

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[8] See 28 U.S.C. 995(a)(1).

See footnote 9, page 1332.

It has been suggested by some, as noted before, that the Parole Commission retain its assumed role of correcting sentencing disparities. The Parole Commission cannot correct this cause of disparity, however, and for this and several other more fundamental reasons that have been discussed in relation to the new chapters 20 and 23 of title 18, the Committee has not retained the Parole Commission. The Committee believes that the sentence provisions as a whole provide ample safeguards against unwarranted disparity without a requirement that the Parole Commission review the product of a series of decisions made by the Sentencing Commission, the Congress, the sentencing judge, and perhaps an appellate

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[9] Such disparity is illustrated by the data in two charts published in O'Donnell, Churgin, and Curtis, *Toward a Just and Effective Sentencing System*, 5-6, Tables 1 and 2 (1977), as follows:

TABLE 1.—AVERAGE SENTENCE LENGTH FOR SELECTED OFFENSES, IN 1972 (MONTHS)

	Homicide and assault		Robbery		Burglary		Larceny		Auto theft		Counterfeiting	
National average	102		120		63		40		38		42	
Maine							144	(+104)	21	(−17)	24	(−18)
Massachusetts	48	(−54)	115	(−5)	40	(−23)	36	(−4)	20	(−18)	32	(−10)
New York (northern)			39	(−81)			11	(−29)	9	(−29)	12	(−30)
New York (eastern)	18	(−84)	130	(+10)	2	(−61)	48	(+8)	12	(−26)	49	(+7)
NewJersey	11	(−91)	103	(−17)	27	(−36)	50	(+10)	32	(−6)	29	(−13)
Pennsylvania (eastern)	102	(0)	88	(−32)			25	(+15)	49	(+11)	30	(−12)
Maryland	6	(−96)	146	(+26)	61	(−2)	45	(+5)	49	(+11)	40	(−2)
Virginia (eastern)	66	(−36)	135	(+15)	81	(+18)	50	(+10)	41	(+3)	39	(−3)
Florida (middle)			126	(+6)	34	(−29)	37	(−3)	32	(−6)	41	(−1)
Texas (northern)	62	(−40)	224	(+104)	46	(−17)	42	(+2)	39	(+1)	66	(+24)
Kentucky (eastern)	24	(−78)	124	(+4)	167	(+104)	25	(−15)	32	(−6)	20	(−22)
Ohio (northern)	28	(−74)	119	(−1)	36	(−27)	29	(−11)	31	(−7)	35	(−7)
Illinois (northern)	20	(−82)	81	(−39)	30	(−33)	40	(0)	45	(+7)	38	(−4)
Indiana (southern)	40	(−62)	101	(−19)	24	(−39)	35	(−5)	29	(−9)	34	(−8)
Missouri (eastern)	27	(−75)	180	(+60)	60	(−3)	54	(+14)	46	(+8)	46	(+4)
Missouri (western)	36	(−66)	120	(0)			57	(+17)	36	(−2)	33	(−9)
California (northern)	79	(−23)	115	(−5)	120	(+57)	32	(−8)	42	(+4)	37	(−5)
California (central)	190	(+88)	96	(−24)	24	(−39)	40	(0)	41	(+3)	43	(+1)
Kansas	74	(−28)	115	(−5)			46	(+6)	47	(+9)	63	(+21)
Oklahoma (western)	29	(−73)	85	(−35)	48	(−15)	31	(−9)	36	(−2)	41	(−1)
District of Columbia	161	(+59)	103	(−17)	84	(+21)	42	(+2)	40	(+2)	67	(+25)

Note: The Federal district courts for each of the 11 circuits were chosen on the basis of the 2 districts in each circuit that sentenced the greatest number of offenders for the selected offenses.

Source: Administrative Office of the U.S. Courts, "Federal Offenders in U.S. District Courts, 1972," app. table X–4.

TABLE 2.—PERCENTAGE OF CONVICTED OFFENDERS PLACED ON PROBATION, 1972

	Homicide and assault		Robbery		Burglary		Larceny		Auto theft		Forgery and counterfeiting	
National average	36		13		43		60		36		58	
Maine							50	(−10)	0	(−36)	20	(−38)
Massachusetts	14	(−22)	17	(+4)	0	(−43)	77	(+17)	50	(+14)	53	(−5)
New York (northern)	100	(+64)	50	(+37)			54	(−6)	83	(+47)	62	(+4)
New York (eastern)	60	(+24)	16	(+3)	50	(+7)	52	(−8)	89	(+53)	62	(+4)
New Jersey	80	(+44)	6	(−7)	20	(−23)	64	(+4)	60	(+24)	66	(+8)
Pennsylvania (eastern)	50	(+14)	18	(+5)			79	(+19)	80	(+44)	74	(+16)
Maryland	33	(−3)	7	(−6)	0	(−43)	79	(+19)	57	(+21)	67	(+9)
Virginia (eastern)	8	(−28)	6	(−7)	60	(+17)	53	(−7)	33	(−3)	52	(−6)
Florida (middle)	50	(+14)	0	(−13)	40	(−3)	47	(−13)	28	(−8)	45	(−13)
Texas (northern)	0	(−36)	4	(−9)	25	(−18)	51	(−9)	24	(−12)	41	(−17)
Kentucky (eastern)	50	(+14)	0	(−13)	0	(−43)	11	(−49)	8	(−28)	17	(−41)
Ohio (northern)	43	(+7)	10	(−3)	50	(+7)	67	(+7)	45	(+9)	68	(+10)
Illinois (northern)	43	(+7)	16	(+3)	0	(−43)	64	(+4)	50	(+14)	62	(+4)
Indiana (southern)[1]												
Missouri (eastern)	60	(+24)	7	(−6)	0	(−43)	51	(−9)	14	(−22)	58	(0)
Missouri (western)	0	(−36)	6	(−7)	100	(+57)	78	(+18)	47	(+11)	74	(+16)
California (northern)	29	(−7)	12	(−1)	50	(+7)	65	(+5)	25	(−9)	62	(+4)
California (central)	53	(+17)	21	(+8)	50	(+7)	75	(+15)	64	(+28)	79	(+21)
Kansas	10	(−26)	19	(+6)	100	(+57)	61	(+1)	35	(−1)	64	(+6)
Oklahoma (western)	18	(−18)	25	(+12)	0	(−43)	49	(−11)	21	(−15)	42	(−16)
District of Columbia	37	(+1)	16	(+3)	35	(−8)	49	(−11)	48	(+12)	54	(−4)

[1] No information was available for the southern district of Indiana.

Source: Administrative Office of the U.S. Courts, "Federal Offenders in U.S. District Courts, 1972," app. table X—4.

court. Indeed, retention of this function by the Parole Commission would undercut the sentencing guidelines before they are even put in place. Senator Kennedy has repeatedly expressed this concern during the Committee debate. If, despite the guidelines, the Parole Commission were to retain the power to release prisoners after a fixed eligibility period, it is likely that the sentencing judges would try to second-guess both the guidelines and the Parole Commission and, in fixing a defendant's sentence, try to determine when the offender will actually be released. It is hard to conceive of a step that would be more damaging to the entire sentencing system found in the reported bill.[10]

Subsection (a)(1)(B) requires that the sentencing guidelines recommend an appropriate amount of fine or appropriate length of a term of probation or imprisonment. In recommending an appropriate fine, the Commission could, of course, provide a formula or set of principles for determining an appropriate fine relative to the damage caused, the gain to the defendant, or the ability of the defendant to pay, consistent with the flexibility possible because of the high maximum fines set forth in chapter 22 of title 18, United States Code, rather than specifying a dollar amount of fine.

Subsection (a)(1)(C) requires that the sentencing guidelines recommend whether a category of defendant convicted of a particular offense who is sentenced to a term of imprisonment should be required to serve a term of supervised release, and, if so, what length of term is appropriate.

The Committee has added a new subsection (a)(1)(D) in S. 1630 that requires that the sentencing guidelines include recommendations as to whether sentences to terms of imprisonment should be ordered to run concurrently or consecutively. The Committee has taken this approach instead of the approach in earlier versions of the bill setting in section 2304 of title 18 a ceiling on the maximum term of imprisonment that could be imposed for multiple offenses. The Committee believes that the new provision when read with the revised version of 28 U.S.C. 994(k) will lead to carefully considered determinations as to the appropriateness of concurrent, consecutive, or overlapping sentences in cases of multiple offenses.

The list of determinations concerning which the guidelines should make recommendations is not necessarily inclusive. For example, the Sentencing Commission may wish to make recommendations in the guidelines in some cases as to, for example, a requirement of restitution or a particularly appropriate condition of probation for a category of offender convicted of a particular offense.

Under subsection (a)(2), the Commission is required to issue general policy statements concerning application of the guidelines and other aspects of sentencing and sentence implementation that would further the ability of the Federal criminal justice system to achieve the purposes of sentencing set forth in section 101(b) of title 18. The policy statements are required to address the questions of the appropriate use of: the sanctions of order of criminal forfeiture,[11] order of restitution,[12] and order of notice to victims;[13] conditions of probation[14] and supervised release;[15] sentence modification provisions for fines,[16] probation,[17] and imprisonment; authority under Rule 11(e) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement; and temporary release under section 3822 of title 18 and prerelease custody under section 3824(c) of title 18.[18] These policy statements could also address, for example, such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which did not occur sufficiently frequently to be incorporated in the guidelines themselves. The policy statements might also address such issues as the kind of recommendations a judge might make pursuant to section 2302(a) of title 18 to the Bureau of Prisons as to an appropriate prison facility for a defendant committed to its custody.[19] One important function of the policy statements might be to alert Federal district judges to existing disparities which have not adequately been cured by the guidelines, while offering recommendations as to how these situations should be treated in the future.

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[10] See e.g., Hearings, pp. 8579, 8595, 9021 (testimony of former Judge Harold Tyler before the House Judiciary Subcommittee on Criminal Justice, October 11, 1979; letter from Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Robert F. Drinan, Chairman, House Judiciary Subcommittee on Criminal Justice, dated September 14, 1979; letter to the Editor, The New York Times, November 15, 1979, from Marvin E. Frankel, Norval Morris, and Alan Dershowitz). See also Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 377 (1979).

Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses. Under section 2001(c), such an organization may sentenced to probation pursuant to chapter 21, to pay a fine pursuant to chapter 22, to forfeit property pursuant to section 2004, to give notice to victims pursuant to section 2005, to make restitution pursuant to section 2006, or to any combination of such penalties that the sentencing judge deems fitting under the circumstances. Given the breadth of discretion thus available to the court in the context of sentencing an organizational defendant, the Committee believes that it would be appropriate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.[20]

Under subsection (a)(3), the Sentencing Commission is required to issue either guidelines or policy statements concerning the appropriate use of probation revocation under section 2105 of title 18, and of the provisions for modification of the term or conditions of probation or supervised release under section 2103(c), 2104(d), or 2303(e) of title 18.

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[11] Section 2004 of title 18, United States Code, as added by the reported bill.

[12] Section 2006 of title 18, United States Code, as added by the reported bill.

[13] Section 2005 of title 18, United States Code, as added by the reported bill.

[14] See section 2103 of title 18, United States Code, as added by the reported bill.

[15] See sections 2303(d) and 2103 of title 18, United States Code, as added by the reported bill.

[16] Section 2203 of title 18, United States Code, as added by the reported bill.

[17] Section 2103(c) of title 18, United States Code, as added by the reported bill.

[18] Section 2302(b) of title 18, United States Code, as added by the reported bill.

[19] See section 2302(a) of title 18, United States Code, as added by the reported bill.

[20] See, for example, American Bar Association recommendations, Hearings, Part XVI, pp. 11855-11858, 11877-11878, 12354-12356.

The provision of subsection (a)(2)(D), concerning the issuance of policy statements with regard to plea acceptance, is important. The guideline sentencing provisions of S. 1437 in the 95th Congress were criticized on the ground that, while structuring and rationalizing the exercise of judicial sentencing discretion, they did not also address the exercise of prosecutorial discretion at the charging and plea agreement stages of criminal proceedings. As a result of this omission, it was claimed, prosecutorial decisions—particularly decisions to reduce charges in exchange for guilty pleas—could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system.

One approach that has been suggested for dealing with this situation is to have sentencing judges review charge-reduction plea agreements to ensure that such agreements do not result in undue leniency or unwarranted sentencing disparities.[21] Subsection (a)(2)(D), in combination with the bill's modification of Rule 11(e) of the Federal Rules of Criminal Procedure (to clarify that the Rule covers withholding of charges as well as dismissal of charges) and the addition of subsection (p) of section 994 (to require careful attention by the Sentencing Commission to the effects of plea agreements on sentencing under the new Code), is intended to implement this suggestion. It would require the Sentencing Commission to promulgate policy statements for use by a sentencing court in determining whether, pursuant to Rule 11(e)(2), to accept a charge-reduction agreement described in Rule 11(e)(1). This approach is intended to provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, while at the same time to guard against improper judicial intrusion upon the responsibilities of the Executive Branch.

It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review,[22] while one that is consistent with the guidelines but inconsistent with the policy statements is not. This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more difficult to use in determining the right to appellate review. Nevertheless, it is expected that the sentencing judge will take the policy statements into account in deciding what sentence to impose and that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of the sentence and corrections program applied to a particular case.

Under subsection (b), the Commission is to devise categories based on characteristics of the offense and categories based on characteristics of the offender.[23] For each combination of a category of offense and a category of offender, a sentence or sentencing range is to be recommended that is consistent with all pertinent provisions of title 18 of the United States Code.

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[21] See S. Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform*, Report for Federal Judicial Center (August 1979).

[22] See section 3725 of title 18, United States Code, as added by the reported bill.

This subsection is of major significance. It contemplates a detailed set of sentencing guidelines, to be used as indicated in subsection (a) and chapters 20 through 23 of title 18, that are designed to achieve the purposes of sentencing set forth in title 18. The Committee expects that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offender circumstances. There might be, for example, various guideline ranges for a single offense varying on the basis of existing aggravating and mitigating circumstances.[24] The guidelines may be designed and promulgated for use in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. Whatever their form, the general logic underlying the effects of individual factors would presumably be apparent, or at least would be traceable to Sentencing Commission determinations. The result should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures a standardized result.[25]

The subsection requires that, if the guidelines recommend a term of imprisonment for a particular category of offense committed by a particular category of offender, the maximum of the sentencing range recommended may not exceed the minimum of that range by more than 25 percent. For a particular penal offense, therefore, while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent; all the ranges together, however, would be expected to cover the spectrum from no or little imprisonment to or close to the statutory maximum for the applicable class of offense. The breadth of the sentencing range provided in each guideline is a matter for the Commission to decide so long as it is within the 25 percent limit imposed pursuant to subsection (b). The range may be narrow where the purposes of sentencing can be served by a single sentence or a narrow range of sentences in all similar cases. The range may necessarily be broader where miscellaneous factors not entirely provided for in the guidelines may change the appropriate sentence in a particular case. A range may also be broad where no such factors exist, but where the Commission is not sufficiently confident in its judgment as to the appropriate sentence to suggest a narrow range. For this group of cases, the guideline range might well become more narrow as, over time, the Commission is able to refine its guidelines.

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[23] Subsections (c) and (d) suggest factors that the Commission might conclude are pertinent to the sentencing decision.

[24] For example, it is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply to different categories of offenders convicted of basically similar offenses.

[25] In developing the form in which the guidelines are to be used, the Committee expects that the Commission will undertake an evaluation to assure that the necessary complexity of the guidelines does not detract from their effective use.

The Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing. The Committee is aware that guidelines addressing this broad range of sentencing alternatives—rather than just the length of terms of imprisonment, for example, covered by the current Parole Commission guidelines—will be difficult to develop. That is true especially in view of the 25 percent limitation on the difference between the maximum and minimum terms of imprisonment specified in a single guideline. The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors. By so doing, the Commission will be able to maintain the proper relationship between its function and that of the courts of appeals in contributing to purposeful and consistent sentencing. It is for these reasons, among others, that the Commission is to be created 30 months before the guidelines are to be put into use, and that the Commission is structured to contain full-time members and an extensive research and development capability.

Subsection (c) lists a number of offense characteristics that the Sentencing Commission is required to examine for the purpose of determining whether and to what extent they are pertinent to the establishment of categories of offenses for use in the sentencing guidelines and policy statements dealing with the nature, extent, location, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose. The Sentencing Commission is also required under subsection (c) to determine whether other factors not specifically listed are relevant to the sentencing decision.

Subsection (c)(1) specifies that the Commission consider the degree of relevance of the grade of the offense to the sentencing decision. As discussed in connection with proposed section 2301 of title 18, all offenses are graded according to their relative seriousness. This does not mean that the Committee intends that sentences for offenses with the same grade necessarily have the same sentence. It is intended instead that the grading be a guide as to the Committee's view of the relative seriousness of similar offenses. The rough approximations practical for statutory purposes are expected by the Committee to be refined considerably by the sentencing guidelines.

Subsection (c)(2) specifies that the Commission consider the relevance to the sentencing decision of the circumstances under which the offense was committed that might aggravate or mitigate the seriousness of the offense. Among the considerations the Commission might examine under this factor are whether the offense was particularly heinous; whether the offense was committed on the spur of the moment or after substantial planning; whether the offense was committed in reckless disregard of the safety of others; whether the offense involved a threat with a weapon or use of a weapon; whether the offense was committed in a manner plainly designed to limit the danger to the victims; whether the defendant was acting under a form of duress not rising to the level of a defense; etc.

Subsection (c)(3) specifies that the Commission consider the relevance to the sentencing decision of the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust.

Subsection (c)(4) specifies that the Commission consider the relevance of the community[26] view of the gravity of the offense to the sentencing decision, and subsection (c)(5) specifies consideration of the public concern generated by an offense. These suggestions are not intended to mean that a sentence might be enhanced because of public outcry about a single offense. It is intended, instead, to suggest that changed community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense. Two recent examples of action by the Parole Commission with regard to its guidelines suggest the kinds of situations in which the Commission might wish to reflect the community view of an offense in its guidelines: the Parole Commission has in recent years lowered the guidelines parole dates applicable to simple possession of marihuana, and, following the Vietnam War, lowered the guidelines parole dates for draft violations. Similarly, if there were a substantial increase in the rate of commission of a very serious crime, the public concern generated by that increase might cause the Commission to conclude that the guidelines sentences for the offense should be increased.

Subsection (c)(6) specifies that the Commission consider the relevance to the sentencing decision of the deterrent effect a particular sentence may have on the commission of the offense by others. Thus, the Commission might conclude, for example, that there was an increase in the incidence of a particular offense that justified an increase in the guidelines sentences for the offense in order to deter others from committing the offense. The Commission might also conclude, on the basis of further research, that some kinds of offenses may be more easily deterred than others, and that this might appropriately be reflected in the guidelines.

Subsection (c)(7) specifies that the Commission consider the relevance to the sentencing decision of the current incidence of the offense in the community and in the nation as a whole.

Subsection (d) lists a number of offender characteristics that the Sentencing Commission is required to examine in order to determine whether and to what extent they are pertinent to the establishment of categories of offenders for use in the sentencing guidelines and policy statements concerning the nature, extent, location, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose, or that, for example, it is relevant to the type of prison facility to which a defendant is sent if he is sentenced to a term of imprisonment, but is not relevant to the question whether he should be sentenced to a term of imprisonment, probation, or a fine. The Sentencing Commission is also required under subsection (d) to determine whether other factors not specifically listed are relevant to the sentencing decision.

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[26] The community might be national or it might be regional. It is expected that in certain situations the Commission may find it appropriate to draft the guidelines to take account of considerations based on pertinent regional differences.

Subsection (d) contains a specific provision that "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders."[27] The Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.[28]

Subsection (d)(1) specifies that the Commission consider what effect the age of the defendant should have on the sentencing decision. The factor derives in part from the fact that, under the Youth Corrections Act and the young adult offender provisions in current law, the youth of an offender frequently plays a role in the sentencing decision. This role may, depending upon the way in which the current law provisions are applied, result in a more harsh or less harsh sentence than a regular adult offender would receive for the same offense committed under similar circumstances. The sentence might be more harsh today if the defendant is sentenced to an indeterminate sentence under 18 U.S.C. 5010(b) for a relatively minor offense. Under 18 U.S.C. 5017(c), such a defendant is required to be released upon parole in no more than four years, and to be unconditionally released in six years, yet this sentence could apply to an offense for which an adult might be sentenced, for example, to only one or two years in prison. Conversely, if the young offender is sentenced for a more serious offense under the Youth Corrections Act provisions that permit the imposition of a sentence up to that applicable for the same offense if committed by an adult, he may actually serve less time in prison than his adult counterpart—the parole guidelines that apply to persons sentenced under the Youth Corrections Act for all but the least serious offenses provide earlier parole release dates than for an adult convicted of an offense with the same severity rating who has the same "parole prognosis" or "salient factor" score. An additional problem with the Youth Corrections Act is that judges are inconsistent in their use of the sentencing provisions of the Act. For example, some judges use the Act's sentencing provisions for most youthful offenders, while others will not use it for those involved in serious felonies. The Committee believes that, while consideration of youth in determining the appropriate sentence may be justified, the consideration should be employed in a much more rational and consistent way than it is today. Accordingly, the bill repeals the Youth Corrections Act and the young adult offender sentencing provisions and requires the Sentencing Commission in subsection (d)(1) to consider, in promulgating the sentencing guidelines and policy statements, what effect age—including youth, adulthood, and old age—should have on the "nature, extent, location, or other incidents of an appropriate sentence."

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[27] The requirement of neutrality with regard to such factors is not a requirement of blindness. In sentencing a person to imprisonment it would be appropriate to have a judge consider, for example, recommending placement in an institution equipped to accommodate the religious dietary laws followed by the defendant, or an institution housing prisioners of the defendant's sex.

[28] Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training. This qualifying language in subsection (d), when read with the provisions in proposed section 2302(a) of title 18 and 28 U.S.C. 994(j), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison *only* because the prison has a program that "might be good for him."

Subsection (d)(2) specifies that the Commission determine what effect, if any, the education of the offender should have on the nature, extent, location, or other incidents of an appropriate sentence. Subsection (e) specifies that education should be an inappropriate consideration in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of such a term. The Commission might conclude, however, that the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment. Clearly, education considerations will play an important role in such determinations as the conditions of probation or supervised release, the nature of the prison facility to which an offender is sent, and the type of programs that should be made available to an offender in prison.[29]

Subsection (d)(3) specifies that the Commission determine the effect, if any, that the vocational skills of the offender should have on the incidents of the sentence. The considerations for the Commission, including the restrictions of subsection (e), are similar to those for the education factor.

Subsection (d)(4) specifies that the Commission shall determine what effect, if any, the defendant's "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant" should have on the attributes of the sentence. The Commission might conclude that a particular set of offense and offender circumstances called for probation with a condition of psychiatric treatment rather than imprisonment. It might also lead the Commission to conclude, in a particularly serious type of case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting.

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[29] A defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release.

Subsection (d)(5) specifies the consideration of the defendant's physical condition, including drug dependence. Drug dependency, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. It might, in an unusual case, cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for "drying out," as a condition of probation. Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. This is consistent with the provision of section 2302(c) permitting the Director of the Bureau of Prisons to petition the court for reduction of a term of imprisonment in a compelling case, such as terminal cancer. Of course, the physical condition of the defendant would play an appropriate role in the determination of the conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs. It should be noted that drug treatment programs at the present time are made available to prisoners on a voluntary basis, but are not required since prison officials have yet found no way to make compelled programs effective.

Subsection (d)(6) specifies that the Commission consider the relevance of the defendant's employment record to the attributes of sentence. The considerations here, including the provisions of subsection (e), are similar to those for the education and vocational skills of the defendant.

Subsection (d)(7) specifies that the Commission consider the extent to which family ties and responsibilities are pertinent to the sentencing decision. As stated in subsection (e), the Committee believes that the factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment. The Commission certainly could conclude, however, that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family. Even more frequently, perhaps, family ties might play a role in such matters as the location of the prison facility in which a prisoner is to be housed, the use of furlough, and the location of pre-release custody.

Subsection (d)(8) specifies that the Commission consider the extent to which community ties are pertinent to the sentencing decision. Under subsection (e), the Committee again has found that this factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of a term of imprisonment. Like family ties and responsibilities, this factor could play a role in determining in which prison facility a defendant might be incarcerated.

Subsection (d)(9) specifies that the Commission is to consider the extent to which the defendant's role in the offense should affect the sentencing decision. This factor includes such matters as whether the defendant initiated the offense or followed someone else's lead, or whether the defendant was a major participant or acted only in a minor capacity. The Commission might reasonably conclude that the answers are important in determining both the nature of the sentence and its length and conditions.

Subsection (d)(10) specifies that the Commission consider the extent to which the defendant's criminal history should affect his sentence. This factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a "career criminal" or a manager of a criminal enterprise.

Subsection (d)(11) specifies that the Commission consider the relevance to the sentencing decision of the degree of the defendant's dependence on criminal activity for a livelihood.

Subsections (e) through (l) of section 994 contain general statements of legislative direction for the Commission to follow in promulgating guidelines.

Subsection (e) specifically requires that the Sentencing Commission insure that the sentencing guidelines and policy statements reflect the "general inappropriateness" of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of imprisonment. As discussed in connection with subsection (d), each of these factors may play other roles in the sentencing decision—they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.

The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties. It should be emphasized, however, that the Committee decided to describe these factors as "generally inappropriate", rather than always inappropriate, to the decision to impose a term of imprisonment or determine its length, in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration. The Committee believes that it is important to encourage the new Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, obviously pertinent or not; to subject them to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise. There are sufficient checks built into the system to avoid aberrations, and thus the guidance in this subsection is cautionary rather than proscriptive.

Subsection (f) directs that the Commission, in promulgating sentencing guidelines, promote the purposes of the guidelines, particularly the avoidance of unwarranted sentencing disparity.[30]

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[30] The parole guidelines were a pioneering effort to bring uniformity to parole decisions which they have done. They were developed, however, from past decisions. The sentencing guidelines will differ significantly in their substance and in their theoretical base. They will require reevaluation of all underlying policies, even though section 994(l) requires the Sentencing Commission to take into consideration the average sentence imposed and, in the case of imprisonment, the average time served for particular categories of cases.

Subsection (g) directs the Commission, in promulgating sentencing guidelines pursuant to subsection (a)(1), to seek to satisfy the purposes of sentencing, taking into account the nature and capacity of the penal, correctional, and other facilities and services available. The purpose of the requirement is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing and to assure that the available capacity of the facilities and services is not exceeded. Federal prisons are, for the most part, already at capacity, and the probation service resources are strained.

Subsection (h) requires that the sentencing guidelines provide a substantial term of imprisonment for a convicted defendant who fits into one of five categories: a defendant who has a history of prior Federal, State, or local felony convictions for offenses committed on different occasions; a defendant who has committed the offense as part of a pattern of criminal activity from which he derived a substantial portion of his income; a defendant who committed the offense in furtherance of a conspiracy with three or more persons engaging in racketeering activity in which the defendant played a managerial role; a defendant who committed a violent felony while on pretrial release or release while awaiting sentence or appeal for another felony; or a defendant who committed an offense described in section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs) if the offense involved a substantial quantity of controlled substances. The first three categories are derived from the dangerous special offender sentencing provisions now contained in 18 U.S.C. 3575(e) and the dangerous special drug offender provisions of 21 U.S.C. 849(e). However, rather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is provided in 18 U.S.C. 3575(b), section 994(h) requires a substantial sentence to imprisonment that is nevertheless within the range generally available for the offense. The fourth category was added on the Senate Floor as an amendment to S. 1437 of the Ninety-Fifth Congress. The fifth category was added to S. 1630, as introduced, in order to assure a substantial term of imprisonment for major drug traffickers. Subsection (h) is not intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified.

Subsection (i) requires the Sentencing Commission to insure that the guidelines reflect the general appropriateness of a sentence other than imprisonment for a first offender whose offense is not a crime of violence or an otherwise serious offense.[31]

Subsection (j) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentencing.

Subsection (k) directs the Commission to promulgate guidelines that reflect the appropriateness of imposing an incremental penalty for each offense if a defendant is convicted of a number of offenses that are part of the same course of conduct and that result in the exercise of ancillary jurisdiction over one or more of the offenses and if a defendant is convicted of multiple offenses committed at different times, including cases in which the subsequent offense is a violation of section 1313 (Bail Jumping) of title 18 or is committed while the person is on pretrial release pursuant to section 3502 of title 18. If no such incremental penalty were provided (e.g., were all sentences to be imposed without regard to the commission of other offenses and made to run concurrently), an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first.[32] It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified. If this approach is taken, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence.

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[31] The similar provisions of S. 1437, as introduced in the 95th Congress, applied only to defendants under the age of twenty-six at the time of sentencing.

Subsection (k) also provides that the guidelines reflect the general inappropriateness of imposing consecutive terms of imprisonment for an offense described in section 1002 (Criminal Conspiracy) or 1003 (Criminal Solicitation) and for an offense that was the sole object of the solicitation or conspiracy.

Subsection (l) requires that the Commission be guided in promulgating the initial guidelines by the average sentence imposed for different categories of cases and the average length of time served in prison when such terms were imposed,[33] but makes clear that the Commission need not follow the current prison terms if it finds that they do not adequately reflect the purposes of sentencing set forth in section 101(b) of title 18. It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices of the past. It is intended that the Commission learn what those practices were in order more effectively to evaluate the appropriateness of continuing or changing past practices.[34] The Commission might conclude that a category of offenders, for example, first offenders convicted of a particular nonviolent offense that did not involve substantial harm to the victim, were too frequently sentenced to terms of imprisonment, and that for many of them a term of probation might sufficiently carry out the punishment, deterrence, incapacitation, and rehabilitation purposes necessary. On the other hand, the Commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or to too short a term of imprisonment because judges using the old rehabilitation theory of sentencing did not see a need for incarceration because the offenders did not need to be rehabilitated. The Commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment and deterrence. The Commission might also conclude that there was insufficient data for a particular combination of offense and offender characteristics on which to base a policy decision on the appropriateness of the sentencing pattern. For example, there might not be enough persons convicted of a particularly serious violent offense in the Federal system for the data on that category of offense to give an accurate picture of the sentencing practices for that offense.

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[32] See the discussion of section 2304 of the Code, *supra*.

[33] With the elimination of early parole release it is absolutely essential that the Commission not be unduly influenced by the lengths of sentences of imprisonment imposed today. A Federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one-third of the sentence. The Commission should concern itself, instead, with the length of time convicted defendants actually spend in prison today—this length of time provides a considerably more accurate picture of actual sentencing practices than does the sentence imposed.

[34] See B. Forst, W. Rhodes, and C. Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 Hofstra L. Rev. 355 (1979).

Subsection (m) requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. This revision and refinement of the guidelines will represent the bulk of the Commission's work once the intitial guidelines and policy statements are promulgated. This task will be a formidable one because it includes a continuing effort to refine the guidelines to best achieve the purposes of sentencing. It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation. Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very real way, this subsection complements the appellate review sections by providing effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

Even without advancements in our ability to increase the effectiveness of various corrections programs for criminal offenders, much can be done to have ongoing guidelines take fullest advantage of the capability we do have. For example, sound statistical studies on the effectiveness of certain sanctions of treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the Commission under section 995, particularly as they relate to research.[35]

Subsection (n) requires that proposed amendments to the guidelines be reported, along with a report of the reasons for the recommended amendments, to the Congress at or after the beginning of a session of Congress but no later than the first of May, and provides that the amendments are to take effect 180 days after they have been reported to Congress unless either House of Congress votes to disapprove a guideline. The subsection also specifies that the effective date of any guideline may be delayed by either House. The Congressional Reference Service of the Library of Congress has identified 159 separate statutes enacted since 1932 that contain legislative veto provisions. At least 50 of these are of the sort contained in this subsection—resolutions of disapproval by either House of Congress. The Committee feels that such a provision, allowing for effective Congressional oversight of the actions of an executive agency, is particularly appropriate here in view of (1) the importance of the role given the Sentencing Commission in the criminal justice process; and (2) the need to ensure that the process reflect, to some significant extent, the influence of public sentiment and opinion.

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[35] Id.

Subsection (o), one of the provisions inserted by the Committee at the suggestion of Senator Biden in the 96th Congress, requires the Sentencing Commission and the Bureau of Prisons to conduct a thorough analysis of the optimum utilization of resources to deal with the Federal prison population, and to report to the Congress on the results of that study. In conducting the study, the Commission and the Bureau are required to examine a variety of alternatives, including modernization of existing facilities; inmate classification, and periodic review of the classification, to place inmates in the least restrictive facility necessary to insure adequate security: and use of existing Federal facilities, such as those within military jurisdiction.

Subsection (p) requires the Sentencing Commission to evaluate the impact of the sentencing guidelines on prosecutorial descretion, plea bargaining, sentencing disparity, and the use of incarceration. The Commission is required to submit a report of its findings, adopted by a majority of the voting members, to the courts, the Department of Justice, and the Congress.

Subsection (q) requires the Commission to make recommendations to the Congress concerning raising or lowering grades for offenses, or otherwise modifying the maximum penalties for offenses. The first set of recommendations is to be made within three years of the date of enactment of the Criminal Code Reform Act of 1981, with later recommendations to be made as advisable. The Committee believes that the Commission will be in a particularly good position to make such recommendations to the Congress. It will be able to make recommendations based on such considerations as, for example, the fact that, for a particular category of offenses, the Commission never found it advisable to recommend a term of imprisonment even close to the maximum for the grade of offense, suggesting that the offense was overgrade. It might also find for a particular offense that the guidelines could not recommend what the Commission felt was an appropriately high sentence because the offense was graded too low. It might also find at a later date a need for recommending increased fine levels because the fine levels set forth in section 2201 of title 18 had become too low because of inflation, or were too high or too low for particular categories of offenses.

Subsection (r) requires the Sentencing Commission to give "due consideration" to a request by a defendant for modification of the sentencing guidelines applied to his case. The defendant could request such modification only on the basis of changed circumstances that were unrelated to his individual case, such as changes in the community view of the gravity of the offense, or the deterrent effect the sentences for the offense might have on the commission of the offense by others. The Commission is required to respond, to state reasons for any declination to make modifications and to keep the Congress informed of such actions on an annual basis. The

Committee included this provision in the Ninety-Sixth Congress in order to assure that the Commission is constantly alerted to the possible need for amendments to the guidelines. Of course, if the Commission accepts a defendant's recommendations for amendment, it would submit the proposed amendment, and a report of the reasons for it, do the Congress pursuant to subsection (n), and would be expected to make a copy of these materials available to the defendant.

Subsection (s) requires the Commission to describe the "extraordinary and compelling reasons" that would justify a reduction of a particularly long sentence pursuant to section 2302(c)(2) of title 18. The subsection specifically states, consistent with the rejection by the Committee of the rehabilitation theory as the basis for determining the length of a term of imprisonment, that "rehabilitation of the defendant along shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Subsection (t) requires the Sentencing Commission, in reducing sentence for a particular category of offense, to specify by what amount the sentence of a prisoner sentenced outside the guidelines might be reduced if the person was sentenced before the reduction. This specification would then be used by the court in assessing a prisoner's petition pursuant to section 2302(c)(3).

Subsection (u) provides that the policy statements issued by the Sentencing Commission shall include a policy limiting consecutive terms for an offense involving violation of a general prohibition and an offense involving a specific probibition contained within the general prohibition. The policy is intended to apply to those offenses which in effect are "lesser included offenses" in relation to other, more serious ones, but which for merely technical reasons do not quite come within the definition of a lesser included offense. The limitation need not be a complete prohibition (except when sentencing for both offenses would be barred by law); its extent is to be determined by the Commission.

Subsection (v) provides that the appropriate judge or officer[36] will supply the Sentencing Commission in each case with a written report of the sentence containing detailed information as to the various factors relevant to the sentence and other information found appropriate by the Commission.[37] This provision is necessary for the Sentencing Commission to be able to monitor the effectiveness of various sentencing policies and practices. The Commission is required to submit at least annually to the Congress an analysis of the reports submitted to it under these provisions and any recommendations for legislation that the analysis indicates is warranted.

Subsection (w) makes the provisions of 5 U.S.C. 553, the provisions of the Administrative Procedure Act that relate to rulemaking applicable to the promulgation of guidelines pursuant to section 994. This is an exception to the fact that the Administrative Procedure Act is not generally applicable to the judicial branch[38] and also to the fact that the Federal Register is not generally used by that branch for publication required under the Act.

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[36] E.g., magistrate, probation officer, or prison officials.

[37] See also 28 U.S.C. 995(a)(8).

[38] See 5 U.S.C. 551.

This provision establishes minimum procedural requirements for outside consultation by the Commission. The Committee recognizes that ordinarily the Commission will observe more extensive procedures than those required by section 553, at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines. Section 995(a)(21) empowers the Commission to hold hearings and call witnesses in the fulfillment of its duties. Such procedures are particularly appropriate for use by the Commission in developing guidelines. The Commission should consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all stages of guideline development. In this context the notice-and-comment procedures of section 553 will serve as a checking mechanism to insure that all relevant views are evaluated by the Commission. As a result, the Committee does not intend that the informal rule-making procedures of section 553 constitute the first and only means by which the Commission consults interested parties outside the Commission; rather, these procedures represent the final steps in the process.

SECTION 995. POWERS OF THE COMMISSION

Subsection (a) enumerates twenty-one specific powers of the Commission that may be exercised by majority vote of the members present and voting,[39] and provides, in paragraph (22), that the Commission may perform such other functions as are required to permit Federal courts to meet their sentencing responsibilities, as provided in section 2003(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities. The section reflects the broad responsibility imposed upon the Commission to assure that sentencing and the administration of sentences fulfill the purposes of sentencing enumerated in section 101(b) of title 18.

The first eight paragraphs of subsection (a) contain general administrative powers necessary to carry out the functions of the Commission. Paragraph (1) provides that the Commission may establish general policies and promulgate necessary rules and regulations. The policies, rules, and regulations covered by this paragraph differ from the sentencing guidelines and policy statements required to be promulgated pursuant to section 994(a)—paragraph (1) relates to those provisions necessary for the internal administration of the Commission and such matters as establishing the procedures for the conduct of hearings and receipt of views on the guidelines and policy statements. Paragraph (2) provides that the Commission may appoint and fix the salary and duties of the Staff Director of the Commission, who will be paid at a rate not to exceed the highest rate applicable for grade 18 of the General Schedule. It is the intent of the Committee that the Staff Director be a highly qualified individual who is able to efficiently administer the staff of the Commission, including administration of its very important research functions. Paragraph (3) gives the full Commission the authority to deny, revise, or ratify budget requests of the Commission prepared under the direction of the Chairman of the Commission pursuant to section 993(b)(1). Paragraphs (4), (5), (6), and (7) contain provisions common to Commissions relating to procurement power, acquisition of property and services, and contract authority. Paragraph (8) permits the Commission to request information from Federal agencies and judicial officers required in the performance of its duties, and permits those agencies and officers to provide the requested information consistent with other provisions of law. This provision is designed to permit the Commission to obtain information necessary to its research concerning efficacy of sentencing practices and to the preparation of guidelines and policy statements relating to sentencing matters.

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[39] It is intended that the members of the Commission approve the broad outlines of various research-related projects and provide policy guidance to their conduct. The functions of the Commission set forth here could, of course, be delegated to a committee or staff personnel by vote of the Commission in those instances where the day-to-day details would be too cumbersome to manage by full Commission action. See subsection (b). This is in contrast to the promulgation of guidelines and policy statements pursuant to section 994, matters which cannot be delegated.

In addition to these general administrative provisions, section 995 gives the Commission a number of powers relating specifically to its role in monitoring the effectiveness of the sentencing practices and policies in the Federal criminal justice system.

Under subsection (a)(9), the Sentencing Commission has authority to monitor the performance of probation officers with respect to sentencing recommendations, including those relating to application of guidelines and policy statements. Under subsection (a)(10), the Commission is authorized to issue instructions to probation officers concerning the application of guidelines and policy statements of the Commission. The probation officers will be a crucial link in the effectiveness of both sentencing guidelines and policy statements. It is essential that their preparation of presentence reports, along with recommendations as to applicable guidelines and notice to the sentencing judge of pertinent policy statements of the Sentencing Commission, be done with sufficient information from the Commission to result in reasonable consistency in their recommendations. In addition, the probation officers as supervisors of probationers and persons on supervised release will need an understanding of the guidelines and policy statements in order to assist them in carrying out those supervisory functions.

A number of additional provisions provide for extensive research and data collection and dissemination authority in the sentencing area.[40] These functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in section 101(b) of title 18, United States Code,[41] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[42]

Under subsection (a)(17), the Sentencing Commission is authorized to conduct programs of instruction in sentencing techniques for persons connected with the sentencing process.[43] While the instructional effort would probably be most extensive during the early period of implementing the initial guidelines and policy statements, it is expected that periodic instruction will continue to be necessary, partly to bring personnel up to date on changes in the guidelines and policy statements and on developments in the case law, and partly to instruct new personnel in the Federal criminal justice system. The programs could be run in cooperation with the Department of Justice if both believed this approach would be helpful.[44]

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[40] Subsections (a)(12) through (a)(16).

[41] Section 991(b)(2).

[42] Section 991(b)(1)(C). See also section 994(m).

Under subsection (a)(19), the Commission is authorized to study the feasibility of developing guidelines for the disposition of juvenile delinquents.

Subsection (b) is a broad statement as to powers and duties similar to section 995(a)(22), and includes specific authority to delegate powers other than promulgation of general policy statements and guidelines for sentencing pursuant to section 994(a), the issuance of general policies and promulgation of rules and regulations pursuant to section 995(a)(1), and the decision as to the factors to be considered in establishment of categories of offenders and offenses pursuant to section 994(b). It also contains language added by the Committee in this Congress that requires the Commission to coordinate its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, with any related activities of the Administrative Office of the United States Courts and the Federal Judicial Center in order to avoid unnecessary duplication.[45]

Subsection (c) requires Federal agencies to make services, equipment, personnel, facilities, and information available to the greatest practicable extent upon request of the Commission in the execution of its functions.

Subsection (d) provides that a simple majority of the membership then serving shall constitute a quorum for the conduct of business. Except for the promulgation of sentencing guidelines or policy statements, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present. Section 994(a) requires that guidelines and policy statements be promulgated only by affirmative vote of at least four members of the Commission. The phrase "the membership then serving" means those members who have been designated by the President or appointed by the President and confirmed by the Senate. For example, if only five have been designated or appointed at a given time, then only three are needed for a quorum, and the Commission may conduct most routine business by the vote of two.

Subsection (e) requires the Commission, except where otherwise provided by law, to make available for public inspection a record of the final vote of each member on any actions taken.

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[43] The Sentencing Commission may wish to include in these programs such persons as prosecutors and defense counsel, sentencing and appellate judges, and probation officers who need to understand the Commission's guidelines and policy statements in order to assure their understanding of the new sentencing policies and procedures. In addition, prison officials would benefit from such instruction if they are involved in making sentencing recommendations and carrying out sentences pursuant to the guidelines and policy statements.

[44] See subsection (a)(11) and (b).

[45] Hearings, Part XVI, p. 11918 (testimony of Judge Harold Tjoflat).

SECTION 996. DIRECTOR AND STAFF

The Staff Director is given authority, under subsection (a), to supervise the activities of the Commission employees and perform other duties assigned by the Commission, and, under subsection (b), to appoint such officers or employees as are necessary in the execution of the functions of the Commission, subject to the approval of the Commission. The Committee intends that the Commission staff consist of persons with a wide variety of backgrounds pertinent to conducting criminal justice research and making recommendations as to sentencing policy.

The officers and employees of the Commission are, under subsection (b), exempted from most Civil Service provisions in title 5, United States Code, except for the benefits provided in chapters 81-89.

SECTION 997. ANNUAL REPORT

This section requires the Commission to report annually to the Judicial Conference, the Congress, and the President on the activities of the Commission.

SECTION 998. DEFINITIONS

This section defines the terms "Commission", "Commissioner", "guidelines", and "rules and regulations".

CHAPTER 83. COURTS OF APPEAL

SECTION 1291. FINAL DECISIONS OF DISTRICT COURTS

Section 1291, relating to jurisdiction of appeals from final decisions of the United States district courts, is amended to provide that a court of appeals may review a decision of the district court made pursuant to Rule 35(b)(2) of the Federal Rules of Criminal Procedure if the court of appeals has granted the petition for leave to appeal of the United States or the defendant. It is intended that the petition for leave to appeal to the court of appeals be similar to a petition to the United States Supreme Court for a writ of certiorari and the discretionary appeal provided in 28 U.S.C. 1292(b).

TITLE IV—GENERAL PROVISIONS

1. Introduction

Title IV of the bill contains the general provisions applicable to the legislation.

2. Section 131—Severability

Section 131 provides that an invalid provision of the bill is severable from the other provisions of the bill,[1] and that a finding that a particular application of a provision is invalid will not affect other applications of the provision, except that if a part of section 3725(b) of title 18, relating to government appeal of sentence, is held invalid, all of section 3725 becomes void. This section also provides that if an affirmative defense set forth in this Act is held invalid then the offense shall be read as if the affirmative defense had not been set forth. An affirmative defense is a defense specifically designated as "affirmative" and is characterized by the fact that the defendant has the burden of proving it by a preponderance of the evidence. This is to be distinguished from a "regular" defense as to which, once the issue is properly raised by the evidence, the government has the burden of disproving it beyond a reasonable doubt. The affirmative defenses in this Code have been carefully considered and are deemed appropriate only if the defendant has the burden of proof. Accordingly, this provision makes it clear that a judicial determination that an affirmative defense is invalid has the effect of repealing the affirmative defense.

3. Section 132—Transition

Section 132 contains provisions to continue the existence of the Bureau of Prisons and the Federal Prison Industries.

Section 132(a) continues the Bureau of Prisons created under existing chapter 303 of title 18, United States Code, as the Bureau of Prisons under new section 571 of title 28, United States Code, and provides that the person who is Director of the Bureau of Prisons on the effective date of the Act will remain in office under new section 571(b) of title 28. Under new section 571(a), the Director serves under the direction of the Attorney General and could be replaced by him, as is the case under existing law.[2]

Section 132(b) continues the present Federal Prison Industries created under existing section 4121 of title 18 as the Federal Prison Industries under new section 581 of title 28, and provides that members of the Board of Directors in office on the effective date will continue in office.

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[1] See *United States* v. *Jackson*, 390 U.S. 570, 585–591 (1968).

[2] 18 U.S.C. 4041.

4. Section 133—Authorization

Section 133 authorizes the appropriation of necessary sums to carry out the provisions and purposes of the Act.

5. Section 134—Effective Date

Subsection (a) of section 134 contains the effective date provision for the Act. It provides that, with two exceptions, the Act will take effect on the first day of the first calendar month beginning thirty months after the date of enactment.

The first exception, contained in subsection (a)(1)(A), is that the provision of chapter 58 of title 28, United States Code, relating to the creation and responsibilities of the United States Sentencing Commission, take effect on the date of enactment. Subparagraph (A) also specifies that the Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to 28 U.S.C. 994(a)(1) to the Congress within 18 months of the date of enactment. Under subsection (a)(2), the terms of the first members of the United States Sentencing Commission would not begin to run for purposes of 28 U.S.C. 992(a) until the sentencing guidelines were in effect pursuant to subsection (a)(1)(B), even though they would be designated or appointed well before that time. The work of the Sentencing Commission in promulgating sentencing guidelines and policy statements is crucial to the effectiveness of the revised sentencing system set forth in the Code. It is essential that the work of the Sentencing Commission begin as soon after the date of enactment of this Act as possible.

The second exception, contained in subsection (a)(1)(B), is that the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances, until three events occur: First, the Sentencing Commission must have submitted the initial set of sentencing guidelines to the Congress along with a report of the reasons for its recommendations. Under subsection (a) (1)(A), the Commission has 18 months from the date of enactment to make that submission. Second, the General Accounting Office must, within six months of the submission of the guidelines, conduct a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and report its findings to the Congress. Third, the Congress must have six months after the guidelines have been submittd to it, and after the General Accounting Office has made its report pursuant to subsection (a)(1)(B)(ii), in which to examine the guidelines and consider the reports. The Committee has added this provision to the bill to assure that there is ample opportunity for interested parties to examine the proposed initial guidelines before they are used to replace the existing sentencing system.

The Act will apply to any offense or other event occurring on or after the effective date. A sentence set before the effective date of the guidelines as to an individual imprisoned or on probation or parole on that date would not be affected by this Act. As to an offense committed prior to the effective date, the preexisting law will apply as to all substantive matters including the imposable sentence. If a trial occurs or a sentence is imposed on or after the effective date for an offense committed before the effective date, the procedural and administrative provisions of the Act will apply accept to the extent that such provisions are inconsistent with the preexisting law.

Subsection (b) keeps the Parole Commission and current law provisions related to parole in effect for the five year period after the effective date of this Act in order to deal with sentences imposed under current sentencing practices. It also keeps the provisions as to a term of imprisonment in current law in effect during the period described in subsection (a)(1)(B). This will assure that the length of a term of imprisonment, and the parole and good time statutes, will remain in effect as to any prisoner sentenced before the sentencing guidelines and the provisions of proposed 18 U.S.C. 2303 and 3824 go into effect pursuant to subsection (a)(1)(B). All other aspects of the sentencing provisions will go into effect on the effective date of the Act as to any person sentenced after the effective date.

Most of those individual incarcerated under the old system will be released during the five year period. As to those individual who have not been released at that time, the Parole Commission must set a release date for them prior to the expiration of the five years that is the earliest date that applies to the prisoner under the applicable parole guidelines.[3]

Subsection (b) also assures that, while the Parole Commission remains in existence, the Chairman of the Parole Commission or his designee will remain a member of the National Institute of Corrections. and the Chairman will remain a member of the Advisory Corrections Council ex officio and be an ex officio member of the United States Sentencing Commission.

6. *Section 135—Reservation of Jurisdiction*

Section 135 carries forward an amendment proposed by Senator Long on the Senate Floor to S. 1437 in the Ninety-Fifth Congress and adopted by the Senate by voice vote to the effect that enactment of this Act does not modify or impair the jurisdiction of any Committee of the Senate to consider and report measures establishing criminal offenses in connection with legislation within its jurisdiction under the Standing Rules of the United States Senate or prescribing or altering penalties for committing such offenses.

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[3] The Committee intends that, in the final setting of release dates under this provision, the Parole Commission give the prisoner the benefit of the applicable new sentencing guideline if it is lower than the minimum parole guideline.

TITLE V—TECHNICAL AND CONFORMING AMENDMENTS CROSS REFERENCED IN TITLE 18

Title V of the bill as reported, contains amendments that transfer some current title 18 provisions to non-title 18 titles. Only those provisions that are moved out of title 18 but cross-referenced in the new code are included in title V. The provisions are also amended where appropriate to conform them to the new Criminal Code. Other technical and conforming amendments necessary to transfer a number of essentially regulatory offenses now in title 18 into title 18 Appendix pending further study for finding a place for them in other appropriate titles or possible repeal and to conform the non-title 18 titles of the United States Code are included in the bill as titles VI and VII respectively.

Part A of title V carries forward the provisions of 18 U.S.C. 841 through 848, relating to explosives (title XI of the Organized Crime Control Act of 1970), amended to conform to the new Criminal Code and to be codified to title 15, United States Code. Part B carries forward without amendment 18 U.S.C. 1116(b)(4) as section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons and carries forward current 18 U.S.C. 951. Part C carries forward an amended version of the provisions of 18 U.S.C. 1151, 1152, 1153, 1162, and 3243 and 25 U.S.C. 232, relating to jurisdiction over offenses in Indian country, in a provision to be codified to title 25, United States Code. The provisions are amended to conform to the proposed Criminal Code. Part D carries forward without amendment 18 U.S.C. 793, 794, and 798 as sections of Acts codified to title 50, United States Code.

The material following these introductory comments briefly describes the changes made by each section of title V. Preceding the section-by-section description is an outline of the types of changes made.

1. Sections Moved From Title 18

As noted above, title V contains the limited number of sections that have been moved from existing title 18 to other titles of the United States Code and are cross-referenced in the new Code. Most of the former title 18 provisions are reenacted and redesignated as sections of an Act that is codified to a title that is not positive law, while other former provisions of title 18 are set out in full as sections to be codified to another title. Where the Committee concluded that a section of existing title 18 should be moved to a title of the United States Code which has not been codified into positive law and there was no particularly appropriate Act, to which to move it, the provision being transferred has been placed after a caption indicating the title believed to be most appropriate, and is given a section number of this bill in proper sequence. See, e.g., section 161 of the bill under the caption of title 25 enacting provisions dealing with jurisdiction over offenses committed in Indian country currently in title 18. Where material to be included in a title which has not been enacted into positive law has been made an amendment to an existing Act on the subject covered by the amendment, it follows a caption in the bill for the appropriate title. See e.g., section 141 of the bill transferring a number of existing title 18 provisions relating to explosives to the Organized Crime Control Act of 1970 to be codified to title 15 of the United States Code. The sections moved from existing title 18 to other titles have also been conformed to the revised version of title 18 as discussed below.

2. Culpability

Culpability standards have been conformed to those used in the new Criminal Code, except for the offenses transferred to title 50, for which current law terminology is retained. As a general rule, when a particular mental state is desired as to an element of an offense, this is accomplished by explicitly setting forth the mental state required. Unlike the new title 18, which in the absence of an express culpability standard has special rules of construction for determining the mental state required with respect to the various elements of the offense, the applicable mental state required is to be determined by looking to the provisions of each offense or regulatory scheme as under current law.[1]

In these title V conforming amendments, the culpability standard in existing law is changed to "knowing" unless the text indicates otherwise.[2]

3. Sentencing

Of the offenses transferred out of title 18 by provisions of title V of this Act, many continue to be punishable under provisions of title 18 that cross-reference the transferred provisions.[3] Other offenses are deleted from the transferred provisions and covered in the new Criminal Code.[4] The provisions transferred to Acts codified to title 50, however, are transferred verbatim, leaving current law sentence levels, consistent with the decision of the Committee to leave revision of the espionage laws for later consideration. The new Criminal Code refers in chapter 11 to the espionage offenses by cross-reference for both the descriptions of the elements of the offenses and the maximum sentence.[5]

4. Terminology

In those instances in which the section-by-section analysis notes a change in terminology, the section has been amended to conform terminology in the section to the terminology of the Criminal Code with no intent to change the substance of the provision.

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[1] Section 303(a)(2) provides, among other things, that the state of mind, if any to be proved with respect to any element of an offense described in a statute outside title 18 shall be determined by the provisions of that statute. Without the rules of construction applicable, the courts will look to the type of statute, the regulatory scheme, as well as the terminology used for the required mental states.

[2] Where culpability standards have been amended under this general rule, the section-by-section analysis indicates this either by the word "culpability" or by a statement that culpability has been conformed to proposed title 18, without further elaboration.

[3] See proposed section 1821(a)(2).

[4] See, *e.g.*, proposed section 1821(a)(1) of title 18.

[5] Proposed sections 1121 through 1124 of title 18.

5. Cross-references

In those instances in which the section-by-section analysis indicates a change in a cross-reference, the cross-reference has been amended to preserve the effect of existing references. If the analysis indicates instead that a provision has been amended to refer to a particular section, this is generally a new cross-reference made to a provision of the new title 18 describing the offense for which punishment was previously provided in the section now containing the cross-reference.

6. Section-by-Section Analysis

PART A—AMENDMENTS RELATING TO COMMERCE AND TRADE, TITLE 15, UNITED STATES CODE

Section 141:

(15 U.S.C. ——)......Amends title XI of the Organized Crime Control Act of 1970, relating to explosives, by reenacting and redesignating sections 841 through 848 of title 18 as sections 1102 through 1109 of the Organized Crime Control Act, and renumbering existing sections 1103 through 1107 as sections 1110 through 1114. The provisions are amended as follows:

Section 1102 (formerly 18 U.S.C. 841) is amended to delete material covered by the definition of "explosives" in proposed sections 111 and 1821 of title 18. Section 1103 (formerly 18 U.S.C. 842) is amended by deleting language relating to causing an offense in subsection (a)(3)(A) as covered in proposed chapter 4 (complicity) of title 18, by updating the reference to the drug laws in subsections (d)(5) and (i)(3), to conform the culpability standard in subsection (f) to proposed title 18, and by conforming a cross-reference in subsection (g). Section 1104 (formerly 18 U.S.C. 843) is amended by conforming cross-references in subsections (b)(1) and (d), and by conforming the culpability standard in subsection (b)(2) to proposed title 18. Section 1105 (formerly 18 U.S.C. 844) refers to the offense under proposed section 1821 (explosives offenses) of title 18, which covers former subsections (a) and (b) of 18 U.S.C. 844 through its grading provisions. Existing subsection (c) of 18 U.S.C. 844 has been omitted as covered in proposed section 4001(a)(20) of title 18 (civil forfeiture). Existing subsection (d) of

18 U.S.C. 844 has been omitted as covered in proposed section 1821(a)(1) of title 18. Existing subsection (e) has been omitted as covered in proposed sections 1615 (terrorizing) and 1616 (communicating a threat) of title 18. Subsections (f) and (i) have been omitted as covered in proposed sections 1701 (arson), 1702 (aggravated property destruction), 1601 (murder), 1602 (manslaughter), 1611 (maiming), 1612 (aggravated battery), 1613 (battery), and 1001 (criminal attempt) of title 18. Subsection (g) has been omitted as covered in proposed section 1821(a)(4) of title 18. Subsection (h) has been omitted as covered in proposed section 1823 (using or possessing a weapon in the course of a crime) of title 18. Subsection (j) has been omitted as covered in proposed section 1821(b) of title 18. Section 1106 (formerly 18 U.S.C. 845) has been amended to delete the reference in subsection (a) to provisions which have been omitted, and to conform the cross-references in subsection (a)(5). Sections 1107 (formerly 18 U.S.C. 846), 1108 (formerly 18 U.S.C. 847), and 1109 (formerly 18 U.S.C. 848) have been amended as to cross-references. Section 1107 is also amended to delete material covered in proposed section 3001 (investigative authority over offenses within this title) of title 18. Section 1108 is also amended to provide that the Secretary may not prescribe regulations that require purchasers of black powder under the exemption for black powder (new section 1106 (a)(5)) to complete affidavits or forms attesting to the exemption. Section 1111, as redesignated, is amended as to cross-references.

PART B—AMENDMENT RELATING TO FOREIGN RELATIONS AND INTERCOURSE, TITLE 22, UNITED STATES CODE

Section 151:
(22 U.S.C. ——)......18 U.S.C. 1116(b)(4) is reenacted and redesignated as section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons.

Section 152:
(22 U.S.C. ——)......Carries forward 18 U.S.C. 951, amended to require the foreign agent notification be to the "Attorney General" rather than the "Secretary of State".

PART C—AMENDMENT RELATING TO INDIANS, TITLE 25, UNITED STATES CODE

Section 161:
(25 U.S.C. ——)......Subsection (a) carries forward 18 U.S.C. 1151. Subsection (b) is new and provides that the bill is not intended to alter in any manner, other than as expressly provided, present State or tribal jurisdiction. Subsection (c) carries forward the first paragraph of 18 U.S.C. 1152, amended to conform the jurisdiction language to the terminology of proposed title 18. Subsection (d)(1) is derived from the second paragraph of 18 U.S.C. 1152, as amended to make clear the relationship between different provisions of law relating to applicability and nonapplicability of the federal criminal laws to Indians. Subsection (d)(2) is derived from but somewhat expands 18 U.S.C. 1153 in order to encompass the major crimes against person and property defined in the Criminal Code. Subsection (e), (f), (g), and (h) restate in a more accurate and contemporary form the statutes (e.g., 18 U.S.C. 1162, 3243; 25 U.S.C. 232) exempting from "Indian country" those areas subject to State jurisdiction pursuant to Federal statutes such as Public Law 280 (67 Stat. 588) authorizing or conferring such an assumption of jurisdiction. Subsection (i) is a new provision to authorize the Attorney General, with respect to juvenile delinquency cases over which an Indian tribe has concurrent jurisdiction, to forego Federal prosecution and surrender the person to the Indian tribe for disposition rather than to State jurisdiction as provided in section 3601 (a) and (b) of title 18.

PART D—AMENDMENTS RELATING TO WAR AND NATIONAL DEFENSE, TITLE 50, UNITED STATES CODE

Section 181:
(50 U.S.C. ——)...... 18 U.S.C. 793 is reenacted and redesignated as section 18 of the Subversive Activities Control Act in lieu of the existing text of that section.

Section 182:
(50 U.S.C. ——)......18 U.S.C. 794(a), 794(b), and 794(c) are reenacted and redesignated as sections 201 (a), 201(b), and 201(c), respectively, of the Espionage and Sabotage Act of 1954; 18 U.S.C. 798, as enacted by section 4 of the

Act of June 30, 1953 (67 Stat. 133), is reenacted and redesignated as section 201(d) of the Espionage and Sabotage Act of 1954. Language is added at the end of section 201 to make clear that for purposes of section 511 (Time Limitations) and section 3502 (Release or Detention of a Defendant Pending Trial), an offense under the section is a Class A felony (see section 2301).

Section 183:
(50 U.S.C. ——)......18 U.S.C. 798, as enacted by section 24(a) of the Act of October 31, 1951 (65 Stat. 719), is reenacted as section 24 of the Act of October 31, 1951, in lieu of the present text of that section.

TITLE VI—CODIFICATION AND REVISION OF TITLE 18 APPENDIX

Title VI of S. 1630, as reported, reenacts, transfers, and codifies approximately 200 sections of existing title 18 of the United States Code to a new title 18 Appendix of the United States Code. (In addition, the introductory language to section 101 of the bill so redesignates existing chapter 44 of title 18 Appendix, without further amendment. See the discussion of section 1822 (Firearms Offenses) of title 18.)

The new title 18 Appendix is intended to be temporary. It contains only those minor provisions of current title 18 that are not covered in the revised title 18 that the Committee believes should be preserved for later reexamination. While title VI amends the sections it moves to title 18 Appendix to conform to the sentencing and culpability terminology contained in revised title 18, it makes few substantive changes in the provisions.

The Committee believes that while a thorough reexamination of the regulatory offenses in title 18 Appendix and in other titles of the United States Code is desirable, such an effort is outside the scope of the codification and revision of the basic Federal criminal law represented by the bill, as reported. The Committee intends that the provisions mf title 18 Appendix and of the numerous other minor offenses that remain outside title 18 be reexamined at a later date to determine whether they should be modified, repealed, made subject to different criminal penalties, or made subject to civil rather than criminal penalties.

Following is a brief description of the format of, and amendments made by, title VI. It should be noted that, because of the format of these amendments, a given section of title 18 Appendix may be amended in several sections of title VI. Amendments relating to culpability appear in section 202; amendments relating to sentencing appear in sections 203 and 204; repealers appear in section 205; and amendments to other provisions of title 18 Appendix appear in sections 206 through the end of title VI. For example, 18 U.S.C. 41 of current law is reenacted and recodified by section 201(a) as 18 U.S.C. App. 41, with its culpability standard amended by section 202(a), its sentencing provisions amended by section 203(s), and its general provisions amended by section 206(a).

1. Reenactment of Title 18 Provisions as a Codified Title 18 Appendix

Section 201 creates and codifies title 18 Appendix of the United States Code, entitled the "Criminal Code Appendix", and specifies that it may be cited as "18 U.S.C. App.—" or "Federal Criminal Code Appendix §—".

Section 201(a)(1) lists the approximately 200 sections of current title 18 of the United States Code that are moved to title 18 Appendix by the section. Subsection (a)(2) indicates that the sections retain the same section and chapter numbers and captions as they had in title 18 of the United States Code. Thus, for example, current 18 U.S.C. 41 is reenacted and codified by section 201(a)(1) as 18 U.S.C. App. 41, and that section becomes part of chapter 3 of title 18 Appendix.

Section 201(a)(2) also preserves the section analysis at the beginning of each chapter in which a section of title 18 Appendix is codified, and the chapter analysis at the beginning of title 18 Appendix. The section analysis consists of the items relating to the sections that are reenacted and codified to title 18 Appendix but does not include the items that relate to sections of current title 18 that are not codified to title 18 Appendix. For example, since 18 U.S.C. 45 is not preserved as part of chapter 3, the section analysis for chapter 3 of title 18 Appendix would contain items for sections 41 through 44, and for sections 46 and 47, but would contain no item relating to section 45. The chapter analysis consists of the items relating to chapters of current law which contains sections of title 18 that are codified to title 18 Appendix but does not include the items relating to chapters of title 18 of which no section was codified to title 18 Appendix. Thus, for example, the chapter analysis contains an item for chapter 3 since several sections of current chapter 3 of title 18 are codified to title 18 Appendix, but contains no item relating to chapter 1 or 2 since no section in either chapter of current title 18 is codified by this bill to title 18 Appendix.

Section 201(b)(1) reenacts and redesignates sections 1201 through 1203 of title VII of the Omnibus Crime Control and Safe Streets Act of 1968 as sections 1201 through 1203 of chapter 56 of title 18 Appendix of the United States Aode. These provisions are currently sections 1201 through 1203 of the Appendix to title 18, but that Appendix is not codified as positive law. The section numbers used in the current Appendix are retained for convenience. Subsection (b)(2) enacts a section analysis for chapter 56 and enacts captions for each section in the chapter. Subchapter (b)(3) enacts an item describing chapter 56 for the chapter analysis at the beginning of title 18 Appendix.

2. Culpability

Section 202 amends culpability standards throughout title 18 Appendix of the United States Code to conform them to those used in the new Criminal Code. In order to keep the amendments as brief as possible, they group in a single subsection all the amendments that make the same change in the culpability standard. For example, subsection (a) changes the culpability standards in 19 sections of title 18 Appendix from "willfully" to "knowingly".

Unlike new title 18, which has special rules of construction for determining the mental state required to be proved with respect to each element of the offense, if no culpability standard is specified, there is no assumption that a certain standard applies.[1]

Sections 202(e), (g), and (i) add a "knowingly" culpability standard to several sections of title 18 Appendix which do not specify a culpability standard in current law. These changes are generally made at the suggestion of the agency primarily responsible for administering the statute or in the interest of consistency with similar statutes providing such a culpability standard.

3. Sentences

Except for chapter 44 of title 18 Appendix, section 203 amends every sentence provision for a title 18 Appendix offense preserved by title VI of the bill to reflect the grading scheme of new title 18. Section 1822 of the Code preserves current law sentencing provisions for chapter 44 of title 18 Appendix as redesignated by section 101 of the bill, as reported. These amendments generally base the grade for the offense on the maximum term of imprisonment applicable under current law. This has the effect of retaining the current law maximum term of imprisonment while increasing the maximum fine for almost every offense[2] because of the increased fine levels set forth in section 2201 of title 18.

Under the new Criminal Code, all felonies, with one type of exception, have been moved into title 18. Thus, there are no felonies in title 18 Appendix except those in chapter 44 and in those instances in which a first offense is a one-year misdemeanor and existing law provides a higher sentence for a second offense. In the latter instances, sections 203(a) through (c) have designated the first offense as a Class A misdemeanor and a second offense as a Class E felony.

A few existing offenses which are now felonies have been retained in title 18 Appendix and reduced to Class A misdemeanors. This is generally done because the Committee concluded, in examining the spectrum of Federal offenses, that the offense did not warrant felony treatment because it was not as serious as offenses designated as felonies in the new title 18 or because the more serious violations of the provision are otherwise covered as felonies in the new Criminal Code.[3]

In order to conserve space, the amendments in section 203 are grouped according to the grade that will apply to each offense after the effective date, with the highest-graded offenses appearing first, and the lowest-graded offenses appearing last, in the section. Thus, provisions amending sentence language for offenses that will be a

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[1] Section 303(a)(2) of title 18 provides that the state of mind, if any, to be proved with respect to an offense described in a statute outside title 18 is determined by the provisions of that statute.

[2] Section 203(ee) retains the existing maximum fine level of $3,000 for 18 U.S.C. App. 431 and 432 (formerly 18 U.S.C. 431 and 432). This is consistent with the view of the Committee that, while low fine levels should be increased to the level specified in section 2201(b) of title 18, fines that exceed the level specified in that provision should not be decreased.

[3] See the amendments made in sections 203(e) through (l) of the bill.

Class A misdemeanor for a first offense and a Class E felony for a second offense are covered in subsections (a) through (c), those for offenses that will be Class A misdemeanors even if they are repeat offenses appear next, followed by Class B misdemeanors, and so forth. Within this grouping according to the new grade of the offense, offenses are arranged in subsections in declining order of the current law term of imprisonment. For example, while the new grades provided in subsections (d) through (l) will all be Class A misdemeanors, the offense listed in subsection (d) is now a 10-year offense, that in subsection (e) is now either a 10-year or a 1-year offense depending on the circumstances of the offense, those in subsection (f) are 5-year offenses in current law, and so forth.

4. Offenses Punishable Under Title 18

Section 204 amends four provisions codified to title 18 Appendix to indicate that they describe unlawful acts that are offenses punishable under specific sections of title 18 of the United States Code. All but one of the sections in title 18[4] referred to in these amendments specifies that a person is guilty of an offense if he violates one of these provisions of title 18 Appendix. The term "violate" is defined in section 111 of title 18 to mean in fact to engage in conduct that is proscribed, prohibited, declared unlawful, or made subject to a penalty. Thus, the section of title 18 Appendix referred to in the section of title 18 describes the elements of the offense, including jurisdictional[5] and culpability[6] elements, but the provision in title 18 specifies the grade for the offense.

5. Repealed Provisions

Section 205 repeals portions of some sections of title 18 Appendix that were reenacted and recodified by section 201. The effect of section 205 is that the provisions listed in that section will go out of effect on the effective date of the bill.

6. Miscellaneous Amendments

Sections 206 through 237 contain miscellaneous amendments to the former provisions of title 18 that are reenacted and recodified to title 18 Appendix. These include amendments to conform cross-references to proposed title 18,[7] to delete or amend outmoded provisions,[8] to delete language covered in proposed title 18,[9] and, in a few instances, to make substantive or clarifying amendments.[10] The amendments appear in the order that the amended provisions appear in title 18 Appendix.

7. Section-by-Section Analysis of Title 18 Appendix

18 U.S.C. App. 41

18 U.S.C. 41, which is reenacted as 18 U.S.C. App. 41 by section 201(a)(1) of the bill, relates to willful unlawful hunting, fishing or

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[4] See section 1703.
[5] See section 201(b)(2) of title 18.
[6] See section 303(a)(2) of title 18.
[7] See, e.g., section 206(b)(3) of the bill.
[8] See, e.g., section 227(m)(1) of the bill.
[9] See, e., section 206(c)(1), (2) and (3) of the bill.
[10] See, e.g., sections 208(c)(1) and 211(e) of the bill.

trapping on federal wildlife refuges and to willful destruction of property of the United States on such refuges.

In conformity with the proposed Code, section 202(a) of the bill changes the culpability standards in section 41 from "willfully" to "knowingly".

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 41 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500 or a term of imprisonment of not more than six months, or both.

Section 206(a) of the bill amends section 41 by deleting the provision that the willful destruction of any property of the United States on a federal wildlife refuge is an offense under section 41. Destruction of Federal property is an offense under section 1701 (Arson), 1702 (Aggravated Property Destruction), or 1703 (Property Destruction) of title 18, depending upon the facts in the case. There is Federal jurisdiction of the offenses under section 1701(c)(2).

18 U.S.C. App. 42

18 U.S.C. 42, which is reenacted as 18 U.S.C. App. 42 by section 201(a)(1) of the bill, relates to the importation into the United States, or shipment between the continental United States and specified territories of the United States, of injurious animals.

Section 203(s) of the bill conforms the sentencing provision in section 42(b) to the Code, designating a violation of section 42 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500 or a term of imprisonment of not more than six months, or both.

Section 206(b) (1) and (2) of the bill amend section 42(a)(1), (a)(3), and (a)(5) to permit enforcement by the Secretary of Commerce, in addition to the Secretary of the Treasury and the Secretary of the Interior, as appropriate for the species involved. Under Reorganization Plan No. 4 of 1970, the Bureau of Commercial Fisheries was transferred from the Department of the Interior to the Department of Commerce, and the Department of Commerce should be able to participate in the functions described in this section as they relate to fish.

Section 206(b)(3) of the bill amends section 42(a)(3) by replacing the reference to "this Act" with a reference to the relevant sections of title 18 Appendix in conformity with the codification of these provisions to title 18 Appendix.

Serious offenses involving the importation of injurious animals could be prosecuted under section 1411 (Smuggling) of title 18, thus permitting felony treatment for serious cases.

18 U.S.C. App. 43

18 U.S.C. 43, which is reenacted as 18 U.S.C. App. 43 by section 201(a)(1) of the bill, relates to the transportation of wildlife taken in violation of State, Federal, or foreign law. Sections 43(c)(1) and (c)(2) provide civil penalties for specified violations, while subsection (d) provides criminal penalties and subsection (e) provides for forfeiture for a criminal offense.

Section 202 (b), (c) and (d) of the bill generally conform the various references to degrees of culpability an section 43 to the culpability standards in the Code (section 302 of proposed title 18). Sections 202 (b) and (c) amend culpability language in the civil penalty provisions of section 43. Section 202(d) of the bill amends sections 43 (d) and (e), which prescribe the criminal penalties for violations of the section and provide for forfeiture of wildlife products seized in connection with an offense. These criminal penalties are independent of the civil penalties prescribed in section 43(c) (1) and (2) and are applied to violations of the section committed with a higher degree of culpability. All references to knowing and "willful" violations are replaced with a requirement for "knowing" violations in conformity with the culpability standards of the Code.

Section 203(n) of the bill conforms the sentencing provision in section 43(d) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000 or a term of imprisonment of not more than one year, or both. Under section 206(c)(6), subsection (d) is amended to make clear that section 1411 (Smuggling) of title 18 applies instead of section 43 of title 18 Appendix wherever the elements of an offense might fall within either section.

Section 206(c) of the bill amends section 43 in a number of ways. Section 206 (c)(1), (c)(2), and (c)(3) of the bill delete language concerning causing an offense as covered in section 401 (Liability of an Accomplice) of proposed title 18. Section 206(c)(4) of the bill amends the grant of search and seizure authority in section 43(c)(2) in order to clarify that this authority is in addition to that granted in other law and more specifically that it supplements authority granted to agents of the Department of Interior in sections 3001 (Investigative Authority Over Offenses Within This Title) and 3022 (Department of the Interior) of proposed title 18. Section 206(c)(5) of the bill substitutes "violation" for "offense" in section 43(c)(1), consistent with the use of the word "offense" to describe criminal conduct in title 18. Section 206(c)(7) of the bill conforms the sentencing language in section 43(e) to that of the Code by deleting "penalty", a term generally used to describe a civil penalty, and substituting "sentence". Section 206(c)(8) of the bill amends the definition of "Secretary" in section 43(f)(1) to include the Secretary of Commerce along with the Secretary of the Interior, as an appropriate enforcement authority for the section, depending upon the species involved. See the discussion of 18 U.S.C. App. 42.

18 U.S.C. App. 44

18 U.S.C. 44, which is reenacted as 18 U.S.C. App. 44 by section 201(a)(1) of the bill, relates to marking packages containing wild animals, their dead bodies, or any parts thereof, such as furs or hides, for shipping or transporting in interstate or foreign commerce.

Section 203(t) of the bill conforms the sentencing provision to the Code, designating a violation of section 44 as a Class B misdemeanor rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 46

18 U.S.C. 46, which is reenacted as 18 U.S.C. App. 46 by section 201(a)(1) of the bill, prohibits the transportation in interstate commerce of water hyacinths and certain other noxious plants.

Section 203(s) of the bill conforms the sentencing provision to the Aode, designating a violation of section 46 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 47

18 U.S.C. 47, which is reenacted as 18 U.S.C. App. 47 by section 201(a)(1) of the bill, relates to using aircraft or motor vehicles to hunt certain wild horses or burros and to the pollution of water holes on federal ranges in order to trap or maim such animals.

Section 203(s) of the bill conforms the sentencing provisions to the Code, designating a violation of both section 47 (a) and (b) as Class B misdemeanors, rather than as offenses subject to fines of not more than $500, or terms of imprisonment of more than six months, or both.

18 U.S.C. App. 112

18 U.S.C. 112, which is reenacted as 18 U.S.C. App. 112 by section 201(a)(1) of the bill, relates to the protection of foreign officials, official guests, and internationally protected persons. Subsection (a) of section 112, relating to assaulting a foreign official, official guest, or internationally protected person, is repealed as covered in subchapter B (Assault Offenses) of chapter 16 of title 18. Section 112(b)(2) of title 18 Appendix, relating to attempts to violate subsection (b)(1), is repealed as covered by section 1001 (Criminal Attempt) of title 18. Subsections (b)(1), relating to intimidating foreign officials or official guests, and (b)(3), relating to congregating, with intent to violate subsection (b)(1), with two or more persons within 100 feet of specified premises used by foreign officials or official guests, are retained.

In conformity with the Code, section 202(a) of the bill changes the culpability standard in section 112(b) from "willfully" to "knowingly".

Section 203(s) of the bill conforms the sentencing provision in section 112(b) to the Code, designating a violation of the subsection a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

Section 207(a) of the bill amends section 112(b)(1) by adding "or" at the end for a better transition between subsections. Section 207(b) of the bill conforms the cross-references in subsection (b)(3) to the relevant offense sections in the Code by replacing the reference to violations of "any other provision of this section" in section 112(b)(3) with references to the provisions of proposed title 18 that cover material deleted from section 112: Sections 1611-1615 (Assault Offenses) of proposed title 18, when there is appropriate jurisdiction, and sections 1701-1703 (Arson and Other Property Offenses) of proposed title 18, when there is appropriate jurisdiction and the offense is likely to endanger the person or liberty of a foreign official, official guest, or internationally protected person.

Section 207(c) of the bill conforms section 112(c) to section 111 (General Definitions) of proposed title 18 by amending existing section 112(c) (redesignated as subsection (c)(1)) to refer to definitions within section 111 (General Definitions) of proposed title 18. The section also adds to subsection (c) a new paragraph (2) that carries forward the definition of "foreign government" contained in current 18 U.S.C. 1116(b) that applies to current 18 U.S.C. 112.

Section 207(d) amends 18 U.S.C. App. 112 (e) and (f) to refer to the offenses formerly covered in section 112 that are covered in title 18 under the new Code. Sections 207 (e) and (f) amend cross-references.

18 U.S.C. App. 154

18 U.S.C. 154 (as amended effective October 1, 1979), which is reenacted as 18 U.S.C. App. 154 by section 201(a)(1) of the bill, prohibits a trustee or other officer of the court in a bankruptcy case from buying an interest in the estate for which he is such an officer.

Section 203(bb) of the bill conforms the sentencing provision to the Code, designating a violation of section 154 as an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $500. The provision excluding the possibility of imprisonment is an exception to the definition of "infraction" in section 111 of proposed title 18, which otherwise provides for a term of imprisonment of five days or less. The Committee has decided not to add a prison term to an offense outside title 18 if none is provided in current law. The sentences of probation (section 2101 of proposed title 18) and fine (section 2201 of proposed title 18) remain applicable for violation of section 112.

18 U.S.C. App. 155

18 U.S.C. 155 (as amended effective October 1, 1979), which is reenacted as 18 U.S.C. App. 155 by section 201(a)(1) of the bill, prohibits fraudulent agreements, for the purpose of fixing fees or other compensation, between parties in interest, or their representatives, in bankruptcy proceedings.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 155 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 202

18 U.S.C. 202, which is reenacted as 18 U.S.C. App. 202 by section 201(a)(1) of the bill, provides definitions of the terms "special Government employee" and "official responsibility" for use in chapter 11 (Bribery, Graft, and Conflicts of Interest) of 18 U.S.C. App.

Section 208(a) of the bill amends section 202 in three instances. The first change in the addition of judicial officers and employees to those of the executive and legislative branches covered by the definition of "special Government employee". This simply brings all three branches of government under the purview of the provisions of chapter 11 that apply to special Government employees. The second change is the deletion of the reference to part-time United States commissioners, a position that no longer exists. Finally, a cross-reference to 5 U.S.C. 30r (c) and (d), which pertains to Reserve officers of the Armed Forces and officers of the National Guard of the United States, is conformed to the renumbered sections in that title.

18 U.S.C. App. 203

18 U.S.C. 203, which is reenacted as 18 U.S.C. App. 203 by section 201(a)(1) of the bill, prohibits the solicitation or acceptance of compensation, otherwise than as provided by law, for any services rendered by members of Congress, or officers or employees of the United States which involve matters affecting the Federal Government.

Section 203(k) of the bill amends the sentencing provision in section 203(b) to designate a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both.

More serious offenses are covered in proposed subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18. The further penalty provision that one who violates the section shall be incapable of holding any office of honor, trust, or profit under the United States is preserved, but should be read in conjunction with the provisions of subchapter D of chapter 40 of title 18, relating to restrictions on the imposition of civil disabilities.

18 U.S.C. App. 204

18 U.S.C. 204, which is reenacted as 18 U.S.C. App. 204 by section 201(a)(1) of the bill, prohibits practice in the Court of Claims by members of Congress.

Section 203(j) of the bill amends the sentencing provision to designate a violation of section 204 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both. If the offense involved the use of special influence, it would be covered under proposed 18 U.S.C. 1354 (Trading in Special Influence), as a Class E (3-year) felony. The further provision in section 204 that one who violates the section shall be incapable of holding any office of honor, trust, or profit under the United States is preserved, but should be read in conjunction with the provisions of subchapter D of chapter 40 of title 18, relating to restrictions on the imposition of civil disabilities.

18 U.S.C. App. 205

18 U.S.C. 205, which is reenacted as 18 U.S.C. App. 205 by section 201(a)(1) of the bill, prohibits an officer or employee of the United States from acting as agent or attorney for anyone prosecuting a claim against the Federal Government, or otherwise involved in a matter before the Government, other than in the proper discharge of his official duties.

Section 203(k) of the bill amends the sentence to designate a violation of section 205 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both. If the offense involved the use of special influence, it would be covered under proposed 18 U.S.C. 1354 (Trading in Special Influence), a Class E (3-year) felony.

Section 208(b) of the bill adds cross-references to sections 1353 (Trading in Government Assistance) and 1354 (Trading in Special Influence) of proposed title 18 in order to make clear that the exceptions to prohibitions of sections 203 and 205 of title 18 Appendix that relate to certain personal and administrative activities of officers and employees, are also applicable to 18 U.S.C. 1353 and 1354.

18 U.S.C. App. 206

18 U.S.C. 206, which is reenacted as 18 U.S.C. App. 206 by section 201(a)(1) of the bill, exempts retired officers of the uniformed services of the United States and any other persons specially excepted by an Act of Congress from the application of sections 203 and 205 of title 18 Appendix.

Section 208(c)(1) of the bill completely rewrites 18 U.S.C. App. 206 to clarify the applicability of the conflict of interest laws to retired military officers. It specifies that the officers are prohibited for two years after retirement from participating in sales of anything to the Government through the department with which they are in retired status; are prohibited for two years after retirement from prosecuting or assisting in the prosecution of claims against the United States which involve their former departments; and are prohibited from prosecuting or assisting in the prosecution of claims that involve subject matter with which they were directly involved while on active duty. The provision covers and clarifies the same subject matter covered in section 2 of the Act of October 23, 1962 (76 Stat. 1126), which is repealed by section 714 of the bill.

18 U.S.C. App. 207

18 U.S.C. App. 207, which is reenacted as 18 U.S.C. App. 207 by section 201(a)(1) of the bill, prohibits certain former officers and employees of the United States, and their associates, from representing a person before an agency, court or other body of the United States with regard to matters with which the former officer or employee was personally and substantially involved while so employed.

Section 203(j) of the bill amends the sentence in section 207(c) by designating a violation of the section by a former officer or employee as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000 or a term of imprisonment of not more than two years, or both. Section 203(n) of the bill conforms the sentencing provision in section 207(g) to the Code, designating a violation of the section by a partner of a former officer or employee as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 208

18 U.S.C. 208, which is reenacted as 18 U.S.C. App. 208 by section 201(a)(1) of the bill, prohibits certain officers and employees of the United States from personally and substantially participating in any Government matters affecting a personal financial interest.

Section 203(k) of the bill amends the section to designate violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both. More serious offenses under this section might also be covered under proposed subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

18 U.S.C. App. 209

18 U.S.C. 209, which is reenacted as 18 U.S.C. App. 209 by section 201(a)(1) of the bill, prohibits a Government official or employee from receiving a salary or compensation for services as such official or employee from any source other than the United States.

Section 203(o) of the bill conforms the sentencing provision in section 209(a) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

Section 208(d) of the bill conforms a cross-reference ot the standard form, by deleting the Act name, Public Law and Statute numbers, and substituting the appropriate title and chapter in the U.S. Code.

18 U.S.C. App. 211

18 U.S.C. 211, which is reenacted as 18 U.S.C. App. 211 by section 201(a)(1) of the bill, prohibits the solicitation or acceptance of any money or thing of value in consideration of the promise of support or use of influence in obtaining for any person any appointive public office or employment under the United States. Section 205 of the bill repeals the first paragraph of the section, which deals with appointive offices, because such conduct is prohibited by section 1353 (Trading in Public Office) of proposed title 18.

Section 202(e) of the bill amends section 211 to add a requirement that the proscribed conduct be undertaken "knowingly" in order to constitute a violation of the section. This requirement is consistent with the culpability standard provided for proposed section 1355 (Trading in Public Office) of title 18.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 211 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 212

18 U.S.C. 212, which is reenacted as 18 U.S.C. App. 212 by section 201(a)(1) of the bill, prohibits an officer, director, or employee of certain banks, from making a loan or gratuity to a bank examiner who has the authority to examine the bank.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 212 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both, and a further fine equal to the sum of the money loaned or gratuity given.

Section 208(e) amends section 212 by deleting references to National Agricultural Credit Corporations, which no longer exist.

18 U.S.C. App. 213

18 U.S.C. 213, which is reenacted as 18 U.S.C. App. 213 by section 201(a)(1) of the bill, prohibits any bank examiner of particular banks from accepting a loan or gratuity from any bank or other organization examined by him, or from any person connected therewith.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 213 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000 or a term of imprisonment of not more than one year, or both, and a further fine equal to the sum of the money loaned or the gratuity given. An additional penalty of disqualification from holding office as a bank examiner is retained, but should be read in conjunction with the provisions of subchapter D of chapter 40 of title 18, relating to restrictions on the imposition of civil disabilities.

Section 208(f) of the bill amends section 213 by deleting the reference to National Agricultural Credit Corporations, since they no longer exist.

18 U.S.C. App. 218

18 U.S.C. 218, which is reenacted as 18 U.S.C. App. 218 by section 201(a)(1) of the bill, provides for voiding Government transactions in relation to which there has been a final conviction for any violation of the chapter (Bribery, Graft, and Conflicts of Interest).

Section 208(g) of the bill conforms the section to the Code, amending the section to include violations, by bank examiners who are Federal public servants, of sections 1351–1355 (official corruption and intimidation offenses) of proposed title 18.

18 U.S.C. App. 219

18 U.S.C. 219, which is reenacted as 18 U.S.C. App. 219 by section 201(a)(1) of the bill, prohibits officers and employees of the United States from acting as agents for foreign principals required to register pursuant to the Foreign Agents Registration Act.

Section 204(a) of the bill conforms section 219 to the Code, designating a violation of the section an offense punishable under section 1126 (Failing to Register as, or Acting as, a Foreign Agent) of proposed title 18, which designates the offense as a Class D (6-year) felony, rather than as one subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both.

18 U.S.C. App. 243

18 U.S.C. 243, which is reenacted as 18 U.S.C. App. 243 by section 201(a)(1) of the bill, prohibits a person charged with selecting or summoning jurors from excluding or failing to summon any qualified citizen for jury service on account of race, color, or previous condition of servitude.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 243 as an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $5,000. The provision excluding the possibility of imprisonment provides a routine exception to the definition of "infraction" in section 111 of proposed title 18, which otherwise authorizes a term of imprisonment of five days or less. This is consistent with the Committee's decision not to add a term of imprisonment for an offense outside title 18 for which no term of imprisonment was prescribed under current law. The sentences of probation (section 2101 of proposed title 18) and fine (section 2201 of proposed title 18) remain applicable for a violation of section 243.

18 U.S.C. App. 244

18 U.S.C. 244, which is reenacted as 18 U.S.C. App. 244 by section 201(a)(1), prohibits the proprietor of a public place of entertainment or amusement from causing discrimination against any person wearing the uniform of any of the armed forces of the United States on account of that uniform.

Section 203(ff) of the bill conforms the sentencing provision to the Code, designating a violation of section 244 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500. The increased penalty was suggested by the Air Force as being in line with the penalties for civil rights violations covered in proposed subchapter A of chapter 15 of title 18.

Section 209 of the bill amends the section by substituting "knowingly discriminates against" for "causes . . . to be discriminated against." This not only focuses the proscribed conduct on direct individual actions but also prescribes the culpability standard of "knowingly" rather than prescribing no culpability standard.

18 U.S.C. App. 290

18 U.S.C. 290, which is reenacted as 18 U.S.C. App. 290 by section 201(a)(1) of the bill, relates to the unlawful withholding of a person's armed forces discharge papers by one engaged in the collection of claims for pay or other allowances for that person.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 290 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both. The additional penalty provision barring such a claims agent from prosecuting claims is retained, but should be read in conjunction with the provisions of subchapter D of chapter 40 of title 18, relating to limitations on civil disabilities.

18 U.S.C. App. 291

18 U.S.C. 291, which is reenacted as 18 U.S.C. App. 291 by section 201(a)(1) of the bill, prohibits court officials and other federal officers and employees from purchasing at less than face value claims against the United States for fees, mileage, or expenses of a witness or juror or other officer of the court.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 291 as an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $1,000. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to provide a term of imprisonment for an offense for which no such term is provided in current law. The sentences of probation (section 2101 of proposed title 18) and fine (section 2201 of proposed title 18) remain applicable for a violation of section 291.

18 U.S.C. App. 292

18 U.S.C. 292, which is reenacted as 18 U.S.C. App. 292 by section 201(a)(1) of the bill, prohibits the solicitation of employment in respect to a Federal employee compensation case, claim, or award and the receipt of unapproved fees or other consideration on account of services furnished with respect to such a case, claim, or award.

Section 203(o) of the bill conforms the sentencing provision to the Code, designating a violation of section 292 as a Class A misdemeanor, rather than as an offense subject to a fine or not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 333

18 U.S.C. 333, which is reenacted as 18 U.S.C. App. 333 by section 201(a)(1) of the bill, prohibits the mutilation of bank notes or other evidences of debt issued by a national banking association, Federal Reserve bank, or the Federal Reserve System, with the intent that the evidence of debt will not be fit to be reissued.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 333 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $100, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 336

18 U.S.C. 336, which is reenacted as 18 U.S.C. App. 336 by section 201(a)(1) of the bill, prohibits the circulation or payment of any note, check, or other obligation for a less sum than $1, that is intended to circulate or to be received in lieu of lawful money of the United States.

Section 202(e) of the bill amends section 336 to add a requirement that the proscribed conduct be undertaken "knowingly" in order to constitute a violation of the section. This culpability standard is consistent with that for the more serious offenses described in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

Section 203(s) of the bill conforms the sentencing provision to the Aode, designating a violation of section 336 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 337

18 U.S.C. 337, which is reenacted as 18 U.S.C. App. 337 by section 201(a)(1) of the bill, prohibits the lending or borrowing of money or credit upon the security of such coins as are designated by the Secretary of the Treasury.

Section 202(e) of the bill amends section 337 to add a requirement that the proscribed conduct be undertaken "knowingly" in order to constitute a violation of the section.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 337 as a Class A misdemeanor, rather than as an offense subject to a fine or not more than $10,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 431

18 U.S.C. 431, which is reenacted as 18 U.S.C. App. 431 by section 201(a)(1) of the bill, prohibits a member of Congress, acting himself or through any other person for the benefit of the member of Congress, from executing or holding any contract or agreement entered into on behalf of the United States or any agency thereof.

Section 203(ee) of the bill conforms the sentencing provision in section 431 to the Code and provides no change in the punishment actually available. It deletes the single provision for a fine of not more than $3,000 and designates a violation of the section as an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment or to pay a fine that exceeds $3,000. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to provide a term of imprisonment for an offense described outside title 18 if no such term is provided in current law. The provision for a fine of not more than $3,000 retains the current maximum fine, which is higher than that provided in section 2201 of title 18 for an infraction committed by an individual. This is consistent with the decision of the Committee to retain current law maximum fines if they exceed those provided in section 2201 of title 18. The sentence of probation (section 2101 of proposed title 18) remains available for a violation of section 431.

18 U.S.C. App. 432

18 U.S.C. 432, which is reenacted as 18 U.S.C App. 432 by section 201(a)(1) of the bill, prohibits an officer or employee of the United States from making a contract or agreement on behalf of the United States or an agency thereof, with a member of Congress.

Section 203(ee) of the bill conforms the sentencing provision in section 432 to the Code but provides no change in the punishment actually available. It deletes the single provision for a fine of not more than $3,000, and designates a violation of the section an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment or to pay a fine that exceeds $3,000. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to provide a term of imprisonment for an offense described outside title 18 if no such term is provided in current law. The provision for a fine of not more than $3,000 retains the current maximum, which is higher than that provided in section 2201 of title 18. This is consistent with the Aommittee's decision to retain current law maximum fines if they exceed those provided in section 2201 of title 18. The sentence of probation (section 2101 of proposed title 18) remains available for a violation of section 432.

18 U.S.C. App. 433

18 U.S.C. 433, which is reenacted as 18 U.S.C. App. 433 by section 201(a)(1) of the bill, exempts certain contracts from the prohibtions of sections 431 and 432 of title 18 Appendix.

Section 210 of the bill amends the section to update the references to various Acts now cited in this section that have been replaced by later enactments.

18 U.S.C. App. 435

18 U.S.C. 435, which is reenacted as 18 U.S.C. App. 435 by section 201(a)(1) of the bill, prohibits any officer or employee of the United States from knowingly contracting to pay an amount in excess of the amount appropriated for the erection, repair, or furnishing of any public building, or for any public improvement.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 435 as a Class A misdemeanor rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 436

18 U.S.C. 436, which is reenacted as 18 U.S.C. App. 436 by section 201(a)(1) of the bill, prohibits any officer or employee of the United States from contracting for, or permitting any official or agent of a correctional institution to hire out, the labor of a prisoner confined for violation of a law of the United States.

Section 203(h) of the bill amends the sentencing provision by designating the offense as a Class A misdemeanor, rather than as a three-year felony.

Section 210(b) of the bill prescribes exceptions to section 436, in order to conform the section to prisoner employment provisions in section 3822 (Temporary Release of a Prisoner) of title 18 and proposed chapters 37 (Bureau of Prisons) and 38 (Federal Prison Industries) of title 28.

18 U.S.C. App. 437

18 U.S.C. 437, which is reenacted as 18 U.S.C. App. 437 by section 201(a)(1) of the bill, prohibits an officer or employee of the United States from having an interest in a contract for goods and supplies for Indians.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of secction 437 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $5,000 or a term of imprisonment of more than six months, or both. The further penalty of removal from office is retained, but should be read in conjunction with the provisions of subchapter D (Restriction on Imposition of Civil Disabilities) of chapter 40 of title 18.

18 U.S.C. App. 438

18 U.S.C. 438, which is reenacted as 18 U.S.C. App. 438 by section 201(a)(1) of the bill, provides criminal penalties for the receipt of money contrary to the provisions of 25 U.S.C. 81 (which sets standards for contracts with Indian tribes or Indians) and 25 U.S.C. 82 (relating to payment of attorneys' fees for certain Indian claims cases).

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 438 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than six months, or both. The further penalty of forfeiture of the money received in violation of 25 U.S.C. 81 or 82 is retained.

18 U.S.C. App. 439

18 U.S.C. 439, which is reenacted as 18 U.S.C. App. 439 by section 201(a)(1) of the bill, prohibits any person from receiving money under a contract for services regarding application for enrollment as a citizen of the Five Civilized Tribes unless the United States consented to the contract.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 439 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 440

18 U.S.C. 440, which is reenacted as 18 U.S.C. App. 440 by section 201(a)(1) of the bill, prohibits an employee of the Postal Service from having any interest in any contract with the Postal Service.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 440 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 441

18 U.S.C. 441, which is reenacted as 18 U.S.C. App. 441 by section 201(a)(1) of the bill, prohibits granting a contract for furnishing supplies to the Postal Service to anyone who has engaged or proposed to engage in price fixing or collusive arrangements with respect to furnishing such supplies.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 441 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 442

18 U.S.C. 442, which is reenacted as 18 U.S.C. App. 442 by section 201(a)(1) of the bill, prohibits the Public Printer, superintendent of printing, superintendent of binding, and any of their assistants from having an interest in publication, printing, binding, engraving, or lithographing of any kind, or in any contract for furnishing material connected with public printing, binding, lithographing, or engraving.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 442 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000 or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 443

18 U.S.C. 443, which is reenacted as 18 U.S.C. App. 443 by section 201(a)(1) of the bill, makes it an offense to secrete, mutilate, obliterate, or destroy certain records of war contractors before a specified time.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 443 by deleting "willfully" and substituting "knowingly".

Section 203(f) of the bill amends the sentence to designate a violation of section 443 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $50,000 if the offense is committed by a corporation, or, if the offense is committed by a natural person, a fine of not more than $10,000, or a term of imprisonment of not more than five years, or both. The distinction between the penalty for a corporation and a natural person is unnecessary because the differences in penalties for organizations and individuals are described in sections 2001 (Authorized Sentences), 2201 (Sentence of Fine), and 2301 (Sentence of Imprisonment) of title 18.

The classification of an offense under 18 U.S.C. App. 443 as a Class A misdemeanor is consistent with the Class A misdemeanor treatment for similar offenses under section 1344 (Tampering With a Government Record) of title 18. Section 443 is retained primarily because it describes in detail the records required to be maintained and the time period during which they must be retained.

18 U.S.C. App. 474

18 U.S.C. 474, which is reenacted as 18 U.S.C. App. 474 by section 201(a)(1) of the bill, is completely rewritten by section 211(a) of the bill.

Under current law, section 474 prohibits the manufacture, possession, or use of various counterfeiting implements, as well as the unlawful printing or photographing of obligations or other securities of the United States. Counterfeiting and forgery offenses, including trafficking in a counterfeiting impliment, are covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18. 18 U.S.C. App. 474 retains only the offense described in the sixth paragraph of section 474 in current law, which relates to making, selling, or importing illustrations or likenesses of various obligations or securities of the United States.

Section 211(a) of the bill completely revises the language of the sixth paragraph of 18 U.S.C. 474 to more clearly describe the obligations and securities covered by the provision and to clarify the relationship between the section and 18 U.S.C. 504 (redesignated as 18 U.S.C. App. 504 by section 201(a) (1) of the bill). It accomplishes this by using the list of obligations and securities set forth in 18 U.S.C. App. 504(1) (A) through (D) and adding a cross-reference to the provisions of that section.

Section 474 is divided into two subsections to make clear that regulation of the making, selling, and importing of postage stamps of the United States comes within the jurisdiction of the Postal Service, while regulation of such activities with regard to other securities and obligations of the United States, and to all securities and obligations of foreign governments, comes within the jurisdiction of the Secretary of the Treasury.

Section 474 is also amended by section 211(a) of the bill by adding a requirement that the conduct prohibited by the section be committed "knowingly" before a violation of the section exists.

Section 203(q) of the bill classifies an offense under section 474 as a Class B misdemeanor rather than as a 15-year felony, and this classification is reiterated in the amended version of section 474 contained in section 211(a) of the bill. The section, as amended, covers violations of printing regulations that may not amount to counterfeiting or forgery. Felony coverage for violations relating to obligations and securities is left to the provisions of subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

18 U.S.C. App. 475

18 U.S.C. 475, which is reenacted as 18 U.S.C. App. 475 by section 201(a)(1) of the bill, prohibits the printing or distribution of any business card or advertisement in thelikeness of or attached to any obligation or other security of the United States.

Section 203(y) of the bill conforms the sentencing provision to the Code, classifying a violation of section 475 as an infraction, with the provision that one convicted of violating the section may not be snetenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $500. The provision excluding the possibility or imprisonment is consistent with the Committee's decision not to provide a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of proposed title 18) remain available for a violation of section 475.

18 U.S.C. App. 486

18 U.S.C. 486, which is reenacted as 18 U.S.C. App. 486 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture or circulation of metal coins intended for use as money, whether the coins resemble coins of the United States or a foreign country, or are of original design. Sections 211 (b)(2) and (b)(3) delete coverage of coins resembling those of the United States or a foreign country as

covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18. See also 18 U.S.C. App. 489.

Section 211(b)(1) of the bill deletes language relating to criminal attempts as covered in section 1001 of title 18.

18 U.S.C. App. 489

18 U.S.C. 489, which is reenacted as 18 U.S.C. App. 489 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture, importation, possession with intent to sell or give away, or use of any token in likeness or similitude as to design, color, or inscription of a coin of the United States or of a foreign country issued as money.

Section 203(y) of the bill conforms the sentencing provision to the Code, classifying a violation of section 489 as an infraction, with the provision that one convicted of imprisonment, rather than as an offense subject to a fine of not more than $100. The provision excluding the possibility of imprisonment is consistent with the Committee's decision outside title 18 if no such term is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for a violation of section 243.

18 U.S.C. App. 491

18 U.S.C. 491, which is reenacted as 18 U.S.C. App. 491 by section 201(a)(1) of the bill, prohibits the manufacture, possession with intent to use, circulation, sale, or use of any token, paper, or other thing similar in size and shape to a lawful coin or currency of the United States and intended to be used as money or for rationing.

Section 203(n) of the bill conforms the sentencing provisions to the Code, classifying violations of both sections 491(a) and (b) as Class A misdemeanors, rather than as offenses subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 205 of the bill repeals the second paragraph of section 491(b), which states that prosecution under the provisions of section 491(b) does not preclude prosecution by a State or territory or possession of the United States, as unnecessary in light of the provisions of section 206 (Concurrent Federal Jurisdiction Generally Not Preemptive) of title 18.

18 U.S.C. App. 492

18 U.S.C. 492, which is reenacted as 18 U.S.C. App. 492 by section 201(a)(1) of the bill, provides for the forfeiture of all counterfeited articles and any material and apparatus used in the making of such counterfeits, and makes it an offense to fail or refuse to surrender possession upon request of an authorized agent of the Treasury Department.

In conformity with the culpability standards in the Code, section 202(f) of the bill amends section 492 by deleting "willful negligence" and substituting "recklessness".

Section 203(n) of the bill conforms the sentencing provision to the Code, classifying a violation of section 492 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $100, or a term of imprisonment of not more than one year, or both.

Section 211(c) of the bill conforms the cross-references in the first paragraph to sections of current title 18 to their new counterparts in title 18 Appendix and in subchapter E (Counterfeiting, Forgery, and Related Offenses) of Chapter 17 of title 18. The provisions of the first paragraph overlap to some extent the provisions of section 4001 (Civil Forfeiture of Property), but are retained in order to assure that coverage of the offense described in the section is not altered.

18 U.S.C. App. 504

18 U.S.C. 504, which is reenacted as 18 U.S.C. App. 504 by section 201(a)(1) of the bill, describes circumstances in which the printing, publishing, importing, or filming of certain United States and foreign obligations and securities are permitted.

Section 211(d) of the bill makes the authority to print, publish, import, or film obligations and securities in certain circumstances, applicable to obiligations of the United States under $1 by adding a reference to 18 U.S.C. App. 336.

18 U.S.C. App. 510

Section 211(e) of the bill enacts a new section 510 of title 18 Appendix. Subsection (a)(1) of section 510 makes it a Class A misdemeanor knowingly and without written authorization to photostat, reproduce, duplicate, or execute a copy of certain obligations of a corporation, business or foreign government. Subsection (a)(2) makes it a Class A misdemeanor knowingly and without written authorization to copy an obligation issued by a State, possession, Commonwealth, or territory of the United States, by a political subdivision of a State, possession, Commonwealth, or territory, or by a public instrumentality of one or more States, possessions, Commonwealths, or territories. Subsection (b) of section 510 makes clear that non-color copies of a document covered by the section may be made by appropriate entities for recordkeeping, enforcement, or validation purposes.

The provision was originally enacted by the Senate as section 789A of S. 1437 in the 95th Congress.[1] Its purpose is to prohibit color copying of marketable securities by anyone, and to prohibit non-color copying of marketable securities by anyone other than the owner or his agent or specified financial institutions, in order to eliminate a potential source of securities fraud.

18 U.S.C. App. 543

18 U.S.C. 543, which is reenacted as 18 U.S.C. App. 543 by section 201(a)(1) of the bill, prohibits any revenue officer from knowingly permitting goods to enter the United States if less than the amount of duty legally due is paid.

Section 203(j) of the bill amends the sentence applicable to the offense by classifying a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than two years, or both. The further penalty of removal from office is retained, but should be read in conjunction with the provisions of subchapter D (Restriction on Imposition of Civil Disabilities) of chapter 40 of title 18.

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[1] See Cong. Rec., p. S539, Jan. 26, 1978 (daily ed.).

18 U.S.C. App. 546

18 U.S.C. 546, which is reenacted as 18 U.S.C. App. 546 by section 201(a)(1) of the bill, prohibits anyone who owns all or part of a vessel from allowing the vessel to be used in smuggling merchandise into a foreign country in violation of its laws if the laws of the foreign country provide a penalty or forefeiture for violation of United States customs laws.

Section 203(j) of the bill amends the sentence applicable to the offense by designating a violation of section 546 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than two years, or both.

18 U.S.C. App. 548

U.S.C. 548, which is reenacted as 18 U.S.C. App. 548 by section 201(a)(1) of the bill, relates to the fraudulent concealment, removal, or repacking of goods in any bonded warehouse, and to the faudulent marking of packages in such a warehouse. It also provides for forfeiture of goods concealed, removed, or repacked, and of packages marked, in violation of the section.

Section 205 of the bill deletes the description of the offense from section 548 because it is covered in sections 1411 (Smuggling), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18. Section 212 of the bill retains the forfeiture provision, amending it to refer to the offenses described in sections 1411 (Smuggling) and 1731 (Theft) of title 18, and to attempts or conspiracies to violate those provisions.

18 U.S.C. App. 549

18 U.S.C. 549, which is reenacted as 18 U.S.C. App. 549 by section 201(a)(1) of the bill, prohibits the unauthorized removal of goods from customs custody or the unauthorized attachment or removal of a customs seal or mark.

Section 205 of the bill repeals the third paragraph of section 549, relating to trespass with intent to unlawfully remove bonded merchandise and to unlawful removal of goods in customs custody, because these offenses are covered by sections 1712 (Criminal Entry) and 1731 (Theft) of title 18. Section 205 also repeals the fourth paragraph of section 549, relating to receiving or transporting goods knowing they have been unlawfully removed from customs custody, because the offense is covered an section 1732 (Trafficking an Stolen Property) and 1733 (Receiving Stolen Property) of title 18.

In conformity with the Code, section 202(a) of the bill changes the culpability standard in section 549 from "willfully" to "knowingly".

Section 203(k) of the bill amends the sentence by designating a violation of section 549 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000 or a term of imprisonment of not more than two years, or both.

18 U.S.C. App. 593

18 U.S.C. 593, which is reenacted as 18 U.S.C. App. 593 by section 201(a)(1) of the bill, prohibits an officer or member of the Armed Forces of the United States from interfering with any matters affecting elections or the exercise of the right of suffrage. Section 205 of the bill repeals the second paragraph of section 593, which prohibits interference with an individual's exercise of the right of suffrage, because the offense is covered in sections 1503 (Interfering With a Federal Benefit) and 1511 (Obstructing an Election) of title 18.

Section 203(g) of the bill amends the sentence by designating a violation of section 593 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both.

Section 213(a) of the bill deletes all attempt language in section 593 because the offense is covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 600

18 U.S.C. 600, which is reenacted as 18 U.S.C. App. 600 by section 201(a)(1) of the bill, prohibits any promise of or aid in obtaining any employment or other benefit made possible by any Act of Congress as a reward for any political activity. Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 600 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 601

18 U.S.C. 601, which is reenacted as 18 U.S.C. App. 601 by section 201(a)(1) of the bill, prohibits the deprivation, or threat of deprivation, of any Federal benefit as inducement for any political activity.

Section 203(n) of the bill conforms the sentencing provision in section 601(a) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than one year, or both.

Section 213(b) of the bill deletes attempt language in section 601(a) because an attempt to violate section 601 is covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 650

18 U.S.C. 650, which is reenacted as 18 U.S.C. App. 650 by section 201(a)(1) of the bill, provides criminal penalties for public depositaries which fail to safeguard deposits. Section 214 deletes the references to embezzlement as covered in section 1731 (Theft) of title 18. The offense is retained, without reference to embezzlement, as a Class A misdemeanor rather than a 10-year felony (see section 203(e) of the bill) in order to cover failure to keep funds of the United States safely when the offense does not amount to theft.

18 U.S.C. App. 700

18 U.S.C. 700, which is reenacted as 18 U.S.C. App. 700 by section 201(a)(1) of the bill, prohibits the desecration of a flag of the United States.

Section 203(n) of the bill conforms the sentencing provision in section 700(a) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as a offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 205 of the bill repeals section 700(c), which states that Federal jurisdiction over this section does not preempt any State jurisdiction over any comparable state offense, as covered in section 206 (Concurrent Federal Jurisdiction Generally Not Preemptive) of title 18.

18 U.S.C. App. 701

18 U.S.C. 701, which is reenacted as 18 U.S.C. App. 701 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture, possession, or sale of official badges, identification cards, and other insignia of the United States, or a colorable imitation thereof.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 701 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisoment of not more than six months, or both.

U.S.C. App. 702

18 U.S.C. 702, which is reenacted as 18 U.S.C. App. 702 by section 201(a)(1) of the bill, prohibits anyone without authority from wearing the uniform of any of the Armed Forces of the United States or the Public Health Service.

Section 202(g) of the bill amends section 702 by adding a requirement that the proscribed conduct be undertaken "knowingly" in order for there to be an offense.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 702 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 703

18 U.S.C. 703, which is reenacted as 18 U.S.C. App. 703 by section 201(a)(1) of the bill, prohibits anyone, with the intent to mislead or deceive, from wearing any official uniform of a foreign nation with which the United States is at peace.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 703 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 704

18 U.S.C. 704, which is reenacted as 18 U.S.C. App. 704 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture, wear-

ing, or sale of decorations or medals of the armed forces of the United States.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 704 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 705

18 U.S.C. 705, which is reenacted as 18 U.S.C. App. 705 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture reproduction, or sale of medals, emblems, or other insignia of veterans' organizations.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 705 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of six months, or both.

18 U.S.C. App. 706

18 U.S.C. 706, which is reenacted as 18 U.S.C. App. 706 by section 201(a)(1) of the bill, prohibits the unauthorized use or use for any fraudulent purpose of the sign, or an insignia in colorable imitation thereof, of the Red Cross.

Section 203(t) of the bill conforms the sentencing provision to the Code, designating a violation of section 706 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 215(b) of the bill deletes as unnecessary the description of an offender, "whether a corporation, association, or person".

Section 215(c) of the bill clarifies the reference to "the date of enactment of this title" in section 706 by substituting "June 25, 1948".

18 U.S.C. App 707

18 U.S.C. 707, which is reenacted as 18 U.S.C. App. 707 by section 201(a)(1) of the bill, prohibits the unauthorized use or use for any fraudulent purpose of any sign or emblem of the 4-H clubs, or any colorable initation of the sign or emblem.

Section 203(t) of the bill conforms the sentencing provision to the Code, designating a violation of section 707 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 215(b) of the bill deletes as unnecessary the description of an offender, "whether an individual, partnership, corporation or association".

Section 215(c) of the bill clarifies the reference to "the date of enactment of this title" in section 707 by substituting "June 25, 1948".

18 U.S.C. App. 708

18 U.S.C. 708, which is reenacted as 18 U.S.C. App. 708 by section 201(a)(1) of the bill, prohibits the use for commercial purposes of the coat of arms of the Swiss Confederation.

In conformity with the culpability standards of the Code, section 202(a) of the bill amends section 708 by deleting "willfully" and substituting "knowingly".

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 708 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 215(d) of the bill deletes "Whoever, whether a corporation, partnership, unincorporated company, association, or person" and substituting "A person who", since the list of types of offenders is unnecessary in light of the provisions of chapter 4 (Complicity) of title 18.

18 U.S.C. App. 709

18 U.S.C. 709, which is reenacted as 18 U.S.C. App. 709 by section 201(a)(1) of the bill, relates to false advertising or misuse of names of federal agencies to convey a false impression of connection with a Federal agency.

Section 203(o) of the bill conforms the sentencing provision to the Code, designating a violation of section 709 as a Class A misdemeanor, rather than as an offense subject to punishment as follows: "a corporation, partnership, business trust, association, or other business entity, by a fine of not more than $1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section by a fine of not more than $1,000 or imprisonment for not more than one year, or both." The differentiation in punishment specified for an offense, depending upon whether it is committed by an organization or an individual, is not carried forward in section 709 because it is covered in sections 2001 (Authorized Sentences), 2201 (Sentence of Fine), and 2301 (Sentence of Imprisonment) of title 18.

Section 205 of the bill repeals obsolete provisions covering misuse of the names of the National Agricultural Credit Corporation and the Reconstruction Finance Corporation which no longer exist.

Section 215(e)(1) adds the word "falsely" before the word "advertises" in the third paragraph, which describes the offense of advertising that bank accounts are federally insured. The amendment was suggested by the Federal Deposit Insurance Corporation, and brings the offense description into line with similar offenses described in section 709.

Section 215(e)(2) amends several cross-references in the fifth paragraph of section 709 to conform with the enactment of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*).

Section 215(e)(3) clarifies the reference to the "date of enactment of this paragraph" in section 709 by substituting "August 25, 1948".

18 U.S.C. App. 710

18 U.S.C. 710, which is reenacted as 18 U.S.C. App. 710 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture, use, or sale of cremation urns of the same design as those used to retain the cremated remains of deceased members of the armed forces.

Section 203(gg) of the bill decriminalizes the offense, at the suggestion of the Department of the Air Force, and makes a violator subject to a civil penalty, in a suit brought by the United States, of no more than $1,000 or twice the amount of personal injury or property damage, whichever is higher.

18 U.S.C. App. 711

18 U.S.C. 711, which is reenacted as 18 U.S.C. App. 711 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture, reproduction, or use for profit of the character or name "Smokey Bear."

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 711 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 205 of the bill repeals the now obsolete second paragraph of section 711 which allowed certain exemptions from the section for one year after its enactment.

18 U.S.C. App. 711a

18 U.S.C. 711a, which is reenacted as 18 U.S.C. App. 711a by section 201(a)(1) of the bill, prohibits the authorized manufacture, reproduction, or use for profit of the character or name "Woodsy Owl" or the associated slogan, "Give a Hoot, Don't Pollute."

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 711a as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, mr both.

18 U.S.C. App. 712

18 U.S.C. 712, which is reenacted as 18 U.S.C. App. 712 by section 201(a)(1) of the bill, relates to the misuse of names or insignias by collection agencies or private detective agencies to convey a false impression of connection with a federal agency.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 712 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 215(f) of the bill amends section 712 to make it an offense to convey the false impression, in the course of collecting one's own debts, as well as debts of someone else, that the offender is connected with a federal agency. The amendment is designed to overturn the holding in *United States* v. *Boneparth*, 456 F.2d 497 (2d Cir. 1972). See Hearings, p. 1559.

18 U.S.C. App. 713

18 U.S.C. 713, which is reenacted as 18 U.S.C. App. 713 by section 201(a)(1) of the bill, prohibits the unauthorized use of a likeness of the great seal of the United States, or the seal of the President or Vice President to convey the false impression of sponsorship or approval of the United States, and the unauthorized manufacture or sale of the seal of the President or Vice-President.

Section 203(s) of the bill amends the sentencing provisions in sections 713 (a) and (b) to conform to the Code, designating a violation of either as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

U.S.C. App. 714

18 U.S.C. 714, which is reenacted as 18 U.S.C. App. 714 by section 201(a)(1) of the bill, prohibits the unauthorized use of the name of character of "Johnny Horizon."

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 713 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 215(g)(1) of the bill conforms a cross-reference in section 714 to current statutory terminology. Section 215(g)(2) of the bill clarifies a reference to the "date of enactment of this Act" by substituting "September 25, 1970," the actual date of enactment.

18 U.S.C. App. 715

18 U.S.C. 715, which is reenacted as 18 U.S.C. App. 715 by section 201(a)(1) of the bill, prohibits the unauthorized manufacture or use of any likeness to "The Golden Eagle Insignia."

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 715 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

Section 215(h) of the bill clarifies a reference in section 715 to the "date of enactment of this Act" by substituting the actual date of the enactment.

18 U.S.C. App. 756

18 U.S.C. 756, which is reenacted as 18 U.S.C. App. 756 by section 201(a)(1) of the bill, prohibits anyone from aiding or enticing a person belonging to the armed forces of a belligerent nation or faction who is interned in the United States in accordance with the law of nations to escape or attempt to escape from the jurisdiction of the United States or from the limits of prescribed internment.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 756 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 216 of the bill amends section 756 to use terminology used in title 18 by deleting "nation" each place it appears and substituting "power". See subchapter A (Offenses Involving Foreign Relations) of chapter 12 of title 18.

18 U.S.C. App. 795

18 U.S.C. 795, which is reenacted as 18 U.S.C. App. 795 by section 201(a)(1) of the bill, prohibits unauthorized photographing or drawing of certain defense installations.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 795 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 796

18 U.S.C. 796, which is reenacted as 18 U.S.C. App. 796 by section 201(a)(1) of the bill, prohibits the use of aircraft to facilitate any violation of section 795 of this title.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 796 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 797

18 U.S.C. 797, which is reenacted as 18 U.S.C. App. 797 by section 201(a)(1) of the bill, prohibits the unauthorized publication or sale of photographs or drawings of certain defense installations.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 797 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 799

18 U.S.C. 799, which is reenacted as 18 U.S.C. App. 799 by section 201(a)(1) of the bill, prohibits the willful violation of any regulation or rule promulgated by the National Aeronautics and Space Administration for the protection or security of any of its property.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 799 by deleting "willfully" and substituting "knowingly".

Section 203(p) of the bill conforms the sentencing provision to the Code, designating a violation of section 799 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

Section 217 of the bill deletes the attempt and conspiracy language in section 799, as covered in sections 1001 (Criminal Attempt) and 1002 (Criminal Conspiracy) of title 18.

18 U.S.C. App. 836

18 U.S.C. 836, which is reenacted as 18 U.S.C. App. 836 by section 201(a)(1) of the bill, prohibits the transportation of fireworks into any State which prohibits their use or sale.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 836 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 218 of the bill deletes attempt language an section 836 as covered an section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 911

18 U.S.C. 911, which is reenacted as 18 U.S.C. App. 911 by section 201(a)(1) of the bill, prohibits anyone from falsely representing himself to be a citizen of the United States.

In conformity with the culpability standards in the Code, section 202(a) of the bill deletes "willfully" and substitutes "knowingly."

Section 203(h) of the bill amends the sentence by designating a violation of section 911 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than three years, or both. More serious offenses are covered in sections 1211 (Unlawfully Entering the United States as an Alien), 1215 (Fraudulently Acquiring or Improperly Using Evidence of Citizenship), and 1216 (Fraudulently Acquiring or Improperly Using a Passport) of title 18.

18 U.S.C. App. 916

18 U.S.C. 916, which is reenacted as 18 U.S.C. App. 916 by section 201(a)(1) of the bill, prohibits a person from falsely, and with intent to defraud, representing himself as a member of representative of the 4–H clubs.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 916 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $300, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 917

18 U.S.C. 917, which is reenacted as 18 U.S.C. App. 917 by section 201(a)(1) of the bill, prohibits false or fraudulent personation as a member of, or agent for, the American National Red Cross for the purpose of receiving money or material.

Section 203(n) of the bill conforms the sentencing provisions of the Code, designating a violation of section 917 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 955

18 U.S.C. 955, which is reenacted as 18 U.S.C. App. 955 by section 201(a)(1) of the bill, prohibits anyone in the United States from undertaking certain financial transactions with or on behalf of foreign governments.

Section 203(f) of the bill amends the sentence applicable to a violation, designating a violation of section 955 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000 or a term of imprisonment of not more than five years, or both.

18 U.S.C. App. 961

18 U.S.C. 961, which is reenacted as 18 U.S.C. App. 961 by section 201(a)(1) of the bill, prohibits anyone within the United States from strengthening an armed vessel which is in the service of any foreign power that is at war with a foreign power with which the United States is at peace.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 961 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 219(a) of the bill modernizes section 961, adding "or aircraft" after "vessel" each place it appears. This amendment is consistent with the coverage of section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

Sections 219 (b) and (c) of the bill also modernize the section by deleting the references to foreign princes, states, colonies, districts, or people and substituting "foreign power".

18 U.S.C. App. 962

18 U.S.C. 962, which is reenacted as 18 U.S.C. App. 962 by section 201(a)(1) of the bill, prohibits anyone, within the United States, from arming a vessel with the intent than it be used against a friendly nation.

Section 203(i) of the bill amends the sentence applicable to the offense by designating a violation of section 962 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than three years, or both.

Section 219(a) of the bill modernizes section 902 by adding "or aircraft" after "vessel" each place it appears. This amendment is consistent with the coverage of section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

Sections 219(b), (d)(2), and (d)(3) of the bill also modernize section 962 by deleting the references to foreign princes, states, colonies, districts, and people and substituting "foreign power."

Section 219(d)(1) of the bill deletes the attempt language in section 962 because attempts to violate the section are covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 963

18 U.S.C. 963, which is reenacted as 18 U.S.C. App. 963 by section 201(a)(1) of the bill, provides for the detention, during a war in which the United States is a neutral nation, of any armed vessel which might be used against any foreign nation with which the United States is at peace.

Section 205 of the bill repeals section 963(b), which prohibits taking a detained vessel out of the United States, because the offense is covered in section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18. It also deletes the forfeiture language in section 963(b) as covered in section 4001 (Civil Forfeiture of Property) of title 18.

Section 219(a) of the bill modernizes section 963 by adding "or aircraft" after "vessel" each place it appears. This amendment is consistent with the coverage of section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

Sections 219(b) and (e) also modernize section 693 by deleting the various references to foreign princes, states, colonies, districts people, or nations and substituting "foreign power," or "power".

18 U.S.C. App. 965

18 U.S.C. 965, which is reenacted as 18 U.S.C. App. 965 by section 201(a)(1) of the bill, requires that during a war in which the United States is a neutral nation verified statements regarding transshipment of cargo be submitted for every vessel prior to its departure from port.

Section 205 of the bill repeals the first and second paragraphs of section 965(b), which make it an offense to take, or authorize the taking of, a vessel from port in violation of the section and provide for forfeiture of the vessel and its property if an offense is committed, because these provisions are covered in sections 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) and 4001 (Civil Forfeiture of Property) of title 18.

Section 219(f) of the bill amends section 965(a) by deleting the reference to 46 U.S.C. 92 because that section was itself repealed by section 3 of Public Law 87-826. Section 219(g) of the bill modernizes the language of section 965(a) by substituting "appropriate customs officer" for "collector of customs" as the officer to whom the required statements must be delivered.

18 U.S.C. App. 966

18 U.S.C. 966, which is reenacted as 18 U.S.C. App. 966 by section 201(a)(1) of the bill, permits customs officials to refuse to clear a vessel for departure if there is reason to believe false statements under section 965 have been made or that the vessel is not entitled to clearance.

Section 205 of the bill repeals section 966(b), which makes it an offense to take, or authorize the taking of, a vessel out of port in violation of the section, and provides for forfeiture of the vessel and its property if an offense is committed, because these provisions are covered in sections 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) and 4001 (Civil Forfeiture of Property) of title 18.

Section 219(g) of the bill modernizes the language of section 966(a) by substituting "appropriate customs officer" for "collector of customs" as the officer authorized to refuse clearance.

18 U.S.C. App. 967

18 U.S.C. 967, which is reenacted as 18 U.S.C. App. 967 by section 201(a)(1) of the bill, provides that, during a war in which the United States is a neutral nation, the President or his authorized representative may withhold clearance from a vessel, or forbid departure of a vessel not required to obtain clearance, if there is reasonable cause to believe that the vessel is about to carry supplies or

information to a vessel of a belligerent nation in violation of the international obligations of the United States.

Section 205 of the bill repeals section 967(b), which prohibits the taking, or authorizing of the taking, of the vessel out of port and provides for forfeiture of the vessel and its property if an offense is committed, because these provisions are covered in sections 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) and 4001 (Civil Forfeiture of Property) of title 18.

Section 219(a) of the bill modernizes section 967 by adding "or aircraft" after "vessel" each place it appears. This amendment is consistent with the coverage of section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

Section 219(h) of the bill amends the section by substituting "belligerent foreign power" for "foreign belligerent nation" to conform with terminology used in subchapter A (Offenses Involving Foreign Relations) of chapter 12 of title 18.

18 U.S.C. App. 970

18 U.S.C. 970, which is reenacted as 18 U.S.C. App. 970 by section 201(a)(1) of the bill, makes it an offense (1) in subsection (a) to damage or destroy property in the United States that belongs to, or is used or occupied by, a foreign government, international organization, or official guest, or (2) in subsection (b) willfully with intent to intimidate, threaten, or harrass, to trespass in, or refuse to leave, premises or a building in the United States that is used or occupied for official business or for diplomatic, consular, or residential purposes by a foreign government, an international organization, a foreign official, or an official guest.

Section 205 of the bill repeals subsection (a) of section 970 as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18, with jurisdiction over these offenses under section 1701(c)(3) (Arson). Subsection (b) of section 970 is retained, although it overlaps to some extent the provisions of sections 1616 (Communicating a Threat), 1712 (Criminal Entry), and 1713 (Criminal Trespass) of title 18. Because of the importance of assuring full coverage of the law to protect the persons and property of foreign officials, the Committee has concluded that it should leave section 970(b) in place for those situations in which it provides coverage where none is provided in title 18 and for those situations in which it provides a higher penalty for an offense covered both in section 970(b) and in title 18.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 970(b) by deleting "willfully" each place it appears and substituting "knowingly".

Section 203(s) of the bill conforms the sentencing provision in section 970(b) to the Code, designating a violation of the section as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

Section 219(i) of the bill conforms section 970(c), which prescribes definitions of terms for use in the section, by referring by cross-reference to the definitions in section 111 (General Definitions) of title 18 for the terms "foreign official", "international organization", and "official guest". It retains the definition in 18 U.S.C. 1116(b) for "foreign government" in order to make clear that the definition applies regardless of recognition of the government by the United States.

18 U.S.C. App. 1009

18 U.S.C. 1009, which is reenacted as 18 U.S.C. App. 1009 by section 201(a)(1) of the bill, prohibits the willful and knowing circulation of false rumors which will have a negative effect on the solvency or financial standing of the Federal Savings and Loan Insurance Corporation.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends section 1009 by deleting "willfully". "Knowingly" is retained as the required degree of culpability.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1009 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1012

18 U.S.C. 1012, which is reenacted as 18 U.S.C. App. 1012 by section 201(a)(1) of the bill, makes it an offense: in the first paragraph, to make, with intent to defraud, false entries in books of the Department of Housing and Urban Development and false reports or statements to the Department; in the second paragraph, to receive any compensation, rebate, or reward with intent to defraud the Department or unlawfully to defeat its purposes; and in the third paragraph, to influence the Department to acquire property or enter into a contract and willfully fail to disclose an interest the offender has in the property or benefit the offender will receive from the property.

Section 205 of the bill repeals the first paragraph of section 1012 because it is covered in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18. Section 205 of the bill also repeals the second paragraph of section 1012, which is covered by section 1301 (Obstructing a Government Function by Draud) of title 18 and eight be covered, depending on the facts of the case, by section 1351 (Bribery), 1352 (Graft), or 1751 (Commercial Bribery) of title 18.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 1012 by deleting "willfully" and substituting "knowingly".

Section 203(o) of the bill conforms the sentencing provision to the Code, designating a violation of section 1012 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 220 of the bill contains a technical amendment of section 1012 that deletes "such Department" and substitutes "the Department of Housing and Urban Developmemt" and that is necessitated by the repeal of the section's first two paragraphs.

18 U.S.C. App. 1081

18 U.S.C. 1081, which is reenacted as 18 U.S.C. App. 1081 by section 201(a)(1) of the bill, provides definitions for use in sections 1083 and 1084 relating to gambling.

Section 205 of the bill repeals the last paragraph of section 1081, which defines the term "wire communication facility", since that term is used only in 18 U.S.C. 1084(a) and (b), which are repealed by section 205 of the bill.

18 U.S.C. App. 1083

18 U.S.C. 1083, which is reenacted as 18 U.S.C. App. 1083 by section 201(a)(1) of the bill, provides civil penalties for operating a vessel to transport people between a point within the United States and a gambling ship outside the jurisdiction of any State. There are no amendments to this section.

18 U.S.C. App. 1084

18 U.S.C. 1084, which is reenacted as 18 U.S.C. App. 1084 by section 201(a)(1) of the bill, makes it an offense for a person engaged in the business of betting or wagering to use a wire communication facility in interstate or foreign commerce to transmit gambling information. Subsection (d) requires a common carrier under Federal Communications Commission jurisdiction to discontinue or refuse to provide service to a customer if it is informed that the facility is or will be used for gambling purposes.

Section 205 of the bill repeals sections 1084(a) and (b) as covered in section 1841 (Engaging in a Gambling Business) of title 18. Section 205 repeals section 1084(c) as covered in section 206 (Concurrent Federal Jurisdiction Generally Not Preemptive).

18 U.S.C. App. 1154

18 U.S.C. 1154, which is reenacted as 18 U.S.C. App. 1154 by section 201(a)(1) of the bill, relates to intoxicants in Indian country.

Section 221(a)(1) rewrites section 1154(a) to preserve the offense of introducing liquor into Indian country except in accord with an ordinance adopted by the tribe under section 1161. Other Federal laws on liquor in Indian country have not been carried forward by this bill.

Section 205 of the bill repeals section 1154(b) as obsolete in light of the authority of the tribes to regulate liquor in Indian country.

Section 202(e) of the bill amends section 1154(a) by adding a requirement that an offense be committed "knowingly".

Section 203(r) of the bill designates an offense under section 1154 (a) as a Class B misdemeanor, rather providing that a first offender is subject to a fine of not more than $500, or a term of imprisonment of not more than one year, or both, and an offender convicted of a subsequent offense is subject to a fine of not more than $2,000, or a term of imprisonment of not more than five years, or both. The Committee believes that these penalties in current law are much too high for the severity of the offense. In addition, the six-month limitation is consistent with the jurisdiction of the Indian tribal courts under 25 U.S.C. 1302(7).

Section 221(a)(2) of the bill amends section 1154(a)(2) to delete the reference to extension of Indian liquor laws to certain lands by treaty or statute as unnecessary in light of the fact that section 1154(a) replaces the Indian liquor laws with a single provision recognizing the authority of the tribes to regulate liquor in Indian country and providing Federal penalties for violation of those ordinances.

18 U.S.C. App. 1158

18 U.S.C. 1158, which is reenacted as 18 U.S.C. App. 1158 by section 201(a)(1) of the bill, prohibits the counterfeiting or unauthorized use of an Indian Arts and Crafts Board trademark, and the making of a false statement to obtain the use of such a trademark.

In conformity with the culpability standards in the Code, section 202(h) of the bill amends section 1158 by deleting "willfully, and corruptly." The term "knowingly" is retained as denoting the required degree of culpability.

Section 203(t) of the bill conforms the sentencing provision to the Code, designating a violation os section 1158 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

Section 205 of the bill repeals the second paragraph of section 1158, which prohibits making false statements for the purpose of obtaining an Indian Arts and Crafts Board trademark, as covered in section 1343 (Making a False Statement) of title 18.

18 U.S.C. App. 1159

18 U.S.C. 1159, which is reenacted as 18 U.S.C. App. 1159 by section 201(a)(1) of the bill, prohibits the misrepresentation as Indian products of goods for sale.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 1159 by deleting "willfully" and substituting "knowingly".

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 1159 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 1161

18 U.S.C. 1161, which is reenacted as 18 U.S.C. App. 1161 by section 201(a)(1) of the bill, defines the places in which Indian liquor laws apply.

Section 221(b) of the bill rewrites section 1161, without substantive change, to delete references to repealed sections of title 18, to refer by cross-reference to the definition of "Indian country" in section 161 of the Criminal Code Reform Act of 1981 (which is derived from current 18 U.S.C. 1151), and to specifically state the authority that each Andian tribe has by implication under current section 1161 to regulate liquor dispensing, possession, and use in the Indian country under its jurisdiction.

18 U.S.C. App. 1164

18 U.S.C. 1164, which is reenacted as 18 U.S.C. App. 1164 by section 201(a)(1) of the bill, prohibits the willful destruction, defacing,

or removal from Indian country of a boundary sign or sign warning that hunting, trapping, or fishing is prohibited.

In comformity with the culpability standards in the Code, section 202(a) of the bill amends section 1164 by deleting "willfully" and substituting "knowingly".

Section 204(b) of the bill conforms the sentencing provision to the Code, designating a violation of section 1164 an offense under section 1703 (Property Destruction) of title 18. There is jurisdiction over the offense under section 1701(c)(1) of title 18 because Indian country is within the special jurisdiction of the United States, and jurisdiction under section 1701(c)(2) if the sign is owned by the United States or under its care, custody, or control.

Section 221(c) of the bill conforms a cross-reference to the Code by deleting section "1151 of this title" and substituting section "161 of the Criminal Code Reform Act of 1981", the provision that defines the term "Indian country".

18 U.S.C. App. 1165

18 U.S.C. 1165, which is reenacted as 18 U.S.C. App. 1165 by section 201(a)(1) of the bill, prohibits willful and knowing hunting, trapping, or fishing on Indian land without authority.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends section 1165 by deleting "willfully" and retaining "knowingly" as the required degree of culpability.

Section 203(v) of the bill amends the sentence to designate a violation of section 1165 as a Class B misdemeanor, with a maximum term of imprisonment of six months, rather than as an offense subject to a fine of not more than $200 or a term of imprisonment of not more than 90 days, or both.

Section 221(d) of the bill amends section 1165 to provide, in effect, that a person who otherwise could be charged under section 1713 (Criminal Trespass) of title 18 and under section 1165 of title 18 Appendix should be prosecuted and sentenced under section 1165. This will permit the higher penalty applicable under section 1165 to apply to the offender. Compare *United States* v. *Pollman,* 364 F. Supp. 995 (D. Mont. 1973).

18 U.S.C. App. 1201

Section 201(b)(1) reenacts, without amendment, section 1201 of the Organized Crime Control and Safe Streets Act of 1968 (currently placed in section 1201 of title 18 Appendix but not codified to that title as positive law) as 18 U.S.C. App. 1201. Section 1201 contains congressional findings and declarations that receipt, possession, or transportation of firearms by the categories of persons covered by sections 1201 through 1203 poses a burden on commerce or a threat to commerce, a threat to the safety of the President and Vice-President, an impediment to the exercise of first amendment rights, and a threat to the continued and effective operation of federal and State government.

18 U.S.C. App. 1202

Section 201(b)(1) reenacts section 1202 of the Organized Crime Control and Safe Streets Act of 1968 (currently placed in section 1202 of title 18 Appendix but not codified to that title as positive law) as 18 U.S.C. App. 1202. Section 1202 makes it an offense for a person in certain categories or a person working for a person in one of these categories to receive, possess, or transport "in commerce or affecting commerce" a firearm.

Section 204(c) amends sections 1202 (a) and (b) to specify that a violation of those provisions is an unlawful act that is an offense described in section 1822 (Firearms Offenses) of title 18. This amendment has the effect of increasing the maximum two-year term of imprisonment applicable under current law to six years, since section 1822(c)(2) grades an offense under 18 U.S.C. App. 1202 as a Class D felony. This is consistent with the penalty for the similar offenses described in 18 U.S.C. App. 922 (g) and (h), as redesignated by section 101 of the bill, as reported.

Section 222(b) amends sections 1202 (a) and (b) to add as a category of persons who may not receive, possess, or transport firearms those who are unlawful users of, or addicted to, marihuana or a depressant or stimulant or narcotic drug, or who are employed by such a person. This amendment makes the coverage of the provision identical to the coverage of 18 U.S.C. App. 922 (d), (g), and (h).

Section 222(c) of the bill amends sections 1202 (a) and (b) by deleting "in commerce or affecting commerce" in order to avoid the problems presented in *United States* v. *Bass,* 404 U.S. 336 (1971). See the discussion of section 1822 of title 18.

18 U.S.C. App. 1203

Section 201(b)(1) reenacts, without amendment, section 1203 of the Organized Crime Control and Safe Streets Act of 1968 (currently placed in section 1203 of title 18 Appendix but not codified to that title as positive law) as 18 U.S.C. App. 1203. The section exempts from coverage of sections 1201 through 1203 a prisoner entrusted with a firearm because of law enforcement authority and a person pardoned for his offense who is expressly authorized by the pardoning authority to receive, possess, or transport a firearm.

18 U.S.C. App. 1261

18 U.S.C. 1261, which is reenacted as 18 U.S.C. App. 1261 by section 201(a)(1) of the bill, describes the scope of and authority for enforcement and for prescribing regulations for liquor traffic.

Section 223(a)(1) of the bill conforms the section to current regulatory authority by deleting "Commissioner of Internal Revenue" and substituting "Director, Bureau of Alcohol, Tobacco, and Firearms". Section 223(a)(2) of the bill amends section 1261 to conform to section 202 (General Jurisdiction of the United States) of title 18.

18 U.S.C. App. 1262

18 U.S.C. 1262, which is reenacted as 18 U.S.C. App. 1262 by section 201(a)(1) of the bill, prohibits the transportation of liquor into any state which prohibits its sale.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1262 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 223(b) of the bill deletes references to attempting or assisting in an offense as covered in section 1001 (Criminal Attempt) and chapter 4 (Complicity) of title 18.

18 U.S.C. App. 1263

18 U.S.C. 1263, which is reenacted as 18 U.S.C. App. 1263 by section 201(a)(1) of the bill, requires certain documents to accompany shipping packages of liquor.

Section 203(n) of the bill conforms the sentencing provision to the Aode, designating a violation of section 1263 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 223(c) of the bill amends section 1263 by modernizing the language describing the liquor to which the section applies.

18 U.S.C. App. 1264

18 U.S.C. 1264, which is reenacted as 18 U.S.C. App. 1264 by section 201(a)(1) of the bill, prohibits any officer or employee of a common carrier from delivering liquor to anyone other than the bona fide consignee except on written order of the consignee.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1264 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 223(c) of the bill amends existing section 1264 by modernizing the language describing the liquor to which the section applies.

18 U.S.C. App. 1265

18 U.S.C. 1265, which is reenacted as 18 U.S.C. App. 1265 by section 201(a)(1) of the bill, prohibits any person from acting as the agent of the buyer or seller of liquor, by collecting C.O.D. charges or otherwise, in a state which prohibits the delivery or sale of such liquor.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1265 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

Section 223(c) of the bill amends section 1265 by modernizing the language describing the liquor to which the section applies. Section 223(d) of the bill deletes the reference to "railroad or express company, or other common carrier which," as unnecessary.

18 U.S.C. App. 1301

18 U.S.C. 1301, which is reenacted as 18 U.S.C. App. 1301 by section 201(a)(1) of the bill, prohibits the importation or transportation in interstate commerce of lottery tickets.

Section 203(j) of the bill amends the sentence by designating a violation of section 1301 as a Class A misdemeanor, subject to a maximum term of imprisonment of one year, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than two years, or both. More serious gambling offenses are covered in section 1841 (Engaging in a Gambling Business) of title 18.

18 U.S.C. App. 1302

18 U.S.C. 1302, which is reenacted as 18 U.S.C. App. 1302 by section 201(a)(1) of the bill, prohibits mailing lottery tickets or related matter.

Section 203(b) of the bill amends the sentence by designating a first violation of section 1302 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than two years, or both, and designates any subsequent violation as a Class E felony, rather than as an offense subject to a term of imprisonment of not more than five years.

Section 224(a) of the bill conforms section 1302 to the Code by deleting the reference to 18 U.S.C. 1953 (Interstate Transportation of Wagering Paraphernalia) whose provisions are carried forward in section 1841 (Engaging in a Gambling Business) of title 18.

18 U.S.C. App. 1303

18 U.S.C. 1303, which is reenacted as 18 U.S.C. App. 1303 by section 201 (a)(1) of the bill, prohibits any employee of the Postal Service from participating in any lottery scheme.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1303 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $100, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1304

18 U.S.C. 1304, which is reenacted as 18 U.S.C. App. 1304 by section 201(a)(1) of the bill, prohibits any radio broadcast of advertisements or other information concerning any lottery, gift enterprise, or similar scheme.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1304 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1305

18 U.S.C. 1305, which is reenacted without amendment as 18 U.S.C. App. 1305 by section 201(a)(1) of the bill, exempts nonprofit fishing contests from the provisions of chapter 61 of title 18 Appendix.

18 U.S.C. App. 1306

18 U.S.C. 1306, which is reenacted as 18 U.S.C. App. 1306 by section 201(a)(1) of the bill, contains the penalty provision applicable to several statutes that prohibit participation in lottery schemes by financial institutions.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1306 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1307

18 U.S.C. 1307, which is reenacted as 18 U.S.C. App. 1307 by section 201(a)(1) of the bill, makes sections 1301 through 1304 inapplicable to advertising and information in specified circumstances concerning lotteries conducted by a State according to State law.

Section 224(b) of the bill amends section 1307 to permit in specified circumstances the advertising or transmission of information pertaining to lotteries conducted by a charitable or nonprofit organization in accord with State and local law. This amendment was adopted on the floor of the Senate during consideration of S. 1437 in the 95th Congress. Its purpose is to permit the promotion of certain charitable and non-profit lotteries, such as church bingos and school fundraising events. (124 Cong. Rec. S522, January 26, 1978).

18 U.S.C. App. 1385

18 U.S.C. 1385, which is reenacted as 18 U.S.C. App. 1385 by section 201(a)(1) of the bill, prohibits the use as a posse comitatus of any part of the Army or Air Force.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 1385 by deleting "willfully" and substituting "knowingly" as the required degree of culpability.

Section 203(j) of the bill amends the sentence by designating a violation of section 1385 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both.

Section 225 of the bill amends section 1385 to make clear that the section is not to be construed to affect the law enforcement functions of the Coast Guard. The amendment is necessary because, under 14 U.S.C. 3, the Coast Guard operates, upon declaration of war or direction of the President, as a service in the Navy, rather than as part of the Department of Transportation.

18 U.S.C. App. 1427

18 U.S.C. 1427, which is reenacted as 18 U.S.C. App. 1427 by section 201(a)(1) of the bill, prohibits the unlawful sale or disposition of naturalization or citizenship papers.

Section 202(i) of the bill amends section 1427 to add a requirement that the conduct prohibited by section 1427 be committed "knowingly" to be an offense.

Section 203(f) of the bill amends the sentence by designating a violation of section 1427 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both. More serious immigration and naturalization offenses are described in subchapter B (Offenses Involving Immigration, Naturalization, and Passports) of chapter 12 of title 18.

18 U.S.C. App. 1428

18 U.S.C. 1428, which is reenacted as 18 U.S.C. App. 1428 by section 201(a)(1) of the bill, requires the surrender of canceled naturalization certificates.

Section 203(f) of the bill amends the sentence by designating a violation of section 1428 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both. More serious immigration and naturalization offenses are covered in subchapter B (Offenses Involving Immigration, Naturalization, and Passports) of chapter 12 of title 18.

18 U.S.C. App. 1464

18 U.S.C. 1464, which is reenacted as 18 U.S.C. App. 1464 by section 201(a)(1) of the bill, prohibits any radio broadcast of any obscene, indecent, or profane language.

Section 203(j) of the bill amends the sentence by designating a violation of section 1464 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than two years, or both. More serious obscenity offenses are covered in section 1842 (Disseminating Obscene Material) of title 18.

18 U.S.C. App. 1543

18 U.S.C. 1543, which is reenacted as 18 U.S.C. App. 1543 by section 201(a)(1) of the bill, prohibits in the first paragraph the forging or counterfeiting of a passport and in the second paragraph the willful and knowing use or attempted use of a forged, counterfeited, or void passport.

Section 205 of the bill repeals the first paragraph as covered in sections 1741 (Counterfeiting) and 1742 (Forgery) of title 18. A passport is a "written instrument" of the United States as that term is defined in section 1747(i) (Definitions for Subchapter E) of title 18.

Section 226(a) of the bill deletes the reference in the second paragraph to attempted use of a forged, counterfeited, or void passport because the offense is covered in section 1001 (Criminal Attempt) of title 18. Section 226(a) of the bill also eliminates the language in the second paragraph relating to a "false, forged, counterfeited, mutilated or altered passport or instrument purporting to be a passport" because that offense is covered in section 1216 (Fraudulently Acquiring or Improperly Using a Passport) of title 18.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends section 1543 by deleting "willfully". Knowingly" is retained as the required degree of culpability.

Section 203(g) of the bill amends the sentence by designating a violation of section 1543 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $2,000, or a term of imprisonment of not more than five years, or both. The more serious offenses described in this section in current law are those that will now be covered by sections 1216, 1741, and 1742 of title 18.

18 U.S.C. App. 1544

18 U.S.C. 1544, which is reenacted as 18 U.S.C. App. 1544 by section 201(a)(1) of the bill, prohibits: in the first paragraph, the will-

ful and knowing use or attempted use of the passport of another; in the second paragraph, the willful and knowing use or attempted use of a passport in violation of conditions or restrictions contained in it or rules regulating its issuance; and, in the third paragraph, the willful and knowing furnishing of a passport for the use of a person other than the one in whose name it is issued. Section 205 repeals the first and third paragraphs as covered in sections 1216 (Fraudulently Acquiring or Improperly Using a Passport) and 1001 (Criminal Attempt) of title 18.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends sections 1544 by deleting "willfully". "Knowingly" is retained as the required degree of culpability.

Section 203(g) of the bill amends the sentence by designating a violation of section 1544 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $2,000, or a term of imprisonment of not more than five years, or both. The more serious offenses described in this section in current law are those that will now be covered in section 1216 of title 18.

Section 226(b) of the bill deletes the attempt language in section 1154 as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1545

18 U.S.C. 1545, which is reenacted as 18 U.S.C. App. 1545 by section 201(a)(1) of the bill, prohibits the violation of any safe conduct or passport duly obtained and issued under authority of the United States.

Section 203(h) of the bill amends the sentence for an offense under section 1545 by designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $2,000, or a term of imprisonment of not more than three years, or both.

18 U.S.C. App. 1692

18 U.S.C. 1692, which is reenacted as 18 U.S.C. App. 1692 by section 201(a)(1) of the bill, provides that any foreign mail, while being transported across territory of the United States under authority of law, is mail of the United States. The bill makes no changes in the substance of section 1692.

18 U.S.C. App. 1693

18 U.S.C. 1693, which is reenacted as 18 U.S.C. App. 1693 by section 201(a)(1) of the bill, prohibits any carrying, collection, or receipt of mail contrary to law.

Section 203(x) of the bill conforms the sentencing provision to the Code, designating a violation of section 1693 as a Class C misdemeanor, rather than as an offense subject to a fine of not more than $50, or a term of imprisonment of not more than thirty days, or both.

18 U.S.C. App. 1694

18 U.S.C. 1694, which is reenacted as 18 U.S.C. App. 1694 by section 201(a)(1) of the bill, prohibits anyone making regular trips over post routes from carrying letters or packets which would otherwise

be mail, except such as relate to some part of the cargo carried or to the current business of the carrier.

Section 203(dd) of the bill conforms the sentencing provision to the Code, designating a violation of section 1694 as an infraction, with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $50. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for violations of section 1694.

18 U.S.C. App. 1695

18 U.S.C. 1695, which is reenacted as 18 U.S.C. App. 1695 by section 201(a)(1) of the bill, prohibits the carriage of mail on board any vessel which carries the mail otherwise than in such mail.

Section 203(x) of the bill conforms the sentencing provision to the Code, designating a violation of section 1695 as a Class C misdemeanor, rather than as an offense subject to a fine of not more than $50, or a term of imprisonment of not more than thirty days, or both.

18 U.S.C. App. 1696

18 U.S.C. 1696, which is reenacted as 18 U.S.C. App. 1696 by section 201(a)(1) of the bill, prohibits anyone from establishing or providing for any private express for the conveyance of letters or packets, and prohibits anyone from transmitting letters or packets by any such private express.

Section 203(s) of the bill conforms the sentencing provision in existing section 1696(a) to the Code, designating a violation of the subsection as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both. Section 203(aa) of the bill conforms the sentencing provision in section 1696(b) to the Code, designating a violation of the subsection as an infraction, but with the provision that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $50. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for violations of section 1696(b).

18 U.S.C. App. 1697

18 U.S.C. 1697, which is reenacted as 18 U.S.C. App. 1697 by section 201(a)(1) of the bill, prohibits anyone in control of any conveyance from knowingly transporting any person who is carrying letters or packets as a private express contrary to law.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1697 as an infraction, but with the provision that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $150. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law.

18 U.S.C. App. 1698

18 U.S.C. 1698, which is reenacted as 18 U.S.C. App. 1698 by section 201(a)(1) of the bill, makes it an offense for a person in charge of a vessel carrying mail between ports or places in the United States to fail to make prompt delivery of that mail to the appropriate post office.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1698 as an infraction, but with the provision that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $150. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for violations of section 1698.

Section 205 of the bill repeals the last sentence of section 1698, which prescribes remuneration of two cents for each letter or packet delivered, as obsolete.

18 U.S.C. App. 1699

18 U.S.C. 1699, which is reenacted as 18 U.S.C. App. 1699 by section 201(a)(1) of the bill, prohibits the entry or unloading of any vessel carrying mail until all letters on board are delivered to the nearest post office.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1699 as an infraction, but with the provision that anyone convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $100. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside of title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for violations of section 1699.

18 U.S.C. App. 1700

18 U.S.C. 1700, which is reenacted as 18 U.S.C. App. 1700 by section 201(a)(1) of the bill, prohibits any mail carrier from abandoning or deserting the mail before it has been appropriately delivered.

In conformity with the culpability standards in the Code, section 202(j) of the bill amends section 1700 by deleting "voluntarily" and substituting "intentionally" as the required degree of culpability.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1700 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1703

18 U.S.C. 1703, which is reenacted as 18 U.S.C. App. 1703 by section 201(a)(1) of the bill, prohibits any Postal Service employee, in subsection (a), from destroying, opening, or delaying the mail, and, in subsection (b), from destroying or delaying delivery of a newspaper. Section 205 repeals subsection (a) as covered an sections 1302(a)(2) (Obstructing a Government Function by Physical Anterference), 1524 (Intercepting Correspondence), 1702 (Aggravated Property Destruction), and 1703 (Property Destruction) of title 18.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1703 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $100, or a term of imprisonment of not more than one year, or both.

Subsection (b), relating to delay, detention, and destruction of newspapers, is retained, but amended in several respects by section 227(a) of the bill. First, section 227(a)(1) makes section 1703(b) applicable to mail contractors and their employees as well as to employees of the Postal Service, since mail is frequently delivered under contract by persons who are not employees of the Postal Service. Second, sections 227 (a)(2), (a)(4), and (a)(5) delete references to destruction of newspapers as covered in sections 1702 (Aggravated Property Destruction) and 1703 (Property Destruction) of title 18. Third, section 227(a)(3) expands the coverage of the subsection to include detention or delay of mail as well as newspapers. This amendment carries forward those portions of subsection (a), but at a misdemeanor level that are not continued by sections 1302, 1702, and 1703 of title 18.

18 U.S.C. App. 1704

18 U.S.C. 1704, which is reenacted as 18 U.S.C. App. 1704 by section 201(a)(1) of the bill, prohibits stealing, counterfeiting, or possessing a key suited to a lock adopted by the Postal Service or Post Office Department and in use on any postal bags, boxes, drawers, or other postal receptacles, and prohibits the manufacturer of such locks or keys from delivering them to anyone not authorized by the Postal Service or Post Office Department to receive them.

Section 205 of the bill repeals the first paragraph of section 1704, which prohibits stealing a postal key, because the offense is covered in section 1731 (Theft) of title 18 and graded in section 1731(b)(2) (B)(v) as a Class D felony.

Section 203(d) of the bill amends the sentence applicable to the remaining offenses in section 1704 by designating a violation of section 1704 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than ten years, or both.

Sections 227(b)(1) and (2) of the bill amend the remaining portions of section 1704 in order to make it internally consistent and understandable in light of the repeal of the first paragraph of the section by section 205 of the bill.

18 U.S.C. App. 1705

18 U.S.C. 1705, which is reenacted as 18 U.S.C. App. 1705 by section 201(a)(1) of the bill, prohibits willfully or maliciously injuring or destroying a letter box or other receptacle intended or used for mail, or breaking open such a box or receptacle, or defacing or destroying the mail in such a box or receptacle.

Section 227(c) of the bill deletes the provision relating to the destruction of mail deposited within any mail box because the offense is covered in sections 1702 (Aggravated Property Destruction) and 1703 (Property Destruction) of title 18. Federal jurisdiction of these offenses is created in sections 1702(c)(2) and 1703(c)(2), depending on the value of the mail.

In conformity with the culpability standards in the Code, section 202(k) of the bill amends section 1705 by deleting "willfully or maliciously" and substituting "knowingly" as the required degree of culpability.

Section 203(h) of the bill amends the sentence for a violation of section 1705 by designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than three years.

18 U.S.C. App. 1711

18 U.S.C. 1711, which is reenacted as 18 U.S.C. App. 1711 by section 201(a)(1) of the bill, in the first paragraph, makes it an offense to misappropriate postal funds, and defines, in the second paragraph, the circumstances under which bank transactions in the course of employment are not offenses.

Section 205 of the bill repeals the first paragraph of section 1711 as covered in section 1731 (Theft) of title 18.

Section 227(d) of the bill amends section 1711 to make clear that the provisions delineating permissible appropriations of postal funds are in exception to section 1731 (Theft) of title 18.

18 U.S.C. App. 1712

18 U.S.C. 1712, which is reenacted as 18 U.S.C. App. 1712 by section 201(a)(1) of the bill, makes it an offense, in the first paragraph, for a Postal Service officer or employee to make a false return, statement, or account to an officer of the United States, or a false entry in a record, book, or account required to be kept of post office business, for the purpose of fraudulently increasing compensation, and, in the second paragraph, for a Postal Service officer or employee to induce or attempt to induce a person to deposit mail at the office where the officer or employee is employed, in order to increase the compensation of the office, knowing that the matter is properly mailable at another post office.

Section 205 repeals the first paragraph of section 1712 as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1731 (Theft) of title 18.

Section 203(k) of the bill amends the sentence available for the remaining offense by designating a violation of section 1712 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than two years, or both. The more serious offenses covered in section

1712 in current law are those moved to sections 1301, 1343, and 1731 of title 18.

Sections 227(e)(1), (2), and (4) amend section 1712 to make it internally consistent given the repeal of the first paragraph by section 205 of the bill and to modernize descriptive terms, i.e., "postal facility" instead of "station" and "postal facility" in addition to "post office." Section 227(e)(3) amends the section by deleting the attempt language as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1713

18 U.S.C. 1713, which is reenacted as 18 U.S.C. App. 1713 by section 201(a)(1) of the bill, prohibits a Postal Service officer or employee from issuing a money order without payment.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1713 as an infraction, but with the provision that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $500. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for violations of this section.

Section 227(f) of the bill extends the coverage of section 1713 to any "person authorized by the Postal Service to issue money orders," since Postal Service officers and employees are not the only individuals authorized to sell money orders.

18 U.S.C. App. 1715

18 U.S.C. 1715, which is reenacted as 18 U.S.C. App. 1715 by section 201(a)(1) of the bill, restricts the mailing of concealable firearms. The Supreme Court in *United States* v. *Powell,* 423 U.S. 87 (1975), upheld the constitutionality of 18 U.S.C. 1715.

Section 203(j) of the bill amends the sentence for a violation of section 1715 by designating a violation of section 1715 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than two years, or both.

18 U.S.C. App. 1716

18 U.S.C. 1716, which is reenacted as 18 U.S.C. App. 1716 by section 201(a)(1) of the bill, restricts the mailing of injurious articles, such as poisonous animals or drugs, intoxicating liquor, and knives.

Section 203(n) of the bill conforms the initial sentencing provision in section 1716(h) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 227(g) of the bill modernizes certain terms which describe liquor in section 1716(f).

Section 205 of the bill repeals the last two paragraphs of subsection (h) of section 1716. The second to last paragraph makes it a 20-year felony to mail anything declared non-mailable by section 1715 "with intent to kill or injure another, or injure the mails or property". The last paragraph of subsection (h) provides an enhanced penalty if a violation of the section results in death. These provisions, in effect, provide Federal jurisdiction over a number of personal injury and property destruction offenses if the mails are used in the offense. Under the Code, offenses such as these are covered by describing the conduct, e.g., murder, and providing jurisdiction if the mails are used in the commission of the offense. Thus, depending upon the circumstances of the offense, an offense now described in the last two paragraphs of section 1716(h) are covered in one or more of the following sections of title 18: section 1601 (Murder), with jurisdiction under section 1601(e)(3), which specifies that there is federal jurisdiction over the offense if "the offense is committed by transmitting a dangerous weapon through the United States mail"; section 1602 (Manslaughter), with jurisdiction described in section 1601(e)(3); section 1603 (Negligent Homicide), with jurisdiction described in section 1601(e)(3); section 1611 (Maiming), with jurisdiction under section 1611(c)(3), which specifies that there is federal jurisdiction over the offense if "the offense is committed by transmitting through the United States mail a dangerous weapon"; section 1612 (Aggravated Battery), with jurisdiction described in section 1611(c)(3); section 1613 (Battery), with jurisdiction described in section 1611(c)(3); section 1701 (Arson); section 1702 (Aggravated Property Destruction); section 1703 (Property Destruction); and, if the offender mails the dangerous weapon "acting with the state of mind otherwise required" for the commission of one of these offenses, section 1001 (Criminal Attempt).

18 U.S.C. App. 1716A

18 U.S.C. 1716A, which is reenacted as 18 U.S.C. App. 1716A by section 201(a)(1) of the bill, prohibits the mailing of motor vehicle master keys.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1716A as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1717

18 U.S.C. 1717, which is reenacted as 18 U.S.C. App. 1717 by section 201(a)(1) of the bill, prohibits the mailing of articles whose mailing is a violation of certain provisions of title 18 or whose mailing provides federal jurisdiction over an offense under one of those provisions or the mailing of which is involved in an offense under one of those provisions.

Section 203(c) of the bill amends the sentence for a violation of section 1717 by designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than ten years, or both. The title 18 provisions listed in the section describe the more serious felonies that involve the use of the mails.

Section 227(h)(1) of the bill amends section 1717(a) to refer to the Code sections for which mailing as part of the offense or as the jurisdictional element constitutes an offense under section 1717.

Section 227(h)(2) of the bill deletes the attempt language in section 1717(b) as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1723

18 U.S.C. 1723, which is reenacted as 18 U.S.C. App. 1723 by section 201(a)(1) of the bill, prohibits anyone from avoiding postage charges by using a lower class mailing rate.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1723 as an infraction, but with the provision that one convicted of a violation may not be senteced to a term of imprisonment, rather than as an offense subject to a fine of not more than $100. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for a violation of section 1723.

Section 227(i) of the bill amends section 1723 by deleting the language referring to postage prepaid "by stamps affixed" since postage may also be prepaid by other means, such as postage meters.

18 U.S.C. App. 1724

18 U.S.C. 1724, which is reenacted as 18 U.S.C. App. 1724 by section 201(a)(1) of the bill, relates to transportation of mail by vessels between the United States and a foreign port. The bill makes no changes in the section.

18 U.S.C. App. 1725

18 U.S.C. 1725, which is reenacted as 18 U.S.C. App. 1725 by section 201(a)(1) of the bill, prohibits anyone from depositing in a letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail any mailable matter on which no postage has been paid, with the intent to avoid payment of lawful postage.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends section 1725 by deleting "and willfully." "Knowingly" is retained as the required degree of culpability.

Section 203(cc) of the bill conforms the sentencing provision to the Code, designating a violation of section 1725 as an infraction, but with the provision that one so convicted may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine or not more than $300. The provision excluding the possibility of a sentence of imprisonment is constent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 for which no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for imposition on one convicted of violating section 1725.

Section 227(j) of the bill amends section 1725 to specify that the section covers any instance where "the lawful postage has not been paid" rather than where "no postage had been paid" at all.

18 U.S.C. App. 1729

18 U.S.C. 1729, which is reenacted as 18 U.S.C. App. 1729 by section 201(a)(1) of the bill, prohibits anyone without authority from setting up or professing to conduct a post office.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1729 as an infraction, but with the provision that anyone so convicted may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $500. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 for which no term of imprisonment is provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for imposition of one convicted of violating section 1729.

Section 227(k) of the bill amends section 1729 by adding language which broadens the coverage of the section to include not merely an office entitled "post office"; but one bearing any title or words which imply that it is conducted by authority of the Postal Service.

18 U.S.C. App. 1730

18 U.S.C. 1730, which is reenacted as 18 U.S.C. App. 1730 by section 201(a)(1) of the bill, prohibits any unauthorized person from wearing a uniform or badge prescribed by the Postal Service for letter carriers.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 1730 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $100, or a term of imprisonment of not more than six months, or both.

Section 227(l)(1), (2), and (3) of the bill amend section 1730 to prohibit the unauthorized use of the uniform or badges of an employee or agent of the Postal Service, not merely that of a letter carrier.

Section 227(l)(4) of the bill deletes language that precluded theatrical, television, or motion-picture use of Postal Service uniforms if the portrayal tended "to discredit that service". The deleted language is similar to language declared unconstitutional in *Schacht* v. *United States,* 398 U.S. 58 (1970).

18 U.S.C. App. 1731

18 U.S.C. 1731, which is reenacted as 18 U.S.C. App. 1731 by section 201(a)(1) of the bill, prohibits the false labeling of any vehicle as a mail carrier.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 1731 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

Sections 227(m)(1), (2), and (3) of the bill amend section 1731 by substituting more contemporary terminology for descriptions of conveyances such as steamboats and stagecoaches.

Section 227(m)(4) deletes references to suffering or permitting the violation as covered in chapter 4 (Complicity) of title 18.

18 U.S.C. App. 1732

18 U.S.C. 1732, which is reenacted as 18 U.S.C. App. 1732 by section 201(a)(1) of the bill, relates to the procedures for approval by the Postal Service of any bond of a bidder, or sureties in any contract.

In conformity with the culpability standards in the Code, section 202(1) of the bill deletes the "knowingly, or without the exercise of due diligence" and prescribes "reckless" as the required degree of culpability. Under section 303(c)(2) of title 18, a requirement that a "reckless" state of mind be proved is satisfied by proving a "knowing" state of mind.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1732 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both. The additional penalty of dismissal from office and disqualification from holding office is retained, but should be read in conjunction with the provisions of subchapter D (Restrictions on Imposition of Civil Disabilities) of chapter 40 of title 18.

Section 227(n) of the bill amends section 1732 to cover any "contracting officer or other authorized representative of the Postal Service," rather than a postmaster, in accordance with present practice of the Postal Service.

18 U.S.C. App. 1734

18 U.S.C. 1734, which is reenacted as 18 U.S.C. App. 1734 by section 201(a)(1) of the bill, requires that reading matter printed in a publication entered in the mail as second class matter be labeled as an advertisement if the editor or publisher received valuable consideration for printing it.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 1734 as an infraction, but with the provision that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $500. The provision excluding the possibility of imprisonment is consistent with the Committee's decision fot to add a term of amprisonment for an offense described outside title 18 for which no term of imprisonment is provided in current law. The sentences of probation and fine (section 2101 and 2201 of title 18) remain available for a violation of section 1734.

Section 227(o) of the bill clarifies the coverage of section 1734 by substituting "entitled to a periodical publication rate" for "entered as second class mail", consistent with current Postal Service terminology.

18 U.S.C. App. 1735

18 U.S.C. 1735, which is reenacted as 18 U.S.C. 1735 by section 201(a)(1) of the bill, prohibits using the mails for delivery of sexually oriented advertisements in violation of 39 U.S.C. 3010 (Mailing of Sexually Oriented Advertisements).

In conformity with the culpability standards of the Code, section 202(a) of the bill deletes "willfully" each place it appears in section 1735(a)(1) and substitutes "knowingly".

Section 203(a) of the bill amends the sentence for a violation of section 1735(a) by designating a first offense as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both, and by designating a second or subsequent offense committed after a first conviction as a Class E felony, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than ten years, or both. More serious violations would be covered by section 1842 (Disseminating Obscene Material) of title 18.

18 U.S.C. App. 1736

18 U.S.C. 1736, which is reenacted as 18 U.S.C. App. 1736 by section 201(a)(1) of the bill, relates to restrictions on the use of information required to be provided by mailers of sexually oriented advertisements under section 3010 (Mailing of sexually oriented advertisements) of title 39, United States Code. No amendments to the provision are made by the bill.

18 U.S.C. App. 1737

18 U.S.C. 1737, which is reenacted as 18 U.S.C. App. 1737 by section 201(a)(1) of the bill, prohibits the manufacture of sexually related mail matter, intending or knowing that it will be deposited for delivery by mail in violation of sections 3008 (Prohibition of Pandering Advertisments) and 3010 (Mailing of Sexually Oriented Advertisments) of title 39.

Section 203(a) of the bill amends the sentence for a violation of section 1737(a) by designating a first offense as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both, and by designating a second or subsequent violation after a first conviction as a Class E felony, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than ten years, or both. More serious violations would be covered by section 1842 (Disseminating Obscene Material) of title 18.

18 U.S.C. App. 1752

18 U.S.C. 1752, which is reenacted as 18 U.S.C. App. 1752 by section 201(a)(1) of the bill, relates to protecting any temporary residences or offices of the President and his staff.

In conformity with the culpability standards of the Code, section 202(d) of the bill deletes references to "willfully" in section 1752(a)(1) and (a)(3) and retains "knowingly" as the required degree of culpability.

Section 203(u) of the bill conforms the sentencing provision in section 1752(b) of the Aode, designating a violation of the section as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

Section 228(a), (b)(1), and (b)(2) of the bill conform the section to the drafting form of the Code by reducing all appropriate terms to their singular form, e.g., "person" but not "group of persons", "office" instead of "offices". Sections 228(b)(3) and (c) of the bill clarify the scope of section 1752, making it explicit that the section is for the necessary immediate protection of the President and not simply for restricting access to areas the President may at some time frequent. Section 228(d) of the bill deletes the attempt and conspiracy language in the section as covered in sections 1001 (Criminal Attempt) and 1002 (Criminal Conspiracy) of title 18. Section 228(e) of the bill amends the grammar in section 1752(d)(2).

18 U.S.C. App. 1761

18 U.S.C. 1761, which is reenacted as 18 U.S.C. App. 1761 by section 201(a)(1) of the bill, prohibits the knowing transportation in interstate commerce or importation of any goods produced in prisons or by prisoners, other than prisoners on parole or probation.

Section 203(n) of the bill conforms the sentencing provision in section 1761(a) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 229(a)(1) of the bill conforms section 1761 to the Code by expecting from the activities proscribed by the section those undertaken pursuant to section 3822 (Temporary Release of a Prisoner) of title 18, chapter 37 (Bureau or Prisons) or 38 (Federal Prison Industries) of title 28, and any state or local statute that authorizes release of prisoners for purposes of employment. Section 229(a)(2) of the bill conforms the section to section 2303 (Inclusion of a Term of Supervised Release After Imprisonment) of proposed title 18 by adding "or serving a term of supervised release" after "probation". Section 229(a)(3) of the bill amends section 1761(a) to reflect contemporary terminology by deleting "reformatory institution" and substituting "correctional facility".

18 U.S.C. App. 1762

18 U.S.C. 1762, which is reenacted as 18 U.S.C. App. 1762 by section 201(a)(1) of the bill, requires that all packages containing goods produced in prisons, or by prisoners, except those on parole or probation, be plainly marked when transported in interstate or foreign commerce.

Section 203(z) of the bill conforms the sentencing provision in section 1762(b) to the Code, designating a violation of the section as an infraction, but with the provision that one convicted of violating the section may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $1,000. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 if there is no term of imprisonment provided in current law. The sentences of probation and fine (sections 2101 and 2201 of title 18) remain available for imposition for a violation of section 1762.

Section 229(a)(1) of the bill conforms section 1762 to the Code by excepting from the activities proscribed by the section, those undertaken pursuant to section 3822 (Temporary Release of a Prisoner) of title 18, chapter 37 (Bureau of Prisons) or 38 (Federal Prison Industries) of title 28, and any State or local statute that authorizes release of prisoners for purposes of employment. Section 229(a)(2) of the bill conforms the section to section 2303 (Inclusion of a Term of Supervised Release after Imprisonment) of title 18, by adding "or serving a term of supervised release" after "probation". Section 229 (a)(3) of the bill amends section 1762(a) to reflect contemporary terminology by deleting "reformatory institution" and substituting "correctional facility".

18 U.S.C. App. 1821

18 U.S.C. 1821, which is reenacted as 18 U.S.C. App. 1821 by section 201(a)(1) of the bill, prohibits the use of the mails or interstate commerce to transport dentures constructed without the authorization or prescription of a person licensed to practice dentistry

Section 203(*o*) of the bill conforms the sentencing provision to the Code, designating a violation of section 1821 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1856

18 U.S.C. 1856, which is reenacted as 18 U.S.C. App. 1856 by section 201(a)(1) of the bill, prohibits anyone who has started a fire on land controlled by the United States from leaving the fire unattended or allowing it to spread beyond his control.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 1856 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 1858

18 U.S.C. 1858, which is reenacted as 18 U.S.C. App. 1858 by section 201(a)(1) of the bill, prohibits the willful destruction, defacing, or removing of a government survey mark.

In conformity with the culpability standards of the Code, section 202(a) of the bill amends section 1858 by deleting "willfully" each place it appears and substituting "knowingly".

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 1858 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $250, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 1860

18 U.S.C. 1860, which is reenacted as 18 U.S.C. App. 1860 by section 201(a)(1) of the bill, relates to collusive agreements or other interference with bidding for the purchase of land of the United States offered at public sale.

Section 203(*o*) of the bill conforms the sentencing provision to the Code, designating a violation of section 1860 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

Section 230 of the bill deletes the attempt language in section 1860 as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1861

18 U.S.C. 1861, which is reenacted as 18 U.S.C. App. 1861 by section 201(a)(1) of the bill, relates to deception of prospective purchasers of public land of the United States by one hired to locate such land.

In conformity with the culpability standards in the Code, section 202(a) of the Aode amends section 1861 by deleting "willfully" and substituting "knowingly" as the required degree of culpability.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1861 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $300, or a term of imprisonment of not more than one year, or both.

18 U.S.C. 1905

18 U.S.C. 1905, which is reenacted as 18 U.S.C. App. 1905 by section 201(a)(1) of the bill, prohibits an officer or employee of the United States from disclosing information received by him in the course of his employment that concerns trade secrets or business practices, or an income return or information.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1905 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both. The additional penalty of removal from office or employment is retained, but should be read in conjunction with the provisions of subchapter D (Restriction on Imposition of Civil Disabilities) of chapter 40 of title 18.

18 U.S.C. App. 1906

18 U.S.C. 1906, which is reenacted as 18 U.S.C. App. 1906 by section 201(a)(1) of the bill, prohibits a bank examiner or an employee of the General Accounting Office from disclosing without authorization information from a bank examination report.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1906 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1907

18 U.S.C. 1907, which is reenacted as 18 U.S.C. App. 1907 by section 201(a)(1) of the bill, prohibits a farm credit examiner from disclosing, without authorization, information concerning borrowers from certain banks.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1907 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both. The additional penalty of disqualification from office as a farm credit examiner is retained, but should be read in conjunction with the provisions of subchapter D (Restriction on Imposition of Civil Disabilities) of chapter 40 of title 18.

Section 231(a) of the bill variously amends section 1907 to modernize its language and cross-references to accord with the passage of the Farm Credit Act of 1971.

18 U.S.C. App. 1909

18 U.S.C. 1909, which is enacted as 18 U.S.C. App. 1909 by section 201(a)(1) of the bill, prohibits bank examiners from performing any other services, for compensation, for any bank or banking or loan association, or for an officer, director, or employee thereof.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1909 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than one year, or both.

Section 231(b) of the bill amends the section by deleting as obsolete the reference to "National Agricultural Credit Corporations", and by adding, at the suggestion of the Federal Reserve Board, coverage of examiners of the Federal Reserve System.

18 U.S.C. App. 1910

18 U.S.C. 1910, which is reenacted as 18 U.S.C. App. 1910 by section 201(a)(1) of the bill, prohibits nepotism in the appointment of a receiver or trustee by a judge of any court of the United States.

Section 203(g) of the bill, amends the sentence for a violation of the section, designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $10,000, or a term of imprisonment of not more than five years, or both.

18 U.S.C. App. 1911

18 U.S.C. 1911, which is reenacted as 18 U.S.C. App. 1911 by section 201(a)(1) of the bill, prohibits the willful failure by a receiver, trustee, or manager in a cause before a court of the United States to manage property in accord with the laws of the State in which the property is located.

Section 202(m) of the bill deletes the culpability standard in section 1911 that requires "willful" failure to manage property in accord with State law in order to eliminate the meaningless concept of "willfulness" in this context. Section 202(m) instead amends section 1732 by providing that the failure to manage the property "in reckless disregard of" the requirement of State law is an offense.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1911 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $3,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 1913

18 U.S.C. 1913, which is reenacted as 18 U.S.C. App. 1913 by section 201(a)(1) of the bill, prohibits, in the absence of congressional authorization, the use of money appropriated by act of Congress to lobby, directly or indirectly, a member of Congress.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1913 by an officer or employee of the United States as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than one year, or both. The additional penalty of removal from office or employment after notice and hearing is retained, but should be read in conjunction with the provisions of subchapter D (Restriction on Imposition of Civil Disabilities) of chapter 40 of title 18.

Section 231(c) of the bill amends section 1913 by deleting the attempt language as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1915

18 U.S.C. 1915, which is reenacted as 18 U.S.C. App. 1915 by section 201(a)(1) of the bill, prohibits an officer of the United States from making an unauthorized compromise of a claim arising under the customs laws.

Section 203(j) of the bill amends the sentence for a violation of the section by designating a violation of section 1915 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than two years, or both.

Section 231(d) of the bill amends section 1915 by deleting the attempt language as covered in section 1001 (Criminal Attempt) of title 18.

18 U.S.C. App. 1916

18 U.S.C. 1916, which is reenacted as 18 U.S.C. App. 1916 by section 201(a)(1) of the bill, prohibits, in the first paragraph, the employment of an individual in the civil service in an Executive department for services unconnected to the appropriations from which he is paid and, in the second paragraph, the failure to return money from lapsed salaries and unused appropriations to the Treasury of the United States.

Section 205 of the bill repeals the second paragraph because the offense is covered in section 1731 (Theft) of title 18.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1916 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year.

Section 231(e) of the bill amends the remaining provisions of section 1916 in accord with the repeal of paragraph (2).

18 U.S.C. App. 1917

18 U.S.C. 1917, which is reenacted as 18 U.S.C. App. 1917 by section 201(a)(1) of the bill, prohibits a member or employee of the United States Civil Service Commission, or an individual in the public service, from willfully and corruptly interfering with a civil service examination.

Section 202(h) of the bill amends section 1917 by deleting "willfully and corruptly".

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1917 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not less than ten days nor more than one year, or both.

Section 231(f) of the bill amends section 1917(1) to cover violations of regulations of the Postal Service as to competitive examinations. The amendment is added at the suggestion of the Postal Service, and is necessary because the provisions of 5 U.S.C. 1302(a) do not apply to Postal Service examinations. The remainder of section 1917 applies to Postal Service examinations without amendment since those examinations are administered by "an individual in the public service", in the terms of the introductory language to section 1917.

18 U.S.C. App. 1918

18 U.S.C. 1918, which is reenacted as 18 U.S.C. App. 1918 by section 201(a)(1) of the bill, prohibits an employee of the United States from advocating the overthrow of our constitutional form of government, or from asserting the right to strike against the goverment.

Section 203(1) of the bill amends the sentence for a violation of section 1918 by designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year and a day, or both.

18 U.S.C. App. 1922

18 U.S.C. 1922, which is reenacted as 18 U.S.C. App. 1922 by section 201(a)(1) of the bill, prohibits an officer or employee of the United States charged by 5 U.S.C. 8102 with responsibility for making reports concerning federal employees' compensation from failing to file a report, filing a false report, or inducing an injured employee to forego filing a claim for compensation.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 1922 by deleting "willfully" each place it appears and substituting "knowingly" as the required degree of culpability.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 1922 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than one year, or both.

Section 231(g) of the bill amends section 1922 by deleting all references in the section to filing a false report because the offense is covered in section 1343 (Making a False Statement) of title 18.

18 U.S.C. App. 2074

18 U.S.C. 2074, which is reenacted as 18 U.S.C. App. 2074 by section 201(a)(1) of the bill, prohibits anyone from knowingly issuing weather reports falsely represented as having been issued by the government.

Section 203(w) of the bill amends the sentence for violation of section 2074 by designating a violation as a Class C misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than ninety days, or both.

Section 232 of the bill modernizes the section by deleting "Weather Bureau" and substituting "National Weather Service".

18 U.S.C. App. 2075

18 U.S.C. 2075, which is reenacted as 18 U.S.C. App. 2075 by section 201(a)(1) of the bill, prohibits an officer from neglecting or refusing to make a report as required by an Act of Congress or regulation of the Department of Treasury, other than his accounts, within the time specified in the Act or regulation.

Section 203(y) of the bill conforms the sentencing provision to the Code, designating a violation of section 2075 as an infraction, except that one convicted of a violation may not be sentenced to a term of imprisonment, rather than as an offense subject to a fine of not more than $1,000. The provision excluding the possibility of imprisonment is consistent with the Committee's decision not to add a term of imprisonment for an offense described outside title 18 for which no term of imprisonment is provided in current law. The sentences of probation and fine (section 2101 and 2201 of title 18) remain available for violations of the section.

18 U.S.C. App. 2076

18 U.S.C. 2076, which is reenacted as 18 U.S.C. App. 2076 by section 201(a)(1) of the bill, prohibits a clerk of a district court of the United States from willfully refusing or neglecting to make or forward a report, certificate, statement, or document as required by law.

In conformity with the culpability standards of the Code, section 202(a) of the bill amends section 2076 by deleting "willfully" and substituting "knowingly".

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 2076 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year.

18 U.S.C. App. 2152

18 U.S.C. 2152, which is reenacted as 18 U.S.C. App. 2152 by section 201(a)(1) of the bill, prohibits, in the first paragraph, willfully trespassing upon, injuring, or destroying certain fortifications, harbor defenses, or harbor-defense systems owned or constructed or under construction by the United States; in the second paragraph, willfully interfering with the operation of any of these defenses; and, in the third paragraph, knowingly, willfully, or wantonly violating an order or regulation issed by the President for purposes of national defense that governs persons or vessels within a defensive sea area.

Section 205 repeals the first and second paragraphs of section 2152 as covered in subchapter B (Sabotage and Related Offenses) of chapter 11 of title 18 and subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18 and in sections 1712 (Criminal Entry) and 1713 (Criminal Trespass) of title 18.

In conformity with the culpability standards in the Code, section 202(n) of the bill amends section 2152 by deleting "willfully, or wantonly" in the third paragraph, leaving the culpability standard as "knowingly".

Section 203(g) of the bill amends the sentence for an offense under section 2152 by designating a violation as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or a term of imprisonment of not more than five years, or both. The more serious offenses in current section 2152 are those that are repealed by section 205 as covered by various provisions of title 18.

18 U.S.C. App. 2195

18 U.S.C. 2195, which is reenacted as 18 U.S.C. App. 2195 by section 201 (a)(1) of the bill, prohibits a master or commander of a vessel of the United States from abandoning a sailor in a foreign place without justifiable cause.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 2195 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $500, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 2274

18 U.S.C. 2274, which is reenacted as 18 U.S.C. App. 2274 by section 201 (a)(1) of the bill, prohibits the owner or person in charge of a vessel from willfully destroying it or permitting its use as the place from which an offense against the laws of the United States or international law is planned, and provides for seizure and forfeiture of the vessel if it is so used.

In conformity with the culpability standards of the Code, section 202(a) of the bill amends section 2274 by deleting "willfully" each place it appears and substituting "knowingly".

Section 233 of the bill deletes the offense provisions in section 2274, leaving the seizure and forfeiture provisions in place. The offense provision is, in effect, a jurisdictional provision to give federal jurisdiction over an offense if it is planned on a vessel in the territorial waters of the United States. The offense is covered by section 203 (Special Jurisdiction of the United States), 1002 (Criminal Conspiracy), 1701 (Arson), 1702 (Aggravated Property Destruction) and 1703 (Property Destruction), among others.

18 U.S.C. App. 2277

18 U.S.C. 2277, which is reenacted as 18 U.S.C. App. 2277 by section 201(a)(1) of the bill, prohibits carrying explosives or dangerous weapons on board a vessel without the permission of the owner or master of the vessel.

Section 203(n) of the bill conforms the sentencing provision in section 2277(a) to the Code, designating a violation of the section as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 2278

18 U.S.C. 2278, which is reenacted as 18 U.S.C. App. 2278 by section 201(a)(1) of the bill, prohibits the master of a vessel carrying steerage passengers from taking on board explosives or articles

which are likely to endanger the health or lives of the passengers or the safety of the vessel.

Section 203(n) of the bill conforms the sentencing provision to the Code, designating a violation of section 2278 as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $1,000, or a term of imprisonment of not more than one year, or both.

18 U.S.C. App. 2279

18 U.S.C. 2279, which is reenacted as 18 U.S.C. App. 2279 by section 201(a)(1) of the bill, prohibits the unauthorized boarding of a vessel before its actual arrival and final mooring.

Section 203(s) of the bill conforms the sentencing provision to the Code, designating a violation of section 2279 as a Class B misdemeanor, rather than as an offense subject to a fine of not more than $200, or a term of imprisonment of not more than six months, or both.

18 U.S.C. App. 2341

18 U.S.C. 2341, which is reenacted as 18 U.S.C. App. 2341 by section 201(a)(1) of the bill, provides definitions of terms used in chapter 114 (Trafficking in Contraband Cigarettes). The bill makes no changes in this section.

18 U.S.C. App. 2342

18 U.S.C. 2342, which is reenacted as 18 U.S.C. App. 2342 by section 201(a)(1) of the bill, makes it unlawful in subsection (a) knowingly to ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes, and, in subsection (b) makes it unlawful to knowingly make a false statement in records required to be kept by a person who ships, transports, or distributes in excess of 60,000 cigarettes in a single transaction.

Section 204(d) of the bill completely rewrites section 2342 to retain the offenses contained in section 2342(a) and designate them as unlawful acts that are offenses in violation of section 1805 (Trafficking in Contraband Cigarettes) of title 18. Current section 2342(b) is omitted as covered in section 1343 (Making a False Statement) of title 18.

18 U.S.C. App. 2343

18 U.S.C. 2343, which is reenacted as 18 U.S.C. App. 2343 by section 201(a)(1) of the bill, prescribes recordkeeping and inspection requirements for shippers, sellers, and distributors of cigarettes. The bill makes no changes in the section.

18 U.S.C. App. 2344

18 U.S.C. 2344, which is reenacted as 18 U.S.C. App. 2344 by section 201(a)(1) of the bill, provides penalties for violation of the laws controlling trafficking in contraband cigarettes. Subsection (a) prescribes the penalties for violating current 18 U.S.C. 2342(a), subsection (b) prescribes the penalties for violating a rule or regulation issued under section 2343(a) or 2346 or violating section 2342(b), and subsection (c) calls for seizure and forfeiture of cigarettes involved in a violation of the chapter.

Section 203(h) amends the penalty for violating section 2344(b) as set forth in current law by designating an offense as a Class A misdemeanor, rather than as an offense subject to a fine of not more than $5,000, or imprisonment for not more than three years, or both. Section 234(a) of the bill completely rewrites the text of section 2344 to carry forward an amended version of subsection (b) in current law, omitting subsection (a) as covered by the amended version of section 2344, and omitting subsection (c) as covered in section 4001(a)(19) (Civil Forfeiture of Property) of title 18. The amended version of section 2344 omits from former subsection (b) the penalty for violating section 2342(b) since that section was repealed as covered in section 1343 (Making a False Statement) of title 18.

18 U.S.C. App. 2345

18 U.S.C. 2345, which is reenacted as 18 U.S.C. App. 2345 by section 201(a)(1) of the bill, provides that chapter 114 shall not be construed to affect concurrent jurisdiction of a State to enact legislation relating to contraband cigarettes and enforce cigarette tax laws, or to affect coordinated State law enforcement programs.

Section 234(b) of the bill conforms the section to the Code by adding cross-references to section 1805 (Trafficking in Contraband Cigarettes) and 4001 (Civil Forfeiture of Property) of title 18 since those provisions replace some of the provisions referred to in section 2345.

18 U.S.C. App. 2346

18 U.S.C. 2346, which is reenacted as 18 U.S.C. App. 2346 by section 201(a)(1) of the bill, authorizes the Secretary of the Treasury to enforce the provisons of chapter 114 (Trafficking in Contraband Cigarettes) and to prescribe appropriate rules and regulations. The bill makes no changes in the section.

18 U.S.C. App. 3054

18 U.S.C. 3054, which is reenacted as 18 U.S.C. App. 3054 by section 201(a)(1) of the bill, permits an employee authorized by the Secretary of the Interior to enforce sections 42, 43, and 44 of current title 18, and any officer of the customs, to make arrests on probable cause for violations of sections 42 and 44, to make arrests for violations of section 43 committed in their presence, and to execute warrants or other process.

In conformity with the culpability standards in the Code, section 202(d) of the bill deletes "and willfully" from section 3054. "Knowingly" is thereby retained as the sole required degree of culpability.

Section 235(a) of the bill makes a number of changes in section 3054. Section 235(a)(1) of the bill permits the Secretary of Commerce to authorize employees to enforce sections 42, 43, and 44, consistent with the authority given the Secretary under amendments to those sections made by this bill. Section 235(a)(2) of the bill adds section 41 of this title to the list of sections to be enforced under section 3054. Section 235(a)(3) of the bill adds language that makes clear that the law enforcement authority prescribed in section 3054 is in addition to any other authority provided by law.

18 U.S.C. App. 3056

18 U.S.C. 3056, which is reenacted as 18 U.S.C. App. 3056, in current law describes in subsection (a) the authority of the Secret Service to protect the President and Vice President and members of their families, visiting heads of foreign governments, and other similar individuals; to investigate violations of certain statutes relating to counterfeiting and banking; to engage in certain activities relating to law enforcement, such as the carrying of firearms; and to pay for unforeseen emergencies out of a fund accounted for by signature of the Secretary of the Treasury. Subsection (a) also requires that moneys that were expended from Secret Service appropriations for purchase of counterfeits and that are subsequently recovered shall be reimbursed to the appropriation current at the time of deposit. Subsection (b) makes it an offense to knowingly and willfully obstruct, resist, or anterfere with a Secret Service agent or other federal law enforcement officer authorized to engage in the protective functions described in section 3054(a) or 1752 of title 18 Appendix.

Section 235(b) completely rewrites section 3054 of title 18 Appendix to carry forward as subsection (a) of the revised section the language in current law authorizing payment of expenses of an unforeseen nature on the certificate of the Secretary of the Treasury, and as subsection (b) of the revised section the language in current law requiring reimbursement to the current appropriation of recovered funds that had been used to purchase counterfeits.

The language in current subsection (a) relating to the special protective functions of the Secret Service is omitted as covered in section 3021(c) (Department of the Treasury) of subchapter C (Law Enforcement Authority of Other Federal Agencies) of chapter 30 of title 18. The language relating to investigative authority is omitted as covered in section 3001 (Investigative Authority Over Offenses Within This Title) of title 18. The language relating to various law enforcement authority is omitted as covered in section 3021(b) (Department of the Treasury) of title 18. Current subsection (b) is omitted as covered in sections 1302(a)(1) (Obstructing a Government Function by Physical Interference) and possibly, depending on the circumstances of the case, section 1358 (Retaliating Against a Public Servant) of title 18 and an offense described in subchapter A (Homicide Offenses) or B (Assault Offenses) of chapter 16 of title 18.

18 U.S.C. App. 3057

18 U.S.C. 3057 (as amended effective October 1, 1979), which is reenacted as 18 U.S.C. App. 3057 by section 201(a)(1) of the bill, prescribes certain procedures to be followed in the investigation of offenses relating to bankruptcies. The bill makes no changes in the section.

18 U.S.C. App. 3058

18 U.S.C. 3058, which is reenacted as 18 U.S.C. App. 3058 by section 201(a)(1) of the bill, makes it an offense for a member of the armed forces of a belligerent foreign nation interned in the United States to leave or attempt to leave the jurisdiction.

In conformity with the culpability standards in the Code, section 202(a) of the bill amends section 3058 by deleting "willfully" and substituting "knowingly" as the required degree of culpability.

Section 235(c)(1) of the bill modernizes the terminology of section 3058 by deleting "nation or belligerent faction" and substituting "foreign power". Section 235(c)(2) of the bill also modernizes the provision by giving arrest power for violation of the section to a federal law enforcement officer authorized to make arrest for violations of the federal criminal laws rather than specifying that a marshal, deputy marshal, or military or naval authorities have the arrest power. Section 235(c)(3) amends section 3058 by permitting an arrested internee to be taken to any appropriate place of internment, rather than requiring that he be returned to the place of internment from which he escaped.

18 U.S.C. App. 3112

18 U.S.C. 3112, which is reenacted as 18 U.S.C. App. 3112 by section 201(a)(1) of the bill, provides authority to execute search warrants for certain violations of sections 42, 43, and 44 of title 18 Appendix and to seize wildlife or property used in violation of one of those provisions.

In conformity with the culpability standards in the Code, section 202(d) of the bill amends section 3112 by deleting "and willful". "Knowingly" is thereby retained as the sole required degree of culpability.

Consistent with the amendments to sections 42 and 43 of title 18 Appendix made by this bill, section 236(a) of the bill adds employees authorized by the Secretary of Commerce to those authorized by the Secretary of the Interior and officers of the customs as those given search and seizure powers under section 3112. Section 236(b) of the bill adds section 41 of this title to the list of sections to be enforced under section 3112. Section 236(c) of the bill adds language that makes clear that the law enforcement authority prescribed in section 3112 is in addition to any other authority provided by law.

18 U.S.C. App. 3615

18 U.S.C. 3615, which is reenacted as 18 U.S.C. App. 3615 by section 201(a)(1) of the bill, authorizes the seizure and forfeiture of liquors and related property involved in any violation of the liquor laws. The bill makes no changes in the section.

18 U.S.C. App. 3620

18 U.S.C. 3620, which is reenacted as 18 U.S.C. App. 3620 by section 201(a)(1) of the bill, authorizes a fine imposed on the master of a vessel for a violation of section 2278 of this title (Explosives on vessels carrying steerage passengers) to be a lien upon the vessel involved.

TITLE VII—TECHNICAL AND CONFORMING AMENDMENTS TO PROVISIONS OUTSIDE TITLE 18 AND TITLE 18 APPENDIX

Title VII of S. 1630, as reported, contains the amendments to provisions outside title 18 and title 18 Appendix of the United States Code that were not made in titles III or V of the bill and that are required by the adoption of the new Criminal Code.

The technical and conforming amendments contained in title VII are considerably less comprehensive than the technical and conforming amendments contained in S. 1437, as passed by the Senate in the 95th Congress. The Committee decided that the non-title 18 offenses should be thoroughly reexamined at a later date. As an interim measure, offenses outside title 18 are graded according to the general provisions of section 2009 of title 18, and culpability standards remain unchanged from current law, as is made clear by section 303(a)(2) of title 18.

While the technical and conforming amendments in S. 1630 are not as comprehensive as those in the earlier bill, there are a substantial number of amendments that the Committee believes should be made to clarify the applicability of title 18. The following is a brief general description of the amendments.

1. Repealed Provisions

Section 301 of S. 1630, as reported, repeals more than 350 provisions of current law that are contained in titles of the United States Code other than title 18 or title 18 Appendix. Most of these provisions are repealed because they create offenses that are covered in the new title 18. A few are repealed because they overlap other provisions of title 18, such as those relating to jurisdiction and venue, or because they are outmoded.

2. Other Amendments

Sections 311 through 714 contain miscellaneous amendments to provisions of the United States Code that are not codified to either title 18 or title 18 Appendix. These amendments appear in order of their United States Code citations, except that sections 713 and 714 contain amendments to provisions of public laws that are not placed in one of the titles of the United States Code.

In general, these amendments are designed to clarify the relative coverage of the title 18 offenses and those offenses that remain outside title 18 in several ways:

A. Repealed language

The amendments in title VII delete language in provisions describing offenses outside title 18 that relates to offenses that are now described in title 18.[1] These amendments are, in effect, repealers of provisions outside title 18 which cannot be repealed in total because remaining language relates to offenses that have not been moved into title 18.

B. Cross-references

The amendments in title VII amend cross-references in order to assure clarity of the relationship between provisions outside title 18 and the provisions of title 18.[2] The amendments do not include amended references to sections of title 18 that have been moved to another section unless the absence of such an amendment might create problems of legislative interpretation.[3] Rather than amend every cross-reference that might be affected by the revision of the Criminal Code, S. 1630, as reported, contains a general provision relating to cross-references that specifies that: "A reference to a provision of law that is replaced by section 101[4] or 201[5] of this Act, including a reference in a regulation, order, or other law, is deemed to be a reference to the corresponding provision of this Act."[6]

3. Section-by-Section Analysis

PART A—REPEALERS

2 U.S.C. 192 (section 102 of the Revised Statutes) makes it an offense for a person who has been summoned by authority of either House of Congress to testify or produce documents to willfully fail to appear or to refuse to answer a question pertinent to the inquiry. Section 301 of the bill repeals section 192 as covered by section 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

2 U.S.C. 390 (section 11 of the Federal Contested Elections Act) makes it an offense for a person subpoenaed to appear to testify or produce documents to willfully fail to appear or to refuse to answer a question pertaining to a contested election. Section 390 is repealed by section 301 of the bill as covered by sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

7 U.S.C. 13(a) (section 9(a) of the Commodity Exchange Act) prohibits any futures commission merchant, or employee or agent thereof, from embezzling anything having a value over $100 which was received by such merchant to margin, guarantee, or secure a trade or contract of a customer. Section 301 of the bill repeals section 13(a), as it is covered in section 1713 (Theft) of title 18, under the jurisdictional base provided in subsection(c)(19) of section 1731.

7 U.S.C. 13(b) (section 9(b) of the Commodity Exchange Act), which prohibits the manipulation of commodity prices, limits, in its

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[1] See, e.g., section 336(a) of the bill, which deletes language relating to forgery and counterfeiting as covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

[2] See, e.g. section 426 of the bill, as reported.

[3] For example, the amendments do not change references to 18 U.S.C. 1001 of current law to read "18 U.S.C. 1343" since it is clear that a reference to current law section 1001 is a reference to new section 1343.

[4] Section 101 enacted the revised version of title 18 of the United States Code.

[5] Section 201 enacted title 18 Appendix of the United States Code.

[6] Section 721 of the bill.

last sentence, the imposition of fines upon an individual to amounts under $100,000. This provision is repealed by section 301 of the bill in order to conform the section to section 2201(b)(1)(A) (Sentence of Fine) of title 18, which authorizes fines, if the defendant is an individual, for a felony of not more than $250,000. See section 331(b)(1) of the bill (discussion infra.) for an additional amendment to 7 U.S.C. 13(b).

7 U.S.C. 15b(d)(3) (section 1952(d)(3) of the United States Cotton Futures Act) prohibits any person engaged in the business of dealing in cotton from willfully withholding information concerning such business from any authorized agent of the Secretary of Agriculture or willfully giving a false or misleading answer to his questions. Section 301 of the bill repeals section 15b(d)(3) as covered in sections 1333 (Refusing to Testify or to Produce Information) and 1343 (Making a False Statement) of title 18. See section 332 of the bill for a further amendment affecting 7 U.S.C. 15b.

7 U.S.C. 87b(a)(3) (section 13(a)(3) of the United States Grain Standards Act) prohibits knowingly attempting to cause, or causing, the issuance of false official certificates or other forms of deceptive handling or sampling of grain. Section 87b(a)(3) is repealed by section 301 of the bill because the attempt reference is covered in section 1001 (Criminal Attempt) of title 18 and the offense provision is covered in section 1343 (Making a False Statement) of title 18.

7 U.S.C. 87b(a)(7) (section 13(a)(7) of the United States Grain Standards Act) prohibits improperly influencing, or attempting to improperly influence, any official inspection personnel or other official personnel with respect to the performance of their duties under the Act. Section 87b(a)(7) is repealed by section 301 of the bill because the attempt reference is covered by section 1001 (Criminal Attempt) of title 18, and the offense provision is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

7 U.S.C. 87b(a)(8) (section 13(a)(8) of the United States Grain Standards Act) prohibits forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with any official inspection personnel or other official personnel, in the course of, or on account of, the performance of their official duties under the Act. Section 87b(a) (8) is repealed by section 301 of the bill because its provisions are covered by section 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), and 1358 (Retaliating Against a Public Servant) of title 18, and subchapter B (Assault Offenses) of chapter 16 of title 18.

7 U.S.C. 87b(a)(9) (section 13(a)(9) of the United States Grain Standards Act) prohibits any false representation that one is authorized to perform an official inspection or other official duty under the Act. Section 87b(a)(9) is repealed by section 301 of the bill as it is covered in section 1303 (Impersonating an Official) of title 18.

7 U.S.C. 87b(a)(10) (section 13(a)(10) of the United States Grain Standards Act) prohibits the use of any false or misleading means in connection with making an application for an inspection, weighing, or supervision of weighing. Section 87b(a)(10) is repealed by

section 301 of the bill as it is covered in section 1343 (Making a False Statement) of title 18.

7 U.S.C. 87b(a)(12) (section 13(a)(12) of the United States Grain Standards Act) prohibits knowingly falsifying the weight of any grain shipped in interstate or foreign commerce. Section 301 of the bill repeals section 87b(a)(12) as it is covered in section 1343 (Making a False Statement) of the title 18.

7 U.S.C. 87b(b)(3) (section 13(b)(3) of the United States Grain Standards Act) prohibits any person authorized to perform any function under the United States Grain Standards Act from knowingly executing or issuing any false or incorrect certificate or other official form. Section 301 of the bill repeals section 87b(b)(3) as it is covered in section 1343 (Making a False Statement) of title 18.

7 U.S.C. 87b(b)(4) (section 13(b)(4) of the United States Grain Standards Act) prohibits any person authorized to perform any function under the United States Grain Standards Act from accepting any consideration for neglect or improper performance of duty. Section 301 of the bill repeals section 87b(b)(4) as it is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

7 U.S.C. 87f(e) (section 17(e) of the United States Grain Standards Act) prohibits neglecting or refusing to attend and testify, or to answer a lawful inquiry or produce documentary evidence, in response to a subpoena issued in relation to the enforcement of the Grain Standards Act. Section 301 of the bill repeals section 87f(e) as it is covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

7 U.S.C. 215 (section 314 of the Packers and Stockyards Act) provides penalties for failure to obey orders and rules regulating rates and practices within the meat packing and stockyards industry. Section 301 of the bill repeals the last sentence of section 215, which provides for payment of the costs of prosecution from the appropriations of the courts of the United States, rather than the Department of Justice, as obsolete.

7 U.S.C. 473c-1(a) (section 3c-1(a) of the Cotton Statistics and Estimates Act) prohibits any person sampling cotton for classification under the Cotton Statistics and Estimates Act from knowingly doing so improperly, or from accepting any consideration for neglect or improper performance of duty as a sampler. Section 301 of the bill repeals section 473c-1(a) as it is covered in section 1343 (Making a False Statement) of title 18 and subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

7 U.S.C. 473c-1(b) (section 3c-1(b) of the Cotton Statistics and Estimates Act) prohibits any person from influencing improperly, attempting to influence improperly, or forcibly assaulting, resisting, impeding, or interfering with a sampler who is taking samples for classification under the cotton Statistics and Estimates Act. Section 301 of the bill repeals section 473c-1(b) because the attempt reference is covered in section 1001 (Criminal Attempt) of title 18, the improper influence reference is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18, and the forcible interference language is covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tam-

pering With a Public Servant) of title 18 and subchapter B (Assault Offenses) of chapter 16 of title 18.

7 U.S.C. 473c–1(d) (section 3c–1(d) of the Cotton Statistics and Estimates Act) prohibits anyone from knowingly attempting to cause, or causing, the issuance of false cotton classification certificates by deceptive baling, handling or sampling of cotton, or by submitting samples of cotton knowing it has been deceptively baled, handled, or sampled. Section 301 of the bill repeals section 473c–1(d), as its attempt reference is covered in section 1001 (Criminal Attempt) of title 18, and the remaining portion in section 1343 (Making a False Statement) of title 18.

7 U.S.C. 511i(e) (section 10(e) of the Tobacco Inspection Act) prohibits anyone from influencing improperly, attempting to influence improperly, or forcibly assaulting, resisting, impeding, or interfering with any inspector or other authorized personnel in the execution of his duties under the Tobacco Inspection Act Section 301 of the bill repeals section 511i(e) because the attempt reference is covered in section 1001 (Criminal Attempt) of title 18, the improper influence reference is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18, and the remaining forcibie interference references are covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tampering With a Public Servant) of title 18, and subchapter B (Assault Offenses) of chapter 16 of title 18.

7 U.S.C. 511i(f) (section 10(f) of the Tobacco Inspection Act) prohibits anyone from falsely representing himself as authorized by the Secretary of Agriculture to perform inspection, sampling, or weighing duties under the Act. Section 301 of the bill repeals section 511i(f), as it is covered in section 1303 (Impersonating an Official) of title 18.

7 U.S.C. 615(b–3)(1), (2), and (3) (section 15(b–3)(1), (b–3)(2), and (b–3)(3) of the Agricultural Adjustment Act) provide sentences for trafficking in tax-payment warrants for processing commodities at less than 99 percent of face value, securing such warrants with respect to rice with intent to defraud, and forging or counterfeiting tax-payment warrants. Section 301 of the bill repeals paragraphs (1), (2), and (3). The Department of Agriculture has recommended repeal of the section as probably obsolete because *United States* v. *Butler*, 297 U.S.1 (1936) declared unconstitutional the taxes referred to in the section and because Congress did not affirm, validate, and reenact the section in the Act of June 3, 1937 (50 Stat. 246, 7 U.S.C. 601 note).

7 U.S.C. 620 (section 20 of the Agricultural Adjustment Act) prohibits falsely stating that deductions from the market price of a commodity are due to taxes imposed under the Agricultural Adjustment Act. Section 301 of the bill repeals section 620 for the same reasons that 7 U.S.C. 615(b–3) (1), (2), and (3) are repealed.

7 U.S.C. 1379i(d) (section 379i(d) of the Agricultural Adjustment Act of 1938) makes it an offense to forge or counterfeit a marketing certificate, or, with fraudulent intent, to possess, transfer, or use a forged or counterfeited certificate. Section 301 of the bill repeals section 1379i(d) as it is covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

7 U.S.C. 2024(b) (section 15(b) of the Food Stamp Act of 1964) provides penalties for the unauthorized use, possession, transfer, acquisition, or alteration of coupons for purchase of food or authorization cards indicating eligibility of a household to obtain coupons. Section 301 of the bill repeals section 2024(b), as it is covered in sections 1731 (Theft), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property) of title 18, under the jurisdictional base provided in section 1731(c)(25), and as it is covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

7 U.S.C. 2024(c) (section 15(c) of the Food Stamp Act of 1964) provides penalties for the presentation for payment or redemption of coupons, knowing them to have been illegally received, transferred, or used. Section 301 of the bill repeals sections 2024(c) as it is covered in sections 1301 (Obstructing a Government Function by Fraud) and 1731 (Theft), with jurisdiction under section 1731(c)(25)(B), of title 18.

7 U.S.C. 2024(d) (section 15(d) of the Food Stamp Act of 1964) defines coupons issued pursuant to the Food Stamp Act as obligations of the United States. Section 301 of the bill repeals section 2024(d) as covered in section 1746(e) (Definitions for subchapter E—Counterfeiting, Forgery, and Related Offenses) of title 18.

7 U.S.C. 2024(f) (section 15(f) of the Food Stamp Act of 1964) makes it an offense for a coupon issuer, or officer, employee, or agent thereof, to make a false statement in the report to the Secretary or his designee concerning the issuer's operations that is required under 7 U.S.C. 2016(d). Section 301 of the bill repeals section 2024(f) as covered in section 1343 (Making a False Statement) of title 18.

7 U.S.C. 2048(c) (section 9(c) of the Farm Labor Contract Registration Act of 1963) provides criminal penalties for an unregistered farm labor contractor who recruits or employs a person who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment. Section 301 of the bill repeals section 2048(c) as covered in section 1214 (Unlawfully Employing an Alien) of title 18.

7 U.S.C. 2146(b) (section 16(b) of the Animal Welfare Act) provides penalties for forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a person engaged in, or on account of the performance of, his official duties under the Animal Welfare Act. Additional penalties are provided if such forcible interference is accompanied by use of a dangerous or deadly weapon, and if the victim is killed, punishment shall be as provided in the homicide sections of title 18. Section 301 of the bill repeals section 2146(b) as its forcible interference provisions are covered in sections 1302 (Obstructing a Government Function by Physical(Anterference), section 1357 (Tampering With a Public Servant) of title 18, section 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18, its dangerous weapon provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18, and the homicide provision is covered in subchapter A (Homicide Offenses) of chapter 16 of title 18.

7 U.S.C. 2622(b) (section 313(b) of the Potato Research and Promotion Act) prohibits anyone from failing to appear or testify concerning any matter based on an alleged violation of the Potato Research and Promotion Act, but also grants immunity from prosecution to one who testifies after having claimed his privilege against self-incrimination. Section 301 of the bill repeals section 2622(b) as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18 and subchapter C (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18.

8 U.S.C. 1185(a)(3) (section 215(a)(3) of the Immigration and Nationality Act) prohibits, during time of war or national emergency, anyone from knowingly making a false statement in an application for permission to depart from or enter the United States. Section 301 of the bill repeals section 1185(a)(3) as covered in section 1343 (Making a False Statement) of title 18. See section 351(c) of the bill for another amendment to section 1185.

8 U.S.C. 1185(a)(6) (section 215(a)(6) of the Immigration and Nationality Act) prohibits, during time of war or national emergency, anyone from forging, counterfeiting, mutilating, or altering any permit or evidence of permission to depart from or enter the United States. Section 301 of the bill repeals section 1185(a)(6) as covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18. See section 351(c) of the bill for another amendment to section 1185.

8 U.S.C. 1251(a)(6)(E) (section 241(a)(6)(E) of the Immigration and Nationality Act) provides for the deportation of any alien, not within any of the other general deportation provisions of section 1251, who is a member of an organization required to be registered under 50 U.S.C. 786 (Registration and Annual Reports of Communist Organizations). Section 301 of the bill repeals section 1251(a)(6)(E) because of the repeal by section 5 of Public Law 90-237 of 50 U.S.C. 786. See section 351(d) of the bill for other amendments to section 1251.

8 U.S.C. 1324(a) (section 274(a) of the Immigration and Nationality Act) prohibits any person (1) from bringing or attempting to bring into the United States; (2) knowing that he is in the United States illegally, from moving or attempting to more within the United States in furtherance of his violation; (3) from willfully or knowingly harboring or attempting to harbor; or (4) from willfully or knowingly inducing or attempting to induce the entry into the United States; an alien not legally admitted or entitled to enter or reside within the United States. Section 301 of the bill repeals section 1324(a) as the attempt provisions are covered in section 1001 (Criminal Attempt) of title 18, the solicitation provision is covered in section 1003 (Criminal Solicitation) of title 18, and, the remaining provisions are covered in sections 1211 (Unlawfully Entering the United States as an Alien), 1212 (Smuggling an Alien into the United States), and 1213 (Hindering Discovery of an Alien Unlawfully in the United States) of title 18.

8 U.S.C. 1324(c) (section 274(c) of the Immigration and Nationality Act) grants authority to arrest for violations of the section to authorized officers and employees of the Immigration and Naturalization Service and all other officers whose duty it is to enforce

criminal laws. Section 301 of the bill repeals section 1324(c) because the authorization for arrest by Immigration and Naturalization Service is covered by section 3015 (Immigration and Naturalization Service) of title 18, and the authorization for arrest by other law enforcement officers is covered in subchapters B (Law Enforcement Authority of the Department of Justice) and C (Law Enforcement Authority of Other Federal Agencies) of chapter 30 of title 18.

8 U.S.C. 1325 (section 275 of the Immigration and Nationality Act) provides penalties for an alien who enters the United States at any time or place other than that designated by immigration officers, eludes examination by immigration officers, or obtains entry into the United States by willful misrepresentation or concealment of any material fact. Section 301 of the bill repeals section 1325 as it is covered in sections 1211 (Unlawfully Entering the United States as an Alien) and 1343 (Making a False Statement) of title 18.

8 U.S.C. 1326 (section 276 of the Immigration and Nationality Act) provides penalties for an alien who enters, attempts to enter, or is found in the United States after having been arrested and deported or excluded and deported. Section 301 of the bill repeals section 1326 as its attempt provision is covered in section 1001 (Criminal Attempt) of title 18, and the offense provision is covered in section 1211 (Unlawfully Entering the United States as an Alien) of title 18.

8 U.S.C. 1327 (section 277 of the Immigration and Nationality Act) provides penalties for anyone who assists or conspires to permit the entry into the United States of an alien excludable for political reasons (8 U.S.C. 1182(a) (27), (28), or (29)). Section 301 of the bill repeals section 1327 as its conspiracy provision is covered in section 1002 (Criminal Conspiracy) of title 18, and the remainder of the section is covered in section 1212 (Smuggling an Alien into the United States) of title 18, graded as a class E felony by subsection (c)(2) of section 1212 of title 18.

8 U.S.C. 1328 (section 278 of the Immigration and Nationality Act) provides penalties for anyone who imports or attempts to import an alien for the purpose of prostitution or any other immoral purpose, or who holds or attempts to hold an alien for such purposes, or who maintains or employs in any place, an alien, for such purposes. Section 301 of the bill repeals section 1328 as its attempt provisions are covered in section 1001 (Criminal Attempt) of title 18, and its offense provisions are covered in section 1843 (Conducting a Prostitution Business) of title 18.

10 U.S.C. 847 (Article 47 of the Uniform Code of Military Justice) provides penalties for anyone not subject to the Uniform Code of Military Justice who willfully neglects or refuses to appear or testify or produce evidence after having been subpoenaed to appear as a witness before a military court, commission, or board, or before any person authorized to take a deposition to be read in evidence before a military court, commission, or board. Section 301 of the bill repeals section 847 as it is covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

Section 816(d)(7) of the Act of October 7, 1975, set forth as a note to 10 U.S.C. 2304, provides that any person who has claimed his privilege against self-incrimination in a matter concerning discrimination in the supply of petroleum products to the Armed Forces and is compelled to testify or produce evidence is given immunity from prosecution for the offense of discrimination. Section 301 of the bill repeals subsection (d)(7) as covered in subchapter C (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18.

10 U.S.C. 2683 authorizes the relinquishment to a State, Commonwealth, territory or possession of the United States of federal legislative jurisdiction over lands controlled by the Secretary of Defense. Section 301 of the bill repeals the section to conform to 5 U.S.C. 306, as enacted by section 321 of the bill, which contains a uniform procedure for relinquishment of jurisdiction.

12 U.S.C. 630 (the twenty-fourth paragraph of section 25(a) of the Federal Reserve Act) provides penalties for various misconduct by officers, directors, employees, or agents of any corporation organized to do foreign banking (12 U.S.C. 611–631). Section 301 of the bill repeals section 630 to conform to the offense provisions of the Code. The embezzlement provisions are covered in section 1731 (Theft) of title 18. The unauthorized issuance of any instrument provision is covered in section 1744 (Criminal Issuance of a Written Instrument) of title 18. The provisions relating to false entry in a report or statement with intent to defraud are covered in section 1343 (Making a False Statement) and 1734 (Executing a Fraudulent Scheme) of title 18. The aiding or abetting provision is covered in chapter 4 (Complicity) of title 18.

12 U.S.C. 1141j(b) (section 15(b) of the gricultural Marketing Act) provides penalties for an officer or employee of the Farm Credit Administration who speculates in agricultural commodities or related products, contracts, or stocks. Section 301 of the bill repeals section 1141j(b) as it is covered in section 1356 (Speculating on Official Action or Information) of title 18.

12 U.S.C. 1457(b) (section 308(b) of the Federal Home Loan Mortgage Corporation Act) extends the proscriptions of 18 U.S.C. 215 (receipt of commissions or gifts for procuring loans), 18 U.S.C. 607 (making political contributions), 18 U.S.C. 658 (fraudulent disposal or conversion of property mortgaged or pledged to farm credit agencies), 18 U.S.C. 1011 (false statements by mortgagees concerning federal land bank mortgage transactions), and 18 U.S.C. 1014 (false statements in loan and credit applications) to apply to and with respect to the Federal Home Loan Mortgage Corporation. Section 301 of the bill repeals section 1457(b) as the provisions of 18 U.S.C. 215 are covered in section 1751 (Commercial Bribery) of title 18, the provisions of 18 U.S.C. 607 are omitted from the Code, the provisions of 18 U.S.C. 658 are covered in sections 1731 (Theft), 1732 (Trafficking in Stolen Property), and 1736 (Interfering With a Security Interest) of title 18, and the provisions of 18 U.S.C. 1011 and 18 U.S.C. 1014 are covered an section 1343 (Making a False Statement) mf title 18.

12 U.S.C. 1457(c) (section 308(c) of the Federal Home Loan Mortgage Corporation Act) provides that the term "bank examiner" as used in 18 U.S.C. 655 shall include any examiner who is an officer or employee of the Federal Home Loan Mortgage Corporation. Section 301 of the bill repeals section 1457(c) as 18 U.S.C. 655 (Theft by a Bank Examiner) is covered by section 1731 (Theft) of title 18 with

jurisdiction over examiners of the Federal Home Loan Mortgage Corporation provided in subsection (c)(3) and (c)(10) of section 1731. The Federal Home Loan Mortgage Corporation is a member under 12 U.S.C. 1452(a) of each Federal home loan bank and is, therefore, a "national credit institution" within the meaning of that term set forth in section 111 (General Definitions) of title 18.

12 U.S.C. 1457(d) (section 308(d) of the Federal Home Loan Mortgage Corporation Act) provides that the term "bank" as used in subsection (f) of 18 U.S.C. 2113 (Bank Robbery and Incidental Crimes) shall include the Federal Home Loan Mortgage Corporation and any building which it uses. Section 301 of the bill repeals section 1457(d) as the provisions of 18 U.S.C. 2113 are covered in sections 1721 (Robbery), 1722 (Extortion), 1723 (Blackmail), 1712 (Criminal Entry), 1731 (Theft), 1732 (Trafficking in Stolen Property), 1733 (Receiving Stolen Property), and 1823 (Using a Weapon in the Course of a Crime) of title 18, and subchapters A (Homicide Offenses) and B (Assault Offenses) of chapter 16 of title 18. The Federal Home Loan Mortgage Corporation for purposes of these provisions is both a federal government agency and a national credit institution as those terms are defined in section 111 (General Definitions) of title 18.

12 U.S.C. 1730a(j)(3) (section 408(j)(3) of the National Housing Act) states that an officer, agent or employee of a savings and loan holding company who makes false entries in a report or statement of such company is subject to the same penalties as are applicable to any officer, agent, or employee of an institution whose accounts are insured by the Federal Savings and Loan Insurance Corporation for false entries in reports or statements of such institution under 18 U.S.C. 1006 (Federal Credit Entries, Reports and Transactions). Section 301 of the bill repeals section 1730a(j)(3) as the offense of making a false statement in those records is covered in section 1343(a)(2) (Making a False Statement) of title 18, with jurisdiction under subsection (d)(3).

12 U.S.C. 1784(c) (section 204(c) of the Act of October 19, 1970) provides for the issuance of court orders and related judicial proceedings to enforce subpoenas of the National Credit Union Administration Board. Section 301 of the bill repeals the last sentence of section 1784(c), which prohibits failure to appear or testify on the grounds of the privilege against self-incrimination but grants immunity from prosecution to anyone compelled to testify after having claimed the privilege. This provision is deleted because it is covered in subchapter C (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18.

12 U.S.C. 1818(n) (section 8(n) of the Federal Deposit Insurance Act) sets out powers and procedures available for examinations, investigations or other matters involving the Federal Deposit Insurance Act. Section 301 of the bill repeals the last sentence of section 1818(n), which provides penalties for willful failure to attend or testify or to answer a lawful inquiry or produce documents in obedience to subpoena, because these offenses are covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

12 U.S.C. 1847(a) (section 8(a) of the Bank Holding Company Act of 1956) provides penalties for violations of provisions of the Bank

Holding Company Act of 1956. Section 301 of the bill repeals the last sentence of section 1847(a), which prescribes the same penalties for false entries in reports or statements by officers, agents, or employees of a bank holding company as are applicable to officers, agents, or employees of member banks for false entries that violate 18 U.S.C. 1005 (Bank Entries, Reports, and Transactions). The offense is covered in section 1343 (Making a False Statement) of title 18.

13 U.S.C. 211(1) provides penalties for anyone who receives or secures to himself any compensation as a consideration for the appointment of any person as an officer or employee of Bureau of the Census. Section 301 of the bill repeals section 211(1) as it is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18, especially section 1355 (Trading in Public Office).

13 U.S.C. 213 provides penalties for willful and knowing false swearing under oath and willful and knowing false statements made by officers or employees of the Bureau of the Census. Section 301 of the bill repeals section 213 as it is covered in sections 1341 (Perjury), 1342 (False Swearing), and 1343 (Making a False Statement) of title 18.

15 U.S.C. 50 (section 10 of the Federal Trade Commission Act) provides penalties for violations of the provisions of the Federal Trade Commission Act. The first paragraph of the section, relating to neglect or refusal to attend and testify, or to answer a lawful inquiry or produce documentary evidence, in obedience to a subpoena or lawful requirement of the Federal Trade Commission, is repealed by section 301 of the bill as covered in sections 1322 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18. An additional amendment to 15 U.S.C. 50 appears in section 393 of the bill.

15 U.S.C. 65 (section 5 of the Webb-Pomerence Act) relates to the Federal Trade Commission's regulation of export trade corporations. The last sentence of the first paragraph of section 65, relating to the payment of prosecution expenses out of the budget of the courts of the United States, is repealed by section 301 as being obsolete.

15 U.S.C. 77t(b) (section 20(b) of the Securities Act of 1933) provides for injunctions and the prosecution of violations of the provisions of the Securities Act of 1933. The last sentence of section 77t(b), which authorizes that a criminal proceeding be brought either in the district from which the prospectus or security complained of was transmitted or in the district in which it was received, is repealed by section 301 of the bill as covered in chapter 33 (Jurisdiction and Venue) of title 18, especially section 3311 (Venue for an Offense Committed in More than One District).

15 U.S.C. 78u(c) (section 21(c) of the Securities Exchange Act of 1934) relates to judicial enforcement of the investigative power of the Securities and Exchange Commission. The last sentence of the section, relating to neglect or refusal to attend and testify or to answer a lawful inquiry in obedience to a subpoena of the Securities and Exchange Commission, is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 78aa (section 27 of the Securities Exchange Act of 1934) relates to jurisdiction of offenses and suits under the Securities Exchange Act of 1934. The second sentence of section 78aa, which authorizes that a criminal proceeding be brought in the district in which the violation occurred, is repealed by section 301 of the bill as covered in chapter 33 (Jurisdiction and Venue) of title 18. See section 396(b) of the bill for an additional amendment to 15 U.S.C. 78aa.

15 U.S.C. 78jjj(c) (section 14(c) of the Securities Investor Protection Act of 1970) describes several offenses involving fraud or embezzlement. Section 301 repeals the section as covered in various provisions of title 18. Subsection (c)(1)(A), which prohibits the use, in contemplation of our in connection with a liquidation proceeding or direct payment procedure, of any scheme or artifice to defraud, is repealed as covered in sections 1734 (Executing a Fraudulent Scheme) and 1735 (Bankruptcy Fraud) of title 18. Subsection (c)(1)(B), which prohibits engaging in any act, practice, or course of business, in contemplation of a liquidation proceeding or direct payment procedure, that operates as a fraud or deceit on any person, is repealed as covered in section 1735 (Bankruptcy Fraud) of title 18. Subsection (c)(1)(C), which describes specific fraudulent acts in contemplation of a liquidation proceeding or direct payment procedure that are prohibited is repealed as covered in various subsections of section 1735 (Bankruptcy Fraud): clause (i), relating to concealing or transferring assets is covered in section 1735(a)(1) and (a)(3); clause (ii), relating to false statements and accounts, is covered in section 1735(a)(5); clause (iii), relating to false claims against the estate of debtor, is covered in section 1735(a)(5) and also in section 1343 (Making a False Statement); clause (iv), prohibiting receipt of a material amount of property, is covered in section 1735(a)(2); clause (v), relating to receipt of compensation for acting or forbearing to act, is covered in section 1735(a)(6); clause (vi), relating to concealing, destroying, mutilating, or otherwise falsifying a document affecting or relating to the property or financial affairs of a debtor, is covered in section 1735(a)(5); clause (vii), relating to withholding from a person entitled to it a document affecting or relating to the property or affairs of a debtor, is covered in section 1735(a)(5). Section 78jjj(c)(2), which makes it an offense to steal moneys, securities, or other assets of the Securities Investor Protection Corporation, or otherwise defraud or attempt to defraud the Corporation or a trustee, is repealed as covered by sections 1001 (Criminal Attempt), 1301 (Obstructing a Government Function by Fraud), 1731 (Theft) (with jurisdiction under subsection (c)(28)), and 1734 (Executing a Fraudulent Scheme) of title 18.

15 U.S.C. 79r(d) (section 18(d) of the Public Utility Holding Company Act of 1935) authorizes judicial aid to compel testimony before the Securities and Exchange Commission on matters affecting possible violations of the Public Utility Holding Company Act. The last sentence of section 79r(d), relating to penalties for neglect or refusal to appear and testify or to answer a lawful inquiry or produce records in obedience to a subpoena of the Securities and Exchange Commission, is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 79y (section 25 of the Public Utility Holding Company Act of 1935) describes federal jurisdiction over offenses and suits brought under the Public Utility Holding Company Act. The second sentence of section 79y, which authorizes that a criminal proceeding be brought in the district in which the violation occurred, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See also subchapter B (Venue) of chapter 33 of title 18. See section 397(a) of the bill for another amendment to 15 U.S.C. 79y.

15 U.S.C. 80a-36 (section 37 of the Investment Company Act of 1940) prohibits the embezzlement or otherwise unlawful conversion of property or assets of a registered investment company. The section is repealed by section 301 of the bill as covered in section 1731 (Theft) of title 18, under the jurisdictional base provided in subsection (c) (19) of section 1731.

15 U.S.C. 80a-41(c) (section 42(c) of the Investment Company Act of 1940) authorizes judicial aid to compel testimony before the Securities and Exchange Commission on matters affecting possible violations of the Investment Company Act. The last sentence of the section, relating to penalties for failure or refusal to attend and to answer a lawful inquiry or produce records, is repealed by section 301 of the bill as covered by sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 80a-43 (section 44 of the Investment Company Act of 1940) describes federal jurisdiction over offenses and suits brought under the Investment Company Act of 1940. The second and third sentences of the section, relating to the appropriate district in which to initiate criminal proceedings and where process may be served, are repealed by section 301 of the bill as covered in chapter 33 (Jurisdiction and venue) of title 18. See section 398(a) of the bill for an additional amendment to 15 U.S.C. 80a-43.

15 U.S.C. 80b-9(c) (section 209(c) of the Investment Advisors Act of 1940) authorizes judicial aid to compel testimony before the Securities and Exchange Commission on matters affecting possible violations of the Investment Advisors Act. The last sentence of section 80b-9(c), relating to penalties for failure to testify or to answer a lawful inquiry or produce records in obedience to a subpoena of the Securities and Exchange Commission is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 80b-14 (section 214 of the Investment Advisors Act of 1940) authorizes federal jurisdiction over offenses and suits arising under the Investment Advisors Act. The second sentence of the section, which states that a criminal proceeding may be brought in the district in which the violation occurred, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See also subchapter B (Venue) of chapter 33 of title 18. See section 399(b) of the bill for an additional amendment to 15 U.S.C. 80b-14.

15 U.S.C. 298(a) (section 5(a) of the Act of June 13, 1960) prescribes venue requirements for criminal proceedings under and the

penalties for violations of sections 294 to 300 of title 15, which relate to falsely stamped or marked gold or silver and goods manufactured therefrom. The last sentence of section 298(a), relating to venue where the offense is begun in one jurisdiction and completed in another, is repealed by section 301 of the bill as covered in section 3311 (Venue for an Offense Committed in More Than One District) of title 18.

15 U.S.C. 645(a) (section 16(a) of the Small Business Act) provides penalties for anyone who makes a false statement knowing it to be false or willfully overvalues a security for the purpose of obtaining a loan, receiving acceptance of security for a loan, influencing the actions of the Small Business Administration, or obtaining anything of value under the Small Business Act. Section 301 of the bill repeals section 645(a) as covered in section 1343 (Making a False Statement) of title 18. Depending upon the facts in the case, an offense might also be a violation of section 1301 (Obstructing a Government Function by Fraud) or 1734 (Executing a Fraudulent Scheme) of title 18.

15 U.S.C. 645(b)(1) (section 16(b)(1) of the Small Business Act) provides penalties for anyone connected with the Small Business Administration who embezzles or willfully misapplies money or anything of value held by the Small Business Administration. Section 301 of the bill repeals section 645(b)(1) as covered in section 1731 (Theft) of title 18, with jurisdiction under subsection (c)(2) and (c)(3).

15 U.S.C. 645(b)(2) (section 16(b)(2) of the Small Business Act) provides penalties for anyone connected with the Small Business Administration who with intent to defraud or to deceive an officer, auditor, or examiner of the Small Business Administration, makes a false statement, or without authorization issues or assigns a note, debenture, bond, or other obligation, or draft, bill of exchange, mortgage, judgment, or decree thereof. Section 301 of the bill repeals section 645(b)(2) as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1741 (Criminal Issuance of a Written Instrument) of title 18.

15 U.S.C. 645(b)(3) (section 16(b)(3) of the Small Business Act) provides penalties for anyone connected with the Small Business Administration who with intent to defraud participates in or receives a benefit from a transaction, loan, commission, contract, or other act of the Small Business Administration. Section 301 of the bill repeals section 645(b)(3) as covered in sections 1301 (Obstructing a Government Function by Fraud) and 1356 (Speculating on Official Action or Information) of title 18.

15 U.S.C. 645(c) (section 16(c) of the Small Business Act) provides penalties for anyone who with intent to defraud conceals, removes, disposes of, or converts to his own or another's use any property mortgaged, or pledged to, or held by the Small Business Administration. Section 301 of the bill repeals section 645(c) as covered in sections 1301 (Obstructing a Government Function by Fraud), 1731 (Theft), or 1736 (Interfering with a Security Interest) of title 18.

All but subsection (b)(4) of 15 U.S.C. 645 is repealed by section 301 of the bill as shown above. Subsection (b)(4) is amended by section 400 of the bill.

15 U.S.C. 714m(a) (section 15(a) of the Commodity Credit Corporation Charter Act) provides penalties for anyone who makes a false

statement or willfully overvalues a security in order to influence the actions of or receive any benefit from the Commodity Credit Corporation. Section 301 of the bill repeals section 714m(a) as covered in section 1343 (Making a False Statement) of title 18. Depending upon the facts of the case, the offense may also be a violation of section 1301 (Obstructing a Government Function by Fraud) or 1734 (Executing a Fraudulent Scheme) of title 18.

15 U.S.C. 714m(b) (section 15(b) of the Commodity Credit Corporation Charter Act) provides penalties for anyone connected with the Commodity Credit Corporation who (i) embezzles or otherwise willfully misapplies anything of value held by the Corporation; or (ii) with intent to defraud anyone or to deceive an officer, auditor, or examiner of the Corporation, makes a false statement to, or issues an order, obligation, or instrument of the Corporation; or (iii) with intent to defraud the Corporation, receives benefits through any action of the Corporation. Section 301 of the bill repeals section 714m(b) as the embezzlement provision is covered in sections 1731 (Theft) and 1736 (Interfering With a Security Interest) of title 18, the false statement and issuance provision in sections 1343 (Making a False Statement), and 1744 (Criminal Issuance of a Written Instrument) of title 18, and the fraudulent receipt of benefits provision in sections 1301 (Obstructing a Government Function by Fraud) and 1356 (Speculating on Official Action or Information) of title 18.

15 U.S.C. 714m(c) (section 15(c) of the Commodity Credit Corporation Charter Act) provides penalties for willful theft of property held by, or mortgaged or pledged to, the Commodity Credit Corporation, or of any property mortgaged or pledged as security for an evidence of indebtedness warranted by the Corporation. Section 301 of the bill repeals section 714m(c) as covered in section 1731 (Theft) and 1736 (Interfering With a Security Interest) of title 18.

15 U.S.C. 714m(d) (section 15(d) of the Commodity Credit Corporation Charter Act) provides penalties for anyone who conspires with another to accomplish any of the acts made unlawful by the preceding provisions of section 714m. Section 301 of the bill repeals section 714m (d) as covered in section 1002 (Criminal Conspiracy) of title 18.

15 U.S.C. 715i(c) (section 10(c) of the Act of February 2, 1935) describes federal jurisdiction over offenses and suits arising under the Connally Hot Oil Act. The second sentence of section 715i(c), stating that any criminal proceeding may be brought in the district where the alleged violation occurred, is repealed by section 321 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See also subchapter B (Venue) of chapter 33 of title 18. See section 402 of the bill for an additional amendment to 15 U.S.C. 715i(c).

15 U.S.C. 717m(d) (section 14(d) of the Natural Gas Act) authorizes judicial aid to compel testimony before the Federal Power Commission on matters affecting possible violations of the Natural Gas Act. The last sentence of section 717m(d), relating to penalties for failure or refusal to attend and testify or to answer any lawful inquiry and produce records, in obedience to the subpoena of the Commission, is repealed by section 301 of the bill as covered in sec-

tions 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 717u (section 22 of the Natural Gas Act) describes federal jurisdiction over offenses and suits arising under the Natural Gas Act. The second sentence of section 717u, stating that a criminal proceeding may be brought in the district where the alleged violation occurred, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See section 403 of the bill for an additional amendment to 15 U.S.C. 717u.

15 U.S.C. 1172 (section 2 of the Act of January 2, 1951) relates to the unlawful transportation of gambling devices and to the effect of the gambling device laws on the authority of the Federal Trade Commission. The first paragraph of the section, relating to the unlawful transportation of gambling devices, is repealed by section 301 of the bill as covered in section 1841 (Engaging in a Gambling Business) of title 18.

15 U.S.C. 1281 (section 1 of the Act of September 13, 1961) provides penalties for the willful destruction or injury of property moving in interstate or foreign commerce in the possession of a common or contract carrier. Section 301 of the bill repeals the section as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18, under the jurisdictional base provided in section 1701(c)(4) of title 18.

15 U.S.C. 1282 (section 2 of the Act of September 13, 1961) bars prosecution of offenses for destruction of property moving in commerce for which a State judgment of conviction or acquittal has been obtained. Section 301 of the bill repeals the section because the subject matter is covered in section 205 (Exercise of Concurrent Federal Jurisdiction) of title 18.

15 U.S.C. 1693n(b) (section 916(b) of the Electronic Fund Transfer Act) makes it an offense, in the first paragraph, to knowingly, in a transaction affecting interstate or foreign commerce, use or attempt or conspire to use a counterfeit, forged, lost, stolen, or fraudulently obtained debit instrument to obtain anything of value which, in a one-year period has a value aggregating $1,000 or more. The second paragraph makes it an offense with unlawful or fraudulent intent, to transport or attempt to transport in interstate or foreign commerce a counterfeit, forged, lost, stolen, or fraudulently obtained debit instrument, knowing that it is counterfeit, forged, lost, stolen, or fraudulently obtained. The third paragraph makes it an offense with unlawful or fraudulent intent to use an instrumentality of interstate or foreign commerce to sell or transport a counterfeit, forged, lost, stolen, or fraudulently obtained debit instrument knowing it to be counterfeit, forged, lost, stolen, or fraudulently obtained. Paragraph (4) of subsection (b) makes it an offense to knowingly receive, conceal, use, or transport anything of value (other than tickets for interstate or foreign transportation) which (A) within a one-year period has a value aggregating $1,000 or more, (B) has moved in, or is part of, or which constitutes interstate or foreign commerce, and (C) has been obtained with a counterfeit, forged, lost, stolen, or fraudulently obtained debit instrument. Paragraph (5) makes it an offense to knowingly receive, conceal, use, sell, or transport in interstate or foreign commerce

one or more tickets for interstate or foreign transportation which (A) within a one-year period have a value aggregating $500 or more, and (B) have been obtained with one or more counterfeit, forged, lost, stolen, or fraudulently obtained debit instruments. Paragraph (6) makes it an offense, in a transaction affecting interstate or foreign commerce to furnish anything of value, which within a one-year period has a value aggregating $1,000 or more, through the use of a counterfeit, forged, lost, stolen, or fraudulently obtained debit instrument, knowing that it is counterfeit, forged, lost, stolen, or fraudulently obtained. Section 301 repeals section 1693n(b) as covered in title 18. Paragraph (1) is repealed as covered in sections 1731 (Theft), with jurisdiction under subsection (c)(32)(B), 1001 (Criminal Attempt), and 1002 (Criminal Conspiracy) of title 18. In addition, subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 18 includes debit instruments within the definition of "security" set forth in section 1747(f) (Definitions for Subchapter E) to cover more clearly the counterfeiting or forgery of a debit instrument. Paragraph (2) is repealed as covered in sections 1731 (Theft), 1732 (Trafficking in Stolen Property), 1741 (Counterfeiting), 1742 (Forgery), 1001 (Criminal Attempt), and 1002 (Criminal Conspiracy) of title 18. Paragraph (3) is repealed as covered in sections 1731 (Theft) and 1732 (Trafficking in Stolen Property). Paragraph (4) is repealed as covered in sections 1731 (Theft), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property) of title 18. Paragraphs (5) and (6) are repealed as covered in sections 1731, 1732, and 1733 of title 18. Section 1693n(b) of title 15 is also covered generally in section 1734 (Executing a Fraudulent Scheme) of title 18.

15 U.S.C. 1825(a)(2)(C) (section 6(a)(2)(C) of the Horse Protection Act of 1970) provides penalties for anyone who forcibly assaults or interferes with anyone while engaged in or on account of the performance of official duties under the Horse Protection Act. Additional penalties are provided for the use of dangerous or deadly weapons in the commission of such acts and if any such person is killed. Section 301 of the bill repeals the section as its forcible interference provisions are covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), and 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18. The dangerous weapons provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18, and the homicide provision in subchapter A (Homicide Offenses) of chapter 16 of title 18. See section 408 of the bill for additional amendments to 15 U.S.C. 1825.

16 U.S.C. 1a–3 (section 6 of the Act of August 18, 1970) authorizes relinquishment by the Secretary of the Interior to a State or possession of the United States of part of the Federal legislative jurisdiction over National Park System lands or interests therein. Section 301 of the bill repeals the section to conform to 5 U.S.C. 306, as enacted by section 321 of the bill, which creates uniform procedures for relinquishment of jurisdiction.

16 U.S.C. 1a–6(b) (section 10(b) of the Act of August 18, 1970) relates to the law enforcement powers of designated personnel within the National Park System. Section 301 of the bill repeals section

1a-6(a) as covered in sections 3022 (Department of the Interior) of title 18. See section 411 of the bill for an amendment to 16 U.S.C. 1a-6(b)(1).

16 U.S.C. 413 (section 1 of the Act of March 3, 1897) provides penalties for the willful destruction, mutilation, or removal of any structure or vegetation on a national military park. Section 301 of the bill repeals the section as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18. The structures and vegetation referred to in 16 U.S.C. 413 are covered by the definition of "property" in section 111 of title 18.

In 16 U.S.C. 718e(b) (section 5(b) of the Act of March 16, 1934) prohibits the alteration, mutilation, imitation, or counterfeiting of a migratory-bird hunting and conservation stamp, or the manufacture, use, sale, or possession of any counterfeit, die, plate, or engraving thereof. Section 301 of the bill repeals section 718e(b) as covered in sections 1741 (Counterfeiting), 1742 (Forgery), and 1745 (Trafficking in a Counterfeiting Implement) of title 18.

16 U.S.C. 825f(c) (section 307(c) of the Federal Power Act) authorizes judicial aid to compel testimony before the Federal Power Commission on matters affecting possible violations of the Federal Power Act. The last sentence of section 825f(c), relating to penalties for willful failure or refusal to attend and testify or to answer a lawful inquiry or produce records in obedience to a subpena of the Commission, is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

16 U.S.C. 825p (section 317 of the Federal Power Act) relates to Federal jurisdiction over offenses and suits arising under the Federal Power Act. The second sentence of section 825p. which states that criminal proceedings shall be brought in the district wherein the alleged violation occurred, is repealed as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See also subchapter B (Venue) of chapter 33 of title 18. See section 429 of the bill for a additional amendment to 16 U.S.C. 825p.

16 U.S.C. 831t (section 21 of the Tennessee Valley Authority Act of 1933) (1) authorizes the application of all general penal statutes relating to embezzlement or other mishandling of property to property entrusted to the Tennessee Valley Authority; (2) provides penalties for any person who, with intent to defraud the Tennessee Valley Authority or to deceive a director, officer, or employee of the Authority or an officer or employee of the U.S., makes a false entry in a book of the Tennessee Valley Authority or makes a false report or statement for the Authority; and (3) provides penalties for any person who receives compensation or enters into any conspiracy or agreement with intent to defraud, or unlawfully defeat the purposes of, the Tennessee Valley Authority. Section 301 of the bill repeals section 831t as its general embezzlement provision is covered in section 1731 (Theft) of title 18, its false statement provision is covered in section 1343 (Making a False Statement) of title 18; and its unlawful compensation and conspiracy or collusion provision is covered in sections 1301 (Obstructing a Government Function by Fraud), and 1002 (Criminal Conspiracy) of title 18, and in

subchapter F (Official Corruption and Intimidation) of chapter 13, and chapter 4 (Complicity) of title 18.

16 U.S.C. 1338(a) (section 8(a) of the Act of December 17, 1971) provides penalties for various activities involving a wild free-roaming horse or burro, such as killing, harassing, unauthorized removal from public lands, and sale. The last sentence of section 1338(a), relating to the jurisdiction of magistrates over the offenses in the section, is repealed by section 301 of the bill as covered in section 3302 (Jurisdiction of United States Magistrates over Offenses) of title 18.

17 U.S.C. 506(e) provides penalties for anyone who knowingly makes a false representation of a material fact in an application for copyright registration or in a written statement connected with the application. This section is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18. See section 442 for an amendment to 17 U.S.C. 506(a).

17 U.S.C. 507(a) limits the commencement of criminal proceedings maintained under title 17 (Copyrights) to those commenced within three years after the cause of action arose. This section is repealed by section 301 of the bill as covered in section 511 (Time Limitations) of title 18.

19 U.S.C. 1341 (section 341 of the Tariff Act of 1930) makes it an offense for anyone to prevent or attempt to prevent, by force, intimidation, threat, or in any other manner, a member or employee of the Tariff Commission from exercising the functions of the Commission or to induce or attempt to induce by like means a member or employee to take an action or make a decision with respect to a matter within the authority of the Commission. Section 301 of the bill repeals the section as its attempt provisions are covered in section 1001 (Criminal Attempt) of title 18; the interference and inducement provisions in sections 1301 (Obstructing a Government Function by Fraud) and 1302 (Obstructing a Government Function by Physical Anterference) of title 18, in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18.

19 U.S.C. 1436 (section 436 of the Tariff Act of 1930) makes it an offense for the master of a vessel to fail to file a report or falsely report on matters pertaining to the vessel and its contents as required by the Tariff Act upon entry at any port of the United States. Additional penalties are provided where the vessel is carrying nonimportable goods. The second paragraph of the section, relating to the submission of false documentation on making entry of a vessel, is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18.

19 U.S.C. 1455 (section 455 of the Tariff Act of 1930) relates to the boarding and inspection of vessels by customs officers. The last sentence of the section, providing penalties for interference with such officers in the performance of their duties is repealed by section 301 of the bill as covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant) of title 18, and subchapter B (Assault Offenses) of chapter 16 of title 18.

19 U.S.C. 1465 (section 465 of the Tariff Act of 1930) relates to reporting supplies and merchandise acquired in any contiguous for-

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eign country. The last sentence of the section, which provides penalties for the failure to make such reports, is repealed by section 301 of the bill as covered in section 1411 (Smuggling) of title 18.

19 U.S.C. 1581(c) (section 581(c) of the Tariff Act of 1930) makes it an offense for the master of any vessel being examined by any customs officer to present false documentation to such officer. Section 301 of the bill repeals section 1581(c) as covered in section 1343 (Making a False Statement) of title 18.

19 U.S.C. 1708(b) (section 8(b) of the Anti-Smuggling Act) makes it an offense for anyone, with intent to defraud the revenue of the United States to procure, or aid or assist in procuring, liquor destined to the United States which does not have a certificate of importation. Section 301 of the bill repeals section 1708(b) as its aid or assistance provision is covered in chapter 4 (Complicity) of title 18, especially section 401 (Liability of an Accomplice), and as the offense provision is covered in sections 1301 (Obstructing a Government Function by Fraud) and 1411 (Smuggling) of title 18.

19 U.S.C. 1919 (section 319 of the Trade Expansion Act of 1962) makes it an offense for anyone to make a false statement of a material fact, to knowingly fail to disclose a material fact, or to willfully overvalue a security, in order to influence action of the Secretary of Commerce regarding tariff adjustments or to obtain anything of value. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement) and 1734 (Executing a Fraudulent Scheme) of title 18.

19 U.S.C. 2316 (section 244 of the Trade Act of 1974) makes it an offense for anyone to make a false statement of a material fact, or knowingly fail to disclose a material fact, in order to obtain or increase a payment for workers harmed by import competition. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1734 (Executing a Fraudulent Scheme) of title 18.

19 U.S.C. 2349 (section 259 of the Trade Act of 1974) makes it an offense for anyone to make a false statement of a material fact, or knowingly fail to disclose a material fact, or willfully overvalue a security, in order to influence a determination or obtain anything of value for firms harmed by import competition. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1734 (Executing a Fraudulent Scheme) of title 18.

20 U.S.C. 581(f)(3) (section 1001(f)(3) of the National Defense Education Act of 1958) provides that criminal false statement provisions are applicable with respect to the loyalty oath and statement concerning the applicant's criminal record that are required of anyone who is to receive funds under the National Defense Education Act. Section 301 of the bill repeals section 581(f)(3) as covered in subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18.

20 U.S.C. 1087-4(a) (section 440(a) of the Higher Education Act of 1965) makes it an offense to knowingly and willfully embezzle or obtain through fraud, false statement or forgery funds or property provided or insured under the low-interest insured student loan

program. Section 301 of the bill repeals section 1087-4(a) as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), under the jurisdictional bases in section 1731(c)(2) and (c)(10), 1742 (Forgery), 1743 (Criminal Endorsement of a Written Instrument), and 1744 (Criminal Issuance of a Written Instrument) of title 18.

20 U.S.C. 1087-4(b) and (c) (sections 440 (b) and (c) of the Higher Education Act of 1965) makes it an offense for anyone to knowingly and willfully make a false statement or conceal material information for the purpose of qualifying an educational institution to participate in the student loan program, in subsection (b), and in subsection (c), with regard to the assignment of student loans. Section 301 of the bill repeals sections 1087-4 (b) and (c) as covered in section 1343 (Making a False Statement) of title 18.

20 U.S.C. 1087-4(e) (section 440(e) of the Higher Education Act of 1965) makes it an offense for anyone to destroy or conceal, with intent to defraud, any loan application or other record relating to loans made or insured under the low-interest insured student loan program. Section 301 of the bill repeals section 1087-4(e) as covered in sections 1301 (Obstructing a Government Function by Fraud), 1344 (Tampering With a Government Record), and 1703 (Property Destruction) of title 18.

21 U.S.C. 17 (section 2 of the Act of July 1, 1902) provides criminal penalties for violations of 21 U.S.C. 16 (false labeling of dairy or food products). The second sentence of the section, authorizing prosecution for such violations in the district wherein it was committed, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure. See also subchapter B (Venue) of chapter 33 of title 18.

U.S.C. 201 to 215 (the Act of March 3, 1915, 38 Stat. 817) are repealed by section 301 of the bill as obsolete. Section 212 provides that it is the "duty of the consular and judicial officers of the United States in China to enforce the provisions of this Act," which regulate the practice of pharmacy and sale of poisons in the consular districts in China. However, the United States relinquished its extraterritorial rights in China by treaty in 1943 (57 Stat. 167), thereby abolishing the United States Court for China, and the statutory authority for consular courts was repealed by the Congress in 1956 (Joint Res., August 1, 1956, ch. 807, 70 Stat. 774).

21 U.S.C. 461(c) (section 12(c) of the Poultry Products Inspection Act) makes it an offense for anyone to forcibly assault, resist, or otherwise interfere with a person engaged in or on account of the performance of official duties under the Poultry Products Inspection Act. Additional penalties are provided if, in the commission of such an act, a deadly or dangerous weapon is used, and, if the person assaulted or resisted is killed, punishment shall be as provided in the homicide sections of title 18. Section 301 of the bill repeals section 461(c) as the forcible interference provisions are covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18; the dangerous weapons provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18; and, the homicide provision is cov-

ered in subchapter A (Homicide Offenses) of chapter 16 of title 18. See section 465(b) of the bill for other amendments to 21 U.S.C. 461.

21 U.S.C. 622 (section 22 of the Federal Meat Inspection Act) makes it an offense for anyone to give or pay anything of value to an officer or employee of the United States authorized to perform duties under the Meat Inspection Act with intent to influence an official act of such a person. Section 622 also makes it an offense for the officer or employee to accept anything of value given to influence his official action, or, if given by any person or firm engaged in commerce, given for any purpose whatsoever. Section 301 of the bill repeals section 622 as covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

21 U.S.C. 675 (section 406 of the Federal Meat Inspection Act) makes it an offense for anyone to forcibly assault, resist, intimidate, or otherwise interfere with a person engaged in or on account of the performance of his official duties under the Federal Meat Inspection Act. Additional penalties are provided if, in the commission of such an act, a deadly or dangerous weapon is used; and, if the victim is killed, punishment shall be as provided in the homicide sections of title 18. Section 301 of the bill repeals section 675 as the forcible interference provisions are covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), and 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18; the dangerous weapons provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18; and the homicide provision is covered in subchapter A (Homicide Offenses) of chapter 16 of title 18.

21 U.S.C. 841 (section 401 of the Controlled Substances Act) prohibits in subsection (a) the unauthorized manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense, a controlled or counterfeit substance. Subsection (b) provides penalties for violations of subsection (a). Subsection (c) relates to special parole terms for offenders under this section. Section 301 of the bill repeals subsections (a), (b), and (c) as subsections (a) and (b) are covered in sections 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), and 1813 (Possessing Drugs) of title 18. The provisions of section 1813 that grade the offense according to the amount of the drug possessed replace the language in current law that requires, for felony treatment of possession of a controlled substance, that it be proved that the possession is with intent to manufacture, distribute, or dispense the substance. Subsection (c) is repealed as obsolete because the Code abolishes parole. See section 467(c) for an amendment to 21 U.S.C. 841(d).

21 U.S.C. 842(c) (2) (B) (section 402(c) (2) (B) of the Controlled Substances Act) authorizes the imposition of enhanced penalties for violators of section 842, relating to the dispensing and manufacturing of controlled substances by registered manufacturers, distributors, and dispensers of controlled substances (an offense under section 1814(a) (1) (Violating a Drug Regulation) of title 18) who have had one or more prior convictions for drug offenses. Section 301 of the bill repeals section 842(c) (2) (B) in conformity with the general provisions of Part III (Sentences) of title 18. The sentencing guidelines can provide a higher penalty within the statutory maximum

for a repeat offender than for a first offender. (See chapter 58 of title 28, United States Code, as enacted by section 126 of the bill.) See section 467(d) of the bill for another amendment to 21 U.S.C. 842(c) (2).

21 U.S.C. 843(b) (section 403(b) of the Controlled Substances Act) prohibits the knowing or intentional use of a "communication facility" in causing or facilitating the commission of an act constituting a felony under the Controlled Substances Act. Section 301 of the bill repeals section 843(b) as unnecessary, given the jurisdictional provisions of the Code (chapter 2 of title 18), particularly section 201(b)(2). See section 467(e) of the bill for an amendment to 21 U.S.C. 843(c).

21 U.S.C. 844 (section 404 of the Controlled Substances Act) makes it an offense to knowingly or intentionally possess a controlled substance except pursuant to a valid prescription, and authorizes, for anyone charged with a first offense, the use of probation without entering a judgment of guilty, and, for anyone who was under the age of twenty-one at the time of the offense, expungement of records for a first offense after fulfilling the requirements of the special probation provisions. Section 301 of the bill repeals section 844 as the possession provision is covered in section 1813 (Possessing Drugs) of title 18, and the special probation and expungement provisions are covered in section 3807 (Special Probation and Expungement Procedure for Drug Possessors) of title 18.

21 U.S.C. 845 (section 405 of the Controlled Substances Act) provides additional penalties for the distribution of any controlled substance if the person to whom they are distributed is under the age of twenty-one and the offender is at least eighteen. Section 301 of the bill repeals section 845 as covered in the grading provisions in sections 1811(b)(1)(B) (Trafficking in an Opiate) and 1812(b) (Trafficking in Drugs) of title 18.

21 U.S.C. 846 (section 406 of the Controlled Substances Act) makes it an offense for anyone to attempt or conspire to commit an offense defined in the Controlled Substances Act. Section 301 of the bill repeals the section as the attempt provision is covered in section 1001 (Criminal Attempt) of title 18, and as the conspiracy provision is covered in section 1002 (Criminal Conspiracy) of title 18.

21 U.S.C. 847 (section 407 of the Controlled Substances Act) states that any criminal penalty imposed for a violation of the Controlled Substances Act shall be in addition to, and not in lieu of, any civil or administrative penalty. Section 301 of the bill repeals the section as unnecessary.

21 U.S.C. 848 (section 408 of the Controlled Substances Act) makes it an offense, under subsection (a)(1), to engage in a continuing criminal enterprise, with higher penalties provided for a second or subsequent offense under the section than for a first offense. Subsection (a)(2) provides that a defendant convicted under subsection (a)(1) shall forfeit to the United States his profits from the enterprise and any interest in, or right of any kind affording a source of influence over, the enterprise. Subsection (b) states that a person is engaged in a continuing criminal enterprise within the terms of the section if he violates a felony provision in the Controlled Substances Act (21 U.S.C. 801 *et seq.*) or the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), and the violation is

part of a continuing series of violations of those Acts that are undertaken by the defendant, acting in a management capacity, with five or more other persons, and from which the defendant obtains substantial income or resources. Subsection (c) prohibits placing a defendant convicted under subsection (a) on probation or parole. Subsection (d) grants the federal district courts jurisdiction to enter restraining orders and take other necessary actions in connection with property subject to forfeiture under subsection (a)(2). Section 301 of the bill repeals section 848 as covered in title 18 as follows: The offense defined in section 848(a)(1) is covered in section 1801 (Operating a Racketeering Syndicate) of title 18. Forfeiture of the profits and interests obtained in the enterprise is covered in section 2004 (Order of Criminal Forfeiture) of title 18, which expands the description of property reachable through forfeiture from the description in 21 U.S.C. 848(a)(2). In addition, sections 1802 (Racketeering) and 1803 (Washing Racketeering Proceeds) of title 18 cover offenses relating to obtaining interests in enterprises, in addition to the racketeering syndicate itself, through racketeering activity or through investing the proceeds from racketeering enterprise. The interests in these enterprises are also reachable under section 2004 of title 18. The definition of "continuing criminal enterprise" in 21 U.S.C. 848(b) is replaced by the definition of "racketeering syndicate" in section 1806(g) (Definitions for Subchapter A) of title 18. The new definition has the advantage over current law of reaching racketeering syndicates engaged in a continuing pattern of organized crime but not necessarily always engaged in violating the same statute. Subsection (c), prohibiting probation, is replaced by section 1811(b) (Trafficking in an Opiate) of title 18. In addition, section 994(h) of title 28, United States Code, as enacted by section 126 of the bill, requires that the sentencing guidelines "specify a sentence to a substantial term of imprisonment" for specified categories of offenders which would clearly include anyone who would have been found guilty of engaging in a continuing criminal enterprise under 21 U.S.C. 846(a). The provisions against parole are deleted as obsolete because of the determinate sentencing provisions in the Code. Subsection (d) of 21 U.S.C. 848, relating to protective orders issued in connection with property subject to forfeiture, is replaced by section 2004(b) of title 18.

21 U.S.C. 849 (section 409 of the Controlled Substances Act) authorizes enhanced penalties and specific sentencing procedures for dangerous special drug offenders. Section 849(e) defines a special drug offender as one who has previously been convicted of two or more felonies involving controlled substances, or the instant controlled substances felony is part of a pattern of dealing in controlled substances which constituted a substantial source of the offender's income and in which he manifested special skill or expertise, or the felony was, or was part of, a conspiracy with three or more persons engaged in a pattern of dealing in controlled substances and in which the defendant was a leader or gave or received a bribe or used force. Subsection (b) provides for inspection of the presentence report and for a sentencing hearing. Subsection (h) of section 849 provides for appellate review of the sentence at the instigation of the defendant or the government. Section 301 of the bill repeals 21 U.S.C. 849 as covered in a variety of offense and

sentencing provisions in title 18. First, section 1811(b)(1)(C) (Trafficking in an Opiate) of title 18 provides enhanced grading for a second or subsequent conviction for opiate trafficking. Second, as discussed in connection with the repeal of 21 U.S.C. 848, subchapter A (Organized Crime Offenses) of chapter 18 of title 18 provides substantial penalties for the leaders of groups of criminals engaged on an ongoing basis in drug trafficking and other criminal activity. A drug trafficker who used bribery to facilitate his criminal activity would be chargeable with an offense under section 1351 (Bribery), with jurisdiction provided in section 1351(c)(5). A drug trafficker who used force against a law enforcement officer in connection with the offense would be chargeable under section 1357 (Tampering With a Public Servant) or 1358 (Retaliating Against a Public Servant) and depending upon the facts in the particular case, might be chargeable with an offense under subchapter A (Homicide Offenses) or B (Assault Offenses) of chapter 16 of title 18. In addition, while the Code does not use dangerous special drug offender sentencing, or any other special sentencing provisions applicable to only one category of offender, it creates in Part III a comprehensive sentencing guidelines system by which, for example, the worst drug offenders convicted of drug trafficking felonies would receive substantial terms of imprisonment near the maximum permitted for the offense for which they were convicted. See, e.g., 28 U.S.C. 994(h), as enacted by section 126 of the bill. Finally, the provisions in 21 U.S.C. 849 for a sentencing hearing and examination of the presentence report are replaced by Rule 32 of the Federal Rules of Criminal Procedure as amended by section 111(r) of the bill.

21 U.S.C. 850 (section 410 of the Controlled Substances Act) relates to information to be considered by a court for the purpose of imposing an appropriate sentence for violations of the Controlled Substances Act. Section 301 of the bill repeals the section as covered in sections 2002 (Presentence Reports) and 2003 (Imposition of a Sentence) of title 18, and in Rule 32 (Sentence and Judgment) of the Federal Rules of Criminal Procedures, as amended by section 111(r) of the bill.

21 U.S.C. 851 (section 411 of the Controlled Substances Act) relates to proceedings to establish prior convictions for the purpose of enhanced sentencing. Section 301 of the bill repeals the section as unnecessary because procedures to be followed in improving sentencing are described in section 2003 (Imposition of a Sentence) of title 18 and in Rule 32 (Sentence and Judgment) of the Federal Rules of Criminal Procedure, as amended by section 111(r) of the bill.

21 U.S.C. 878 (section 508 of the Controlled Substances Act) describes the law enforcement powers of designated personnel of the Bureau of Narcotics and Dangerous Drugs. Section 301 of the bill repeals the section as covered in section 3012 (Drug Enforcement Administration) of title 18.

21 U.S.C. 884 (section 514 of the Controlled Substances Act) relates to the compulsion of testimony and granting of immunity from prosecution after a witness has refused to testify on the basis of the privilege against self-incrimination. Section 301 of the bill re-

peals the section as covered in subchapter C (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18.

21 U.S.C. 955 (section 1005 of the Controlled Substances Import and Export Act) prohibits bringing on board, or possessing on board, a vessel, aircraft, or vehicle arriving in or departing from the United States or the customs territory of the United States, a controlled substance in Schedule I or II or a narcotic drug in Schedule III or IV, unless it is part of the cargo listed in the manifest or part of the official supplies of the vessel, vehicle, or aircraft. Section 301 of the bill repeals the section as covered in sections 1811(a)(3) (Trafficking in an Opiate), 1812(a)(3) (Trafficking in Drugs) and 1813 (Possessing Drugs) of title 18.

21 U.S.C. 959 (section 1009 of the Controlled Substances Import and Export Act) prohibits the manufacture or distribution of a controlled substance in Schedule I or II intending or knowing that it will be unlawfully imported into the United States. Section 301 of the bill repeals the section as covered in sections 1811(a)(4) (Trafficking in an Opiate) and 1812(a)(4) (Trafficking in Drugs) of title 18. Section 204(d) (Extraterritorial Jurisdiction of the United States) of title 18 provides extraterritorial jurisdiction of the offense.

21 U.S.C. 960(b) (section 1010(b) of the Controlled Substances Import and Export Act) provides penalties for importing or exporting a controlled substance in specified circumstances, possessing a controlled substance in Schedule I or II or a narcotic drug in Schedule III or IV on board a vessel, aircraft, or vehicle arriving in or departing from the United States, or manufacturing or distributing a controlled substance in Schedule I or II for purposes of unlawful importation into the United States. Section 301 of the bill repeals section 960(b) as covered in section 1811 (Trafficking in an Opiate) and 1812 (Trafficking in Drugs) of title 18. See section 468(a) of the bill for amendments to 21 U.S.C. 960.

21 U.S.C. 960(c) (section 1010(c) of the Controlled Substances Import and Export Act) relates to the revocation of a special parole term imposed on offenders under the Controlled Substances Import and Export Act. Section 301 of the bill repeals section 960(c) because the Code utilizes a determinate sentencing system. See, however, the provisions of section 2303 (Inclusion of a Term of Supervised Release After Imprisonment) of title 18.

21 U.S.C. 962 (section 1012 of the Controlled Substances Import and Export Act) authorizes enhanced sentencing for second or subsequent offenses under the Controlled Substances Import and Export Act. Section 301 of the bill repeals the section as covered in part in the grading provision of subsection (b)(1)(C) of section 1811 (Trafficking in an Opiate) of title 18. The Code generally leaves the consideration of the effect that a defendant's criminal record should have on the sentence to sentencing guidelines promulgated pursuant to 28 U.S.C. 994, as enacted by section 126 of the bill, and to the judge's sentencing decision pursuant to section 2003 (Imposition of a Sentence) of title 18. See also subchapter A (Organized Crime Offenses) of chapter 18 of title 18.

21 U.S.C. 1041(c) (section 12(c) of the Egg Products Inspection Act) makes it an offense for anyone to forcibly assault, resist, intimidate, or otherwise interfere with any person engaged in or on

account of his performance of official duties under the Egg Products Inspection Act. Additional penalties are provided if, in the commission of such an act, a deadly or dangerous weapon is used, and, if the victim is killed, a punishment shall be as provided in the homicide sections of title 18. Section 301 of the bill repeals section 1041(c) as the forcible interference provisions are covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant) of title 18 and in subchapter B (Assault Offenses) of chapter 16 of title 18; the dangerous weapons provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18; and, the homicide provision is covered in subchapter A (Homicide Offenses) of chapter 16 of title 18. See section 469 for additional amendments to 21 U.S.C. 1041.

22 U.S.C. 141 through 183 (section 1693, 4083 through 4091, 4097 through 4122, and 4125 through 4130 of the Revised Statutes, and the Acts of March 23, 1874, March 2, 1901, March 2, 1909, and March 4, 1915) relate to consular courts in China, Morocco, Egypt, Turkey, and certain other countries. These sections are repealed by section 301 of the bill as obsolete.

22 U.S.C. 615 (section 5 of the Foreign Agents Registration Act of 1938) relates to required recordkeeping by foreign agents. The last sentence of the section, prohibiting the concealment, falsification, obliteration, mutilation, or destruction of the required records, or attempting or causing one of those acts, is repealed by section 301 of the bill as covered in sections 1001 (Criminal Attempt), 1126(a)(2) (Failing to Register as, or Acting as, a Foreign Agent), 1343 (Making a False Statement), and 1344 (Tampering With a Government Record) of title 18, and chapter 4 (Complicity) of title 18.

22 U.S.C. 618(e) (section 8(e) of the Foreign Agents Registration Act of 1938) makes the failure to register, as required by the Act, a continuing offense for as long as the failure exists, notwithstanding any statute of limitations to the contrary. Section 301 of the bill repeals section 618(e) as covered in section 511(d)(2)(B) (Time Limitations) of title 18. See section 474 of the bill for additional amendments to 22 U.S.C. 618.

22 U.S.C. 1198 (section 1734 of the Revised Statutes) makes it an offense for a consular officer to willfully neglect to render true accounts or to neglect to pay over money due the United States or a citizen of the United States. Section 301 of the bill repeals the section as covered in sections 1343 (Making a False Statement) and 1731 (Theft) of title 18.

22 U.S.C. 1200 (section 1737 of the Revised Statutes) makes it an offense for a consular officer to falsely and knowingly certify that property belonging to foreigners belongs to citizens of the United States. Section 301 of the bill repeals the section as covered in section 1343 (Making a False Statement) of title 18.

25 U.S.C. 232 (the Act of July 2, 1948) gives the State of New York jurisdiction over offenses committed by or against Indians on Indian reservations within the state to the same extent that it has jurisdiction over offenses committed elsewhere in the State. Section 301 of the bill repeals the section because it is reenacted as section 161(h) (Jurisdiction Over Offenses Committed in the Indian Coun-

try) of the bill as part of a consolidation of all Indian criminal jurisdiction provisions in a section to be codified to title 25.

25 U.S.C. 450d (section 6 of the Indian Self-Determination and Education Assistance Act) makes it an offense for anyone connected with the recipient of a grant, subgrant, contract, or subcontract pursuant to the Act to embezzle, willfully misapply, or obtain by fraud, property that is the subject of such a grant, subgrant, contract, or subcontract. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18.

26 U.S.C. 5557(a) (section 5557(a) of the Internal Revenue Code of 1954) describes the authority of the Secretary of the Treasury to investigate violations concerning certain liquor violations and issue search warrants, and the authority of the United States Attorney to prosecute the violations. The last sentence of section 5557(a), making 18 U.S.C. 3041 (Power of Courts and Magistrates), which describes the role of the courts with respect to arrestees, applicable to the section, is repealed by section 301 of the bill as covered in sections 3303 (Jurisdiction to Order Arrests for Offenses) and 3501 (Release and Detention Authority Generally) of title 18, and in the Federal Rules of Criminal Procedure.

26 U.S.C. 5603(a)(4) and 5603(b)(4) (sections 5603(a)(4) and 5603(b)(4) of the Internal Revenue Code of 1954) prohibit hindering or obstructing an internal revenue officer, with or without an intent to defraud the United States, from inspecting a document required to be kept under chapter 51 (Distilled Spirits, Wine, and Beer), except subchapters F and G, of title 26. Section 301 of the bill repeals sections 5603(a)(4) and (b)(4) as covered in sections 1301 (Obstructing a Government Function by Fraud), 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant) of title 18, and chapter 16 (Offenses Involving the Person) of title 18. See section 491(i) for other amendments to 26 U.S.C. 5603.

26 U.S.C. 5685 (section 5685 of the Internal Revenue Code of 1954) makes it an offense to posses, when violating a liquor law, a device for emitting fumes or smoke, an explosive, or a firearm, and which may be used to hinder pursuit or capture for violation of such law. The section also provides for forfeiture of the device, explosive, or firearm. Section 301 of the bill repeals the section as covered in sections 1823 (Using a Weapon in the Course of a Crime) and 4001 (Civil Forfeiture of Property) of title 18.

26 U.S.C. 6533(3) (section 6533(3) of the Internal Revenue Code of 1954) contains a cross-reference to 18 U.S.C. 3287, relating to the wartime suspension of the running of certain statutes of limitation. Section 301 of the bill repeals section 6533(3) because the provisions of 18 U.S.C. 3287 have been omitted from title 18.

26 U.S.C. 7201 (section 7201 of the Internal Revenue code of 1954) makes it an offense to willfully attempt to evade or defeat any tax imposed by the Act or the payment thereof. Section 301 of the bill repeals the section as covered in section 1401 (Tax Evasion) of title 18.

26 U.S.C. 7202 (section 7202 of the Internal Revenue code of 1954) makes it an offense for a person required to collect, account for,

and pay over a tax willfully to fail to do so. Section 301 of the bill repeals the section as covered in sections 1401(a)(3) (Tax Evasion) and 1402(a)(2) (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 7204 (section 7204 of the Internal Revenue Code of 1954) makes it an offense for an employer willfully to fail to provide an employee with a tax withholding statement, as required by 26 U.S.C. 6051, or willfully to provide a false or fraudulent statement. Section 301 of the bill repeals section 7204 as covered in section 1402(a)(3) (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 7206 (section 7206 of the Internal Revenue Code of 1954) makes it an offense (1) to willfully make and subscribe under penalties of perjury a false tax declaration; (2) willfully to aid or assist in preparing a tax statement that is fraudulent or is false as to any material matter, whether or not the fraud or falsity is with the knowledge or consent of the person required to file the statement; (3) to simulate or fraudulently execute a bond, permit, or other document required by provisions of the internal revenue laws; (4) in connection with a tax compromise (26 U.S.C. 7122) or closing agreement (26 U.S.C. 7121), to remove or conceal goods or property with intent to evade tax assessment or collection; and (5) to conceal property or withhold, falsify, or destroy records. Section 301 of the bill repeals section 7206 as its provisions are covered in chapter 4 (Complicity) of title 18, section 1301 (Obstructing a Government Function by Fraud) of title 18, subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18, and sections 1401 (Tax Evasion) and 1402 (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 7208 (section 7208 of the Internal Revenue Code of 1954) makes it an offense (1) to counterfeit or forge a tax stamp or coupon, or to sell, lend, or possess a counterfeited or forged tax stamp or coupon; (2) to fraudulently mutilate or remove a tax stamp or coupon, from an article on which tax is imposed; (3) to fraudulently use a mutilated, counterfeited, or forged tax stamp, or a tax stamp removed from an article on which tax has been paid; (4) to prepare for reuse, or knowingly possess or traffic in restored tax stamps; or (5) to violate 26 U.S.C. 7271, relating to disposal and receipt of stamped packages, with intent to defraud the revenue. Section 301 of the bill repeals section 7208 as covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

26 U.S.C. 7209 (section 7209 of the Internal Revenue Code of 1954) makes it an offense to traffic in or pledge a stamp, coupon, ticket, book, or other device used for collection or payment of taxes. Section 301 of the bill repeals this section at the suggestion of the Department of the Treasury because of disuse and because of the repeal of many provisions relating to tax stamps such as those described here.

26 U.S.C. 7214(a)(4), (5), and (6) (sections 7214(a)(4), (5), and (6) of the Internal Revenue Code of 1954) prohibit an officer or employee of the United States acting in connection with a federal revenue law from conspiring or colluding with, acting with intent to enable,

or making an opportunity for, any other persons to defraud the United States. Section 301 of the bill repeals sections 7214 (a)(4), (5), and (6) as covered in chapter 4 (Complicity) of title 18 and in sections 1002 (Criminal Conspiracy), 1301 (Obstructing a Government Function by Fraud), and subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

26 U.S.C. 7214(a)(7) (section 7214(a)(7) of the Internal Revenue Code of 1954) prohibits an officer or employee of the United States acting in connection with a federal revenue law from making or signing a fraudulent entry in a book, or making or signing a fraudulent certificate, return, or statement. Section 301 of the bill repeals section 7214(a)(7) as covered in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18.

26 U.S.C. 7214(a)(9) (section 7214(a)(9) of the Internal Revenue Code of 1954) prohibits an officer or employee of the United States acting in connection with a federal revenue law, without authorization, from demanding, accepting, or attempting to collect, anything of value for the compromise, adjustment, or settlement of a charge or complaint for an alleged violation of law. Section 301 of the bill repeals section 7214(a)(9) as covered in sections 1001 (Criminal Attempt), 1351 (Bribery), and 1352 (Graft) of Title 18. See section 498(c) of the bill for other amendments to 26 U.S.C. 7214.

26 U.S.C. 7215(a) (section 7215(a) of the Internal Revenue Code of 1954) provides penalties for violations of 26 U.S.C. 7512(b) (requiring separate bank accounts to be kept by persons required to collect and account for certain taxes). Section 301 of the bill repeals section 7215(a) as covered in section 1402(a)(5) (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 9012(c) (section 9012(c) of the Presidential Election Campaign Fund Act) makes it an offense to knowingly and willfully use payments made under the Act for any purpose other than defraying campaign expenses. Section 301 of the bill repeals section 9012(c) as covered in section 1731 (Theft) of title 18, with jurisdiction under subsection (c)(29) of section 1731.

26 U.S.C. 9012(d)(1)(A) (section 9012(d)(1)(A) of the Presidential Election Campaign Fund Act) prohibits any person from knowingly and willfully making false statements or tampering with or concealing evidence relevant to a certification, examination, or audit by the Federal Election Commission. Section 301 of the bill repeals section 9012(d)(1)(A) as covered in section 1325 (Tampering With Physical Evidence), 1343 (Making a False Statement), and 1344 (Tampering With a Government Record) of title 18.

26 U.S.C. 9012(e)(1) and (2) (sections 9012(e)(1) and (2) of the Presidential Election Campaign Fund Act) prohibit and provide penalties for anyone who knowingly and willfully gives or accepts a kickback or any illegal payment in connection with campaign expenses. Section 301 of the bill repeals sections 9012(e)(1) and (2) as covered in section 1751 (Commercial Bribery) of title 18, under the jurisdictional base contained in subsection (c)(1)(E) of section 1751. See section 501 of the bill for an amendment to 26 U.S.C. 9012(e).

26 U.S.C. 9042(a) (section 9042(a) of the Presidential Primary Matching Payment Account Act) makes it unlawful to make, or as an officer or member of a political committee knowingly to consent

to, excess campaign expenses in violation of 26 U.S.C. 9035. Section 301 of the bill repeals section 9042(a) as covered in section 1517 (Making an Excess Campaign Expenditure) of title 18.

26 U.S.C. 9042(b) (section 9042(b) of the Presidential Primary Matching Payment Account Act) makes it an offense to knowingly and willfully use payments made under the Act for any purpose other than defraying campaign expenses. Section 301 of the bill repeals section 9042(b) as covered in section 1731 (Theft) of title 18, under the jurisdictional base provided in subsection (c)(29) of section 1731.

26 U.S.C. 9042(c) (section 9042(c) of the Presidential Primary Matching Payment Account Act) makes it an offense to willfully and knowingly make false statements, or tamper with or conceal or refuse to furnish evidence relevant to a certification, audit, or examination by the Federal Election Commission under the Act. Section 301 of the bill repeals section 9042(c) as covered in sections 1325 (Tampering With Physical Evidence), 1333 (Refusing to Testify or to produce Information), 1343 (Making a False Statement), and 1344 (Tampering With a Government Record) of title 18.

26 U.S.C. 9042(d)(1) and (2) (sections 9042(d)(1) and (2) of the Presidential Primary Matching Payment Account Act) prohibit and provide penalties for anyone who knowingly and willfully gives or accepts a kickback or illegal payment in connecton with campaign expenses of a candidate, or his committee, who receives payments under the Act. Section 301 of the bill repeals these provisions as covered in section 1751 (Commercial Bribery) of title 18.

28 U.S.C. 509(4) maintains the functional independence of the Board of Parole within the Department of Justice. Section 301 of the bill repeals section 509(4) as parole is abolished by the Code. See section 511 of the bill for other amendments to 28 U.S.C. 509.

28 U.S.C. 1864(b) relates to compelling the appearance of any person summoned as a juror. The last sentence, relating to willfull misstatements of material facts for the purpose of avoiding or severing services as a juror, is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18. See section 519 of the bill for another amendment to 28 U.S.C. 1864(b).

28 U.S.C. 2902(e) makes it an offense for a narcotic addict to escape or attempt to escape while civilly committed, while prosecution for an offense is held in abeyance, to institutional custody for examination or treatment, or for anyone to rescue, attempt to rescue, instigate, aid, or to assist an escape or attempted escape. Section 301 of the bill repeals section 2902(e) as its aid or assistance and instigation provisions are covered in chapter 4 (Complicity) of title 18; its attempt provisions are covered in section 1001 (Criminal Attempt) of title 18; and the offense provisions are covered in sections 1311 (Hindering Law Enforcement), 1313 (Escape), and 1314 (Providing or Possessing Contraband in a Prison) of title 18.

29 U.S.C. 186(a)(4) (section 302(a)(4) of the Labor Management Relations Act) prohibits an employer or its agent from paying or lending, or agreeing to pay or lend, anything of value to an officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in any of his official duties. Section 301 of the bill repeals section 186(a)(4) as covered in section

1752 (Labor Bribery) of title 18. See section 531 of the bill for additional amendments to 29 U.S.C. 186.

29 U.S.C. 439(b) (section 209(b) of the Labor Management Reporting and Disclosure Act of 1959) makes it an offense for anyone to make a false statement, or fail to disclose a material fact, in information required by the Act. Section 301 of the bill repeals section 439(b) as covered in section 1343 (Making a False Statement) of title 18.

29 U.S.C. 439(c) (section 209(c) of the Labor Management Reporting and Disclosure Act of 1959) makes it an offense for anyone willfully to make a false entry in, or conceal, withhold, or destroy, a record required to be kept under the Act. Section 301 of the bill repeals section 439(c) as covered in sections 1343 (Making a False Statement) and 1344 (Tampering With a Government Record) of title 18.

29 U.S.C. 461(d) (section 301(d) of the Labor Management Reporting and Disclosure Act of 1959) makes it an offense for anyone to make a false statement of a material fact, knowing it to be false, or knowingly fail to disclose a material fact, in the annual report required of every labor organization by 29 U.S.C. 461 and for anyone to make a false entry in or conceal or destroy a document upon which such report is based. Secton 301 of the bill repeals section 461(d) as covered in sections 1343 (Making a False Statement) and 1344 (Tampering With a Government Record) of title 18.

29 U.S.C. 501(c) (section 501(c) of the Labor Management Reporting and Disclosure Act of 1959) makes it an offense for anyone to embezzle assets of a labor organization of which he is an officer or employee. Section 301 of the bill repeals section 501(c) as covered in section 1731 (Theft) of title 18, with jurisdiction under subsection (c) (16) of section 1731.

29 U.S.C. 522 (section 602 of the Labor Management Reporting and Disclosure Act of 1959) prohibits and provides penalties for picketing to obtain anything of value for personal profit, other than a bona fide increase in wages or other employee benefits. Section 301 of the bill repeals the section as covered in sections 1722 (Extortion) and 1723 (Blackmail) of title 18.

29 U.S.C. 528 (section 608 of the Labor Management Reporting and Disclosure Act of 1959) relates to the facts necessary to establish criminal contempt in connection with a civil action brought under the provisions of the Act. Section 301 of the bill repeals the section as covered in section 1331 (Criminal Contempt) of title 18.

29 U.S.C. 629 (section 10 of the Age Discrimination in Employment Act of 1967) makes it an offense for anyone to forcibly resist, oppose, impede, intimidate, or interfere with an authorized representative of the Secretary of Labor while he is engaged in the performance of duties under the Act. Section 301 of the bill repeals the section as covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18.

29 U.S.C. 666(g) (section 17(g) of the Occupational Safety and Health Act of 1970) makes it an offense for anyone knowingly to make a false statement in any document filed or required to be maintained pursuant to the Act. Section 301 of the bill repeals sec-

tion 666(g) as covered in section 1343 (Making a False Statement) of title 18.

30 U.S.C. 689(a) (section 9(a) of the Act of October 3, 1961) makes it an offense for anyone to misrepresent a material fact, knowing it to be false or fraudulent, in order to procure payments to which he is not entitled under the lead and zinc stabilization program. Section 301 of the bill repeals section 689(a) as covered in section 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement) and 1734 (Executing a Fraudulent Scheme) of title 18. See section 541 of the bill for additional amendments to 30 U.S.C. 689.

30 U.S.C. 820(f) (section 110(f) of the Federal Mine Safety and Health Act of 1977) makes it an offense for anyone knowingly to make a false statement in a document filed or required to be maintained pursuant to the Act. Section 301 of the bill repeals sections 820(f) as covered in section 1343 (Making a False Statement) of title 18. See section 542(a) of the bill for an additional amendment to 30 U.S.C. 820.

30 U.S.C. 941 (section 431 of the Federal Mine Safety and Health Act of 1977) makes it an offense for anyone willfully to make a false or misleading statement in order to receive a benefit or payment under the Black Lung Benefits Act. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1734 (Executing a Fraudulent Scheme) of title 18.

30 U.S.C. 1232(d) (section 402(d) of the Surface Mining and Reclamation Act of 1977) makes it an offense for anyone, on behalf of a coal mine operator, to make a false statement, or knowingly fail to make any statement, required by 30 U.S.C. 1232, concerning the amount of coal produced, the method of removal of coal, and the type of coal. Section 301 of the bill repeals section 1232(d) as covered in section 1343 (Making a False Statement) of title 18.

30 U.S.C. 1268(g) (section 518(g) of the Surface Mining and Reclamation Act of 1977) makes it an offense for anyone knowingly to make a false statement, or knowingly fail to make a statement, in a document filed or required to be maintained pursuant to a program or order under the Act. Section 301 of the bill repeals section 1268(g) as covered in section 1343 (Making a False Statement) of title 18. See section 543 of the bill for an additional amendment to 30 U.S.C. 1268.

30 U.S.C. 1294 (section 704 of the Surface Mining and Reclamation Act of 1977) makes it an offense for anyone, except as permitted by law, to knowingly resist, prevent, impede, or interfere with the Secretary or an authorized agent in the performance of duties pursuant to the Act. Section 301 of the bill repeals the section as covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), and 1358 (Retaliating Against a Public Servant) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18.

31 U.S.C. 233 (section 3492 of the Revised Statutes) relates to the duty of United States Attorneys to pursue diligently any violations of 31 U.S.C. 231, relating to the liability of persons making false claims upon or against the government of the United States. The second sentence of the section, authorizing arrest and bail and

limiting the amount of bail to be required in such cases, is repealed by section 301 of the bill as covered in chapter 35 (Release and Detention Pending Judicial Proceedings) of title 18.

31 U.S.C. 1060 (section 211 of the Currency and Foreign Transactions Reporting Act) relates to granting immunity from prosecution where a witness is compelled to testify after refusing to do so on the basis of the privilege against self-incrimination. Section 301 of the bill repeals the section as covered in subchapter C (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18.

33 U.S.C. 364 (section 13 of the Act of June 20, 1874) relates to the remission and recovery of penalties imposed for failure to comply with requirements that ship officers and owners report accidents to the Coast Guard. The last sentence of the section is repealed by section 301 because it authorizes collection of penalties pursuant to 33 U.S.C. 396, which is repealed by section 301 of the bill.

33 U.S.C. 391 to 396 (sections 4300 to 4305 of the Revised Statutes) relate to summary trials for certain offenses against navigation laws. Section 301 of the bill repeals those sections as outmoded. Their provisions are variously covered in title 18, the Federal Rules of Criminal Procedure, and chapter 163 (Fines, Penalties and Forfeitures) of title 28, United States Code.

33 U.S.C. 447 (the fifth paragraph of section 3 of the Act of June 29, 1888) prohibits anyone from bribing an inspector or other employee of the office of a supervisor of a harbor, with intent to influence such official to permit or overlook a violation of provisions against dumping garbage, waste, and dredgings. Secton 301 of the bill repeals the section as covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

33 U.S.C. 506 (secton 4 of the Act of August 21, 1935) authorizes the Secretary of Transportation to conduct hearings to determine the reasonableness of certain bridge tolls. The last sentence of the section, providing penalties for neglect or refusal to attend and testify, or to answer a lawful inquiry or produce documents, in obedience to a subpoena, is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

33 U.S.C. 682 (secton 22 of the Act of March 1, 1893) makes it an offense, in the first sentence, to willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, a dam or other work erected to protect navigable waters from the injuries of hydraulic mining, is repealed by secton 301 of the bill as covered in sections 1001 (Criminal Attempt), 1701 (Arson), 1702 (Aggravated Property Destruction), and 1703 (Property Destruction) of title 18.

33 U.S.C. 931 (section 31 of the Longshoremen's and Harbor Workers' Compensation Act) makes it an offense to willfully make a false or misleading statement for the purpose of obtaining a benefit or payment under the Act. Section 301 of the bill repeals the section as covered in section 1343 (Making a False Statement) of title 18.

33 U.S.C. 938(b) (section 38(b) of the Longshoremen's and Harbor Workers' Compensation Act) makes it an offense for an employer to dispose of, conceal, or destroy property belonging to the employ-

ee, after the employee has been injured within the purview of the Act, and with intent to avoid the payment of compensation under the Act to such employee or his dependents. The secton also makes the president, secretary, and treasurer jointly and severally liable under the section with a corporate employer. Section 301 of the bill repeals section 938 (b) as the offense provisions are covered in section 1325 (Tampering With Physical Evidence) of title 18, and the joint and several liability provision is covered in sections 402 (Liability of an Organization for Conduct of an Agent) and 403 (Liability of an Agent for Conduct of an Organization) of title 18.

33 U.S.C. 990 (section 9 of the Act of May 13, 1954) provides penalties for certain offenses affecting the Saint Lawrence Seaway Development Corporation and is repealed by section 301 of the bill to conform to the Code. Subsection (a) of section 990, relating to embezzlement of public moneys or property of the United States, is repealed as covered in section 1731 (Theft) of title 18. Subsection (b), relating to making, with intent to defraud, false entries in records or false statements for the corporation, is repealed as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18. Finally, subsection (c), making it an offense for anyone to receive compensation, or enter into a conspiracy or agreement, with intent to defraud or unlawfully defeat the purposes of the Corporation, is repealed as covered in chapter 4 (Complicity) of title 18, in sections 1002 (Criminal Conspiracy) and 1301 (Obstructing a Government Function by Fraud) of title 18, and in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

33 U.S.C. 1232(b)(2) (section 13(b)(2) of the Ports and Waterways Safety Act) makes it an offense to use a dangerous weapon or engage in conduct that causes injury or fear of imminent bodily injury to an officer authorized to enforce the provisions of the Act. Section 301 of the bill repeals section 1232(b)(2) as the dangerous weapon provision is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18 and the assault provisions are covered in section 1357 (Tampering With a Public Servant) and 1358 (Retaliating Against a Public Servant) of title 18 and in subchapter B (Assault Offenses) of chapter 16 of title 18. See section 566 of the bill for another amendment to 33 U.S.C. 1232(b).

33 U.S.C. 1319(c)(1) (section 309(c)(1) of the Federal Water Pollution Control Act) provides criminal penalties for anyone who violates the provisions of the Act. The last sentence of section 1319(c)(1), providing enhanced penalties for subsequent convictions under the section, is repealed by section 301 of the bill because section 1853 (Environmental Pollution) of title 18, under subsections (a)(1) and (b)(1), makes an offense a Class E felony. See section 567(a) of the bill for additional amendments to 33 U.S.C. 1319(c).

33 U.S.C. 1344(s)(4)(A) (section 404(s)(4)(A) of the Federal Water Pollution Control Act) makes it an offense for anyone willfully or negligently to violate a condition of a permit to discharge dredged or fill material. The last sentence of section 1344(s)(4)(A), providing enhanced penalties for subsequent convictions under the section, is repealed by section 301 of the bill because section 1853 (Environmental Pollution) of title 18, under subsections (a)(1) and (b)(1),

makes an offense a Class E felony. See section 567(b) for an additional amendment to 33 U.S.C. 1344(s)(4)(A).

38 U.S.C. 787 makes it an offense for anyone to make, conspire to make, or aid or arrange for the making or presentation of, a false statement in or concerning any application or claim for National Service Life Insurance or other insurance of the United States government. Section 301 of the bill repeals the section as covered in chapter 4 (Complicity) of title 18, and in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1734 (Executing a Fraudulent Scheme) of title 18.

38 U.S.C. 3501 makes it an offense for a fiduciary to misappropriate funds paid under any law administered by the Veterans' Administration. Section 301 of the bill repeals the section as covered in section 1731 (Theft) of title 18, with jurisdiction under subsection (c)(27) of section 1731.

38 U.S.C. 3502 makes it an offense for a person to fraudulently accept payment under any law administered by the Veterans' Administration. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud) and 1731 (Theft) of title 18.

38 U.S.C. 5007 authorizes partial relinquishment to a State of legislative jurisdiction over any lands or interests in that State controlled by the Veterans' Administration in order to establish concurrent jurisdiction between the Federal Government and the State concerned. Section 301 of the bill repeals the section to conform to 5 U.S.C. 306, as enacted by section 321 of the bill.

39 U.S.C. 1008(b) defines, for purposes of current 18 U.S.C. 1701, 1708, and 2114, as a carrier or person entrusted with the mail any person who is employed by the Postal Service or is carrying mail under contract with the Postal Service. Section 301 of the bill repeals section 1008(b) as unnecessary given the definition of federal public servant in section 111 of title 18 and the fact that the sections of title 18 that replace 18 U.S.C. 1701, 1708, and 2114 (i.e., 1301 (Obstructing a Government Function by Fraud), 1302 (Obstructing a Government Function by Physical Interference), 1731 (Theft), and 1721 (Robbery)) clearly cover acts involving mail whether it is being carried by an employee, or by a contractor, of the Postal Service.

40 U.S.C. 13m (section 8 of the Act of August 18, 1949) provides penalties for anyone who violates provisions for the maintenance and protection of the Supreme Court building and grounds. The proviso in section 13m, relating to penalties when property damage exceeds $100, is repealed by section 301 of the bill as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18. See section 601 of the bill for an additional amendment to 40 U.S.C. 13m.

40 U.S.C. 101 (section 15 of the Act of July 29, 1892) extends the laws of the District of Columbia to protect all Federal buildings and grounds within the District. The second sentence of the section, providing penalties for disorderly conduct on such property and for the destruction of such property, is repealed by section 301 of the bill as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18.

40 U.S.C. 193s (section 6 of the Act of October 24, 1951) provides penalties for anyone who violates provisions for the protection of the facilities and property of the Smithsonian Institution. The proviso in section 193s, relating to penalties when property damage exceeds $100, is repealed by section 301 of the bill as covered in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18.

40 U.S.C. 883 (section 14 of the Pennsylvania Avenue Development Corporation Act of 1972) describes certain offenses affecting the Pennyslvania Avenue Development Corporation and is repealed by section 301 of the bill to conform to the Code. Subsection (a) of section 883, relating to embezzlement of moneys or property of the Corporation, is repealed as covered in section 1731 (Theft) of title 18. Subsection (b), relating to making a false entry in a book of the Corporation, or making a false report or statement for the Corporation, with intent to defraud the Corporation, or deceive a director, officer, or employee of the Corporation or an officer or employee of the United States, is repealed as covered in sections 1301 (Obstructing a Government Function by Draud), 1343 (Making a False Statement), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18. Finally, subsection (c), making it an offense for anyone to receive compensation, or enter into a conspiracy or agreement, with intent to defraud the Corporation, is repealed as covered in chapter 4 (Complicity) of title 18, in sections 1002 (Criminal Conspiracy), 1301 (Obstructing a Government Function by Fraud), and 1734 (Executing a Fraudulent Scheme) of title 18, and in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

41 U.S.C. 54 (section 4 of the Act of March 8, 1946) makes it an offense for anyone connected with a prime contractor or a higher tier subcontractor to receive, or for anyone to give, by or on behalf of a subcontractor, compensation or a gift either as an inducement for award of a subcontract or acknowledgement of a previously awarded subcontract. Section 301 of the bill repeals the section as covered in section 1751 (Commercial Bribery) of title 18, with jurisdiction under subsection (d)(1)(D) of section 1751.

42 U.S.C. 261(c) (section 346(b) of the Public Health Service Act) makes it an offense for anyone to escape or attempt to escape after being committed to a Public Health Service hospital at which drug addicts or other persons with drug abuse problems are treated. Section 301 of the bill repeals section 261(b) as the attempt reference is covered in section 1001 (Criminal Attempt) of title 18 and the escape provision is covered in section 1313 (Escape) of title 18. Under the definition of "official detention" in section 111 (General Definitions) of title 18, the escape provision would apply in a civil commitment situation only where "civil commitment [is] in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance". See section 611(c) of the bill for an amendment to 42 U.S.C. 261(a).

42 U.S.C. 261(c) (section 346(c) of the Public Health Service Act) makes it an offense to procure, advise, or assist in the escape of, or conceal after escape, anyone who has been committed to a Public Health Service hospital at which drug addicts or other persons with drug abuse problems are treated. Section 301 of the bill re-

peals section 261(c) as covered in chapter 4 (Complicity) of title 18 and in section 1311 (Hindering Law Enforcement) of title 18. See section 611(c) of the bill for an amendment to 42 U.S.C. 261(a).

42 U.S.C. 300e-17(h) (section 1318(h) of the Public Health Service Act) makes it an offense for anyone to knowingly and willfully make or cause to be made, a false statement of a material fact in a statement concerning financial health and transactions of a health maintenance organization that has a grant or contract under the Act. Section 301 of the bill repeals section 300e-17(h) as covered in section 1343 (Making a False Statement) of title 18.

42 U.S.C. 408 (a) through (g) (sections 208 (a) through (g) of the Social Security Act) describe various offenses relating to federal oldage, survivors, and disability insurance benefits. Subsection (a) makes it an offense to make or cause to be made, for the purpose of causing an increase in a payment under the program, a false statement as to payment of wages, the amount of net earnings from self-employment, and whether a person had earnings during a particular period. Subsection (a) is repealed by section 301 of the bill as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1731 (Theft) of title 18, with the language relating to causing the offense repealed as covered in chapter 4 (Complicity) of title 18. Subsections (b) and (c) of 42 U.S.C. 408 make it an offense to make or cause to be made a false statement for use in determining rights to benefits under social security. Subsections (b) and (c) are repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18 and in chapter 4 (Complicity) of title 18. Subsection (d) makes it an offense to conceal or fail to disclose changed circumstances with the intent fraudulently to secure payment of benefits in an amount greater than is due or when no payment is authorized. Section 301 of the bill repeals subsection (d) as covered, depending upon the circumstances of the case, in section 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), or 1731 (Theft) of title 18. Subsection (e) makes it an offense to knowingly and willfully convert to a use other than the use of a person entitled to a social security benefit a payment made for that person. Section 301 repeals subsection (e) as covered in section 1731 (Theft) and 1301 (Obstructing a Government Function by Fraud) of title 18. Subsection (f) of 42 U.S.C. 408 makes it an offense willfully, knowingly, and with intent to deceive the Secretary of Health, Education, and Welfare, to furnish false information as to the identity of a claim for benefits under the Social Security Act. Subsection (f) is repealed by section 301 as covered in proposed sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1731 (Theft) of title 18. Subsection (g) makes it an offense, willfully, knowingly, and with intent to deceive, to use a social security number assigned on the basis of false information, or with intent to deceive, falsely represent such a number assigned to a person, for the purpose of receiving social security payments to which the person is not entitled. Subsection (g) is repealed by section 301 as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18. Subsection (h) in 42 U.S.C. 408 in current law is retained.

42 U.S.C. 1314(h) (section 1114(h) of the Social Security Act) exempts from conflict of interest laws members, other than full-time employees of the United States, of the Advisory Council on Public Welfare or other advisory committee appointed under the Social Security Act from certain provisions of the conflict of interest statutes. Section 301 of the bill repeals section 1314(h) as unnecessary since the members described are "special Government employees" within the definition in 18 U.S.C. App. 202(a), as enacted by section 201(a)(1) of this bill.

42 U.S.C. 1383a (section 1632 of the Social Security Act) makes it an offense for anyone to make, or cause to be made, a false statement in connection with receiving Supplemental Security Income benefits or convert such benefits to an unauthorized use. Section 301 of the bill repeals section 1383a as covered in chapter 4 (Complicity) of title 18, and in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1731 (Theft) of title 18.

42 U.S.C. 1395nn(a) (section 1877(a) of the Social Security Act) makes it an offense for anyone to make, or cause to be made, a false statement in connection with receiving Health Ansurance for the Aged and Disabled benefits or converting such benefits to an unauthorized use. Section 301 of the bill repeals section 1395nn(a) as covered in chapter 4 (Complicity) of title 18, and in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1731 (Theft), with jurisdiction under subsection (c)(31), and 1734 (Executing a Fraudulent Scheme) of title 18. The language providing varying penalties, depending upon whether the offense is committed by one who provides medical services or by someone else, is deleted as unnecessary. To the extent that an offense under current law will be covered by section 1731, that section draws grading distinctions based on the amount taken. Similarly, it can be expected that sentencing guidelines for fraud offenses will take into account the amount of fraud involved and recommend sentences accordingly. See 28 U.S.C. 994(c)(3), as enacted by section 126 of the bill.

42 U.S.C. 1395nn(b) (1) and (2) (sections 1877(b) (1) and (2) of the Social Security Act) make it an offense for anyone to solicit or receive, or offer or pay remuneration (including a kickback, bribe, or rebate) for referring, recommending, arranging, ordering, or purchasing services or goods paid for under the Health Insurance for Aged and Disabled provisions. Section 301 of the bill repeals sections 1395nn(b) (1) and (2) as covered in section 1751 (Commercial Bribery) of title 18, with jurisdiction under subsection (c)(1)(G) of section 1751. See section 612(d) of the bill for an amendment to 42 U.S.C. 1395nn(b)(3).

42 U.S.C. 1395nn(c) (section 1877(c) of the Social Security Act) makes it an offense for anyone to knowingly and willfully make, or cause, induce, or seek to induce the making of, a false statement with respect to the qualifications of a facility as a certified health care facility. Section 301 of the bill repeals section 1395nn(c) as covered in chapter 4 (Complicity) of title 18, and in section 1343 (Making a False Statement) of title 18.

42 U.S.C. 1396h(a) (section 1909(a) of the Social Security Act) makes it an offense for anyone to knowingly and willfully make, or

cause to be made, false statements in connection with receiving benefits or furnishing services under grants made to States for Medical Assistance Programs, or knowingly and willfully convert such benefits to an unauthorized use. Section 301 of the bill repeals the first sentence of section 1396h(a) as covered in chapter 4 (Complicity) of title 18, and in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), with jurisdiction under subsection (c)(31), and 1734 (Executing a Fraudulent Scheme) of title 18. The language providing varying penalties, depending upon whether the offense is committed by one who provides medical services or by someone else, is deleted as unnecessary. To the extent that an offense under current law will be covered by section 1731, that section draws grading distinctions based on the amount taken. Similarly, it can be expected that sentencing guidelines will take into account the amount of fraud involved and recommend sentences accordingly. See 28 U.S.C. 994(c)(3), as enacted by section 126 of the bill. See section 612(e)(1) of the bill for an additional amendment to section 1396h(a).

42 U.S.C. 1396h(b) (1) and (2) (sections 1909(b) (1) and (2) of the Social Security Act) provides penalties for anyone who solicits or receives, or offers or pays, any remuneration, including a kickback, bribe, or rebate, for referring, recommending, arranging, or obtaining services or goods paid for under provisions for grants to States for medical assistance programs. Section 301 of the bill repeals sections 1396h(b) (1) and (2) as covered in chapter 4 (Complicity) of title 18 and section 1751 (Commercial Bribery) of title 18, with jurisdiction provided in subsection (c)(1)(G) of that section. See section 612(e)(2) of the bill for an amendment to 42 U.S.C. 1396h(b)(3).

42 U.S.C. 1396h(c) (section 1909(c) of the Social Security Act) makes it an offense for anyone to knowingly and willfully make, or cause, induce, or seek to induce the making of, a false statement with respect to the qualifications of a facility as a certified health care facility. Section 301 of the bill repeals section 1396h(c) as covered in chapter 4 (Complicity) of title 18, and in section 1343 (Making a False Statement) of title 18.

42 U.S.C. 1713 (section 203 of the War Hazards Compensation Act) makes it an offense for anyone, for the purpose of obtaining an unauthorized increase in benefits, or payment of benefits when none are due, to make or cause to be made, or aid in the making of, a false statement in connection with an application for payment. Section 301 of the bill repeals the section as covered in chapter 4 (Complicity) of title 18, and in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18.

42 U.S.C. 1760(g) (section 12(g) of the National School Lunch Act) makes it an offense for anyone to embezzle or obtain by fraud any funds or property which is subject to a grant or other form of assistance under the National School Lunch Act or the Child Nutrition Act of 1966. The section also makes it an offense for anyone to receive, conceal, or retain such funds or property, knowing them to have been embezzled or otherwise unlawfully obtained. Section 301 of the bill repeals section 176(g) as covered in sections 1301 (Obstructing of a Government Function by Fraud), 1731 (Theft), with

jurisdiction provided in subsection (c)(33), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property) of title 18.

42 U.S.C. 1761(*o*) (section 13(o) of the National School Lunch Act) makes it an offense for anyone to (1) knowingly and willfully make a false statement, use a scheme or device, or aid any other person to defraud the United States, in connection with a lunch program under the Act; (2) as a partner, officer, director, or managing agent of an organization that receives benefits under the Act, to embezzle, mr otherwise obtain by fraud, false statement, or forgery any benefits, funds, or property provided through the programs of the Act; and (3) to conspire or collude to accomplish any of the prohibited acts. Section 301 of the bill repeals section 1761(*o*) as covered in chapter 4 (Complicity) of title 18, and in section 1002 (Criminal Conspiracy), 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), with jurisdiction provided in subsection (c)(33), 1734 (Executing a Fraudulent Scheme), and 1742 (Forgery) of title 18.

42 U.S.C. 1973i (section 11 of the Voting Rights Act of 1965), which prohibits certain acts which deprive individuals of their rights under the Act, is repealed by section 301 of the bill to conform to the Code. Subsection (a), prohibiting anyone acting under color of law from failing or refusing to permit any person to vote who is entitled to vote, is repealed as covered in sections 1501 (Interfering with Civil Rights) and 1511 (Obstructing an Election) of title 18. Subsection (b), prohibiting any person from intimidating, threatening, or coercing, or attempting to do so, any person for voting, or for aiding or urging any other person to vote, or for exercising duties under the Act, is repealed as covered in subchapter A (Offenses Involving Civil Rights) of chapter 15 of title 18, and chapter 16 (Offenses Involving the Person) of title 18, and in sections 1001 (Criminal Attempt), 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), and 1511 (Obstructing an Election) of title 18. Subsection (c) makes it an offense knowingly and willfully to give false information to establish eligibility to register or vote, to conspire to encourage false registration or illegal voting, or to pay or offer to pay or accept payment for registration or voting. Subsection (c) is repealed as covered in chapter 4 (Complicity) of title 18, and in sections 1002 (Criminal Conspiracy), 1511 (Obstructing an Election), and 1512 (Obstructing Registration) of title 18. Subsection (d) makes it an offense for anyone to knowingly and willfully make a false statement in a matter within the jurisdiction of an examiner or hearing officer. Subsection (d) is repealed as covered in section 1343 (Making a False Statement) of title 18. Subsection (e) makes it an offense for anyone to vote more than once in an election, and is repealed as covered in section 1511 (Obstructing an Election) of title 18.

42 U.S.C. 1973j(a) (section 12(a) of the Voting Rights Act of 1965) makes it an offense for anyone to deprive or attempt to deprive anyone of rights secured by the Act. Section 301 of the bill repeals section 1973j(a) as covered in section 1001 (Criminal Attempt) of title 18 and in subchapter A (Offenses Involving Civil Rights) of chapter 15 of title 18.

42 U.S.C. 1973j(c) (section 12(c) of the Voting Rights Act of 1965) makes it an offense for anyone to conspire to violate subsection (a) or (b), relating to interference with or deprivation of the rights secured by the Act and to destruction of ballots or voting records, or to interfere with the rights secured by the Act. Section 301 of the bill repeals section 1973j(c) as covered in section 1002 (Criminal Conspiracy) and subchapter A (Offenses Involving Civil Rights) of chapter 15 of title 18. See Section 613(a) for additional amendments to 42 U.S.C. 1973j.

42 U.S.C. 1973aa-1(i) (section 202(i) of the Voting Rights Act of 1965) states that 42 U.S.C. 1973i(c) shall apply to false registration and other fraudulent acts and conspiracies committed under section 1973aa, relating to residency requirements for voting. Section 301 of the bill repeals section 1973aa-1(i) because section 1973i(c) is repealed above and the relevant offenses are covered in sections 1002 (Criminal Conspiracy), 1511 (Obstructing an Election), and 1512 (Obstructing Registration) of title 18.

42 U.S.C. 1973bb(b) (section 301(b) of the Voting Rights Act of 1965) makes it an offense for anyone to deny or attempt to deny a person a right secured by the twenty-sixth amendment to the Constitution. Section 301 of the bill repeals section 1973bb(b) as covered in sections 1001 (Criminal Attempt) and 1501 (Interfering with Civil Rights) of title 18.

42 U.S.C. 1973dd-3(c) (section 7(c) of the Overseas Citizens Voting Rights Act of 1975) makes it an offense for anyone knowingly and willfully to give false information for the purpose of establishing voter eligibility under the Act, or conspire with another to encourage the giving of false information, or pay, offer to pay, or accept payment either for registration to vote or for voting. Section 301 of the bill repeals section 1973dd-3(c) as covered in chapter 4 (Complicity) of title 18 and in sections 1002 (Criminal Conspiracy), 1343 (Making a False Statement), 1511 (Obstructing an Election), and 1512 (Obstructing Registration) of title 18. See section 614 of the bill for an amendment to 42 U.S.C. 1973dd-3(b).

42 U.S.C. 1975d(d) (section 105(d) of the Civil Rights Act of 1957) exempts members of the Civil Rights Commission from conflict of interest provisions in title 18. Section 301 of the bill repeals section 1975(d) as it was repealed in effect by section 2 of the Act of October 23, 1962 (76 Stat. 1126).

42 U.S.C. 1987 (section 1982 of the Revised Statutes) authorizes law enforcement officers to arrest for and prosecute violations of the elective franchise and civil rights statutes. Section 301 of the bill repeals the section as generally covered in chapter 30 (Investigative and Law Enforcement Authority) of title 18 and in Part II (Department of Justice) of title 28.

42 U.S.C. 1989 (sections 1983 and 1984 of the Revised Statutes) relates to the appointment and powers of magistrates so as to afford speedy and convenient means for the arrest and examination of persons charged with violating the elective franchise and civil rights of any person. Section 301 of the bill repeals the section as covered in section 3302 (Jurisdiction of United States Magistrates Over Offenses) of title 18.

42 U.S.C. 1992 (section 1988 of the Revised Statutes) relates to insuring a speedy trial for any person charged with violating the

elective franchise or civil rights of another person. Section 301 of the bill repeals the section to conform to the provisions of the Speedy Trial Act of 1974 (transferred by section 518(a) of the bill from 18 U.S.C. 3161 through 3174 to 28 U.S.C. 1701 through 1714).

42 U.S.C. 1995 (section 151 of the Act of September 9, 1957) relates to criminal contempt proceedings arising under the provisions of the Act. Section 301 of the bill repeals the section as covered in sections 1331 (Criminal Contempt) and 1335 (Disobeying a Budicial Erder) of title 18.

42 U.S.C. 2000e-13 (section 714 of the Civil Rights Act of 1964) authorizes the application of offense provisions in title 18, relating to physical protection of federal officers and employees, to personnel of the Equal Employment Opportunity Commission. Section 301 of the bill repeals the section as covered in sections 1302 (Interfering with a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant) of title 18, and in chapter 16 (Offenses Involving the Person) of title 18.

42 U.S.C. 2000h (section 1101 of the Civil Rights Act of 1964) relates to criminal contempt proceedings arising under certain titles of the Act. Section 301 of the bill repeals the section as covered in section 1331 (Criminal Contempt) and 1335 (Disobeying a Judicial Order) of title 18.

42 U.S.C. 2000h–1 (section 1102 of the Civil Rights Act of 1964) applies the principle of double jeopardy to bar a criminal contempt proceeding which arises out of the same act which constituted a specific crime for which the accused has been convicted or acquitted, and vice versa. Section 301 of the bill repeals the section as inconsistent with subsection (d) of section 1331 (Criminal Contempt) of title 18.

42 U.S.C. 2187(a) (section 157a of the Atomic Energy Act of 1954) relates to the Patent Compensation Board. The third sentence of section 2187(a), exempting the Board's members from conflict of interest provisions of title 18, is repealed by section 301 of the bill as covered in sections 202 through 209 of title 18 Appendix, as enacted by section 201(a)(1) of this bill.

42 U.S.C. 2283 (section 235 of the Atomic Energy Act of 1954) makes it an offense to kill inspectors while they are engaged in the performance of inspection duties or on account of the performance of such duties relating to activities or facilities licensed by the Nuclear Regulatory Commission. It also covers assaults and intimidation against such inspectors. Section 301 of the bill repeals section 2283 as covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering with a Public Servant), and 1358 (Retaliating Against a Public Servant) of title 18, and in subchapters A (Homicide Offenses) and B (Assault Offenses) of chapter 16 of title 18.

42 U.S.C. 2284 (section 236 of the Atomic Energy Act of 1954) makes it an offense to intentionally and willfully destroy or cause physical damage (or attempt to do so) to a nuclear production facility or utilization facility, a nuclear waste storage facility, or nuclear fuel for such utilization facility, or spent nuclear fuel from such a facility. Section 301 repeals section 2284 as covered in sections 1701

(Arson), 1702 (Aggravated Property Destruction), and 1703 (Property Destruction), with jurisdiction provided in section 1701(c)(10).

42 U.S.C. 2971f (section 626 of the Economic Opportunity Act of 1964) makes it an offense in subsection (a) for a person connected with an agency receiving financial assistance under the Act to embezzle or steal money or property which is the subject of a grant or contract under the Act, and in subsection (b) for a person to induce anyone to give up anything of value by threatening to procure a person's dismissal from employment or by threatening to refuse to renew a contract of employment in connection with a grant or contract of assistance under the Act. Rection 301 mf the bill repeals section 2971f as the provision in subsection (a) is covered in section 1731 (Theft) of title 18, with jurisdiction provided in subsection (c)(21), and subsection (b) covered in sections 1722 (Extortion) and 1723 (Blackmail) of title 18.

42 U.S.C. 3220 (section 710 of the Public Works and Economic Development Act of 1965) creates several offenses related to the Act and is repealed by section 301 of the bill to conform to the Code. Subsection (a), relating to making false statements, and to willfully overvaluing securities, in order to obtain benefits under the Act, is repealed as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18. Subsection (b) relates to offenses committed by anyone connected with the administration of the Act. Subsection (b)(1), prohibiting embezzlement, is repealed as covered in section 1731 (Theft) of title 18. Subsection (b)(2), prohibiting false statements made with intent to defraud or deceive or the unauthorized issuance of notes, bonds, or obligations, is repealed as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1744 (Criminal Issuance of a Written Instrument) of title 18. Subsection (b)(3), prohibiting anyone connected with administration of the Act, with intent to defraud, from participating or sharing in or directly receiving any benefit through a transaction under the Act, is repealed as covered in chapter 4 (Complicity) of title 18, and sections 1002 (Criminal Conspiracy) and 1301 (Obstructing a Government Function by Fraud) of title 18, and subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18. Subsection (b)(4), prohibiting unauthorized giving of information concerning future agency action which might affect the value of securities or, when having such knowledge, investing or speculating in an organization receiving assistance under the Act, is repealed as covered in section 1356 (Speculating on Official Action or Information) of title 18.

42 U.S.C. 3425 (section 315 of the Narcotic Addict Rehabilitation Act of 1966) prohibits escape or attempted escape from institutional custody where one is committed for examination or treatment under the Act. The section also prohibits anyone from rescuing, attempting rescue, instigating, aiding, or assisting such escape or attempted escape. Section 301 of the bill repeals section 3425 as covered, to the extent that it applies to someone committed in lieu of criminal prosecution, in chapter 4 (Complicity) of title 18, and in sections 1001 (Criminal Attempt), 1313 (Escape), and 1314 (Providing or Possessing Contraband in a Prison) of title 18.

42 U.S.C. 3426 (section 316 of the Narcotic Addict Rehabilitation Act of 1966) provides penalties for anyone who knowingly makes a false statement to a U.S. Attorney in a petition for treatment under the Act. Section 301 of the bill repeals the section as covered in section 1343 (Making a False Statement) of title 18.

42 U.S.C. 3611(f) (section 811(f) of the Act of April 11, 1968) relates to violations of provisions to ensure fair housing. The first sentence of section 3611(f), providing penalties for willful failure or neglect to attend and testify or to answer a lawful inquiry or produce documents in obedience to a subpoena or lawful order of the Secretary of Housing and Urban Development, is repealed by section 301 of the bill as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18. See section 618 of the bill for an additional amendment to section 3611(f).

42 U.S.C. 3631 (section 901 of the Act of April 11, 1968) provides penalties for anyone who by force or threat of force injures, intimidates or interferes with, or attempts to do so, anyone on account of his race, color, religion, sex, or national origin, and in connection with efforts to achieve fair housing, or with anyone who assists or participates in efforts to end discrimination in housing. Section 301 of the bill repeals section 3631 as covered in section 1001 (Criminal Attempt) of title 18 and in subchapter A (Offenses Involving Civil Rights) of chapter 15 and chapter 16 (Offenses Involving the Person) of title 18.

42 U.S.C. 3791-3793 (Part H of Title I of the Omnibus Crime Control and Safe Streets Act) provide penalties for offenses committed in connection with the administration of the Act and are repealed by section 301 of the bill to conform to the Code. Section 3791, relating to embezzlement and attempted embezzlement of property or funds which are the subject of any form of assistance under the Act and to receipt or concealment of such property with intent to convert it to his use or gain, knowing the property has been embezzled, is repealed as covered in sections 1001 (Criminal Attempt), 1731 (Theft), with jurisdiction provided in subsection (c)(24), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property) of title 18. Section 3792, making it an offense to knowingly and willfully falsify, conceal, or cover up by trick, scheme, or device, a material fact in an application for assistance under the Act, is repealed as covered in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18. Section 3793, relating to conspiracies to defraud programs administered under the Act, is repealed as covered in sections 1002 (Criminal Conspiracy), 1301 (Obstructing a Government Function by Fraud), and 1734 (Executing a Fraudulent Scheme) of title 18.

42 U.S.C. 4910(a)(1) (section 11(a)(1) of the Noise Control Act of 1972) provides penalties for violations of the Act. The second sentence of section 4910(a)(1), providing enhanced penalties for violations committed after a first conviction, is repealed by section 301 of the bill in conformity with the general provisions of Part III (Sentences) of title 18. Sentencing guidelines promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, as enacted by section 126 of the bill, may provide a higher guidelines range for a defendant with a criminal history for the same offense. See also

section 2003 (Imposition of a Sentence) of title 18. See section 619(a) of the bill for an additional amendment to 42 U.S.C. 4910(a)(1).

42 U.S.C. 5157(a) (section 317(a) of the Disaster Relief Act of 1974) provides penalties for anyone who willfully or fraudulently misstates a fact in connection with a request for assistance under the Act. Section 301 of the bill repeals section 5157(a) as covered in section 1343 (Making a False Statement) of title 18.

42 U.S.C. 6928(d) (section 3008(d) of the Solid Waste Disposal Act) provides penalties for violations of the Act. Paragraph (3) of section 6928(d), relating to false statements, is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18. The last sentence of section 6928(d), relating to enhanced penalties for subsequent convictions under the Act, is also repealed by section 301 of the bill in conformity with the general provisions of Part III (Sentences) of title 18. Sentencing guidelines promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, as enacted by section 126 of this bill, may provide a higher guidelines range for a defendant with a criminal history for the same offense. See also section 2003 (Imposition of a Sentence) of title 18. See section 620 of the bill for an additional amendment to 42 U.S.C. 6928(d).

43 U.S.C. 104 (section 3 of the Act of January 31, 1903) makes it an offense for anyone to willfully neglect or refuse to obey a subpoena issued under 43 U.S.C. 102, or neglect or refuse to appear and testify when subpoenaed. Section 301 of the bill repeals the section as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

43 U.S.C. 1350(c) (section 24(c) of the Outer Continental Shelf Lands Act) provides criminal penalties for violations of the Act. Paragraph (2) of section 1350(c), relating to false statements in a document filed or required to be maintained under the Act [illegible] repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18. The last sentence of section 1350(c), providing that each day that a violation of the Act continues is a separate violation is repealed by section 301 of the bill as covered in section 1853 (Environmental Pollution) of title 18. See section 632 of the bill for additional amendments to 42 U.S.C. 1350(c).

43 U.S.C. 1733(a) (section 303(a) of the Federal Land Policy and Management Act of 1976) relates to enforcement authority and imposition of penalties for violations of provisions of the Act. The last sentence of section 1733(a), authorizing trial and sentencing before a United States magistrate, is repealed by section 301 of the bill as covered in section 3302 (Jurisdiction of United States Magistrates Over Offenses) of title 18.

46 U.S.C. 58 (section 4187 of the Revised Statutes) makes it an offense for a customs collector or officer to make or be concerned in making a false certificate of vessel registry or other document under the provisions for vessel registry and recording. Penalties are also provided for any such officer or employee who receives any gratuity for any services performed. Section 301 of the bill repeals the section as covered in chapter 4 (Complicity) of title 18, sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18, and in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

46 U.S.C. 62 (section 4191 of the Revised Statutes) makes it an offense to knowingly make, issue, or use a false Mediterranean passport or certificate of registry. Section 301 of the bill repeals the section as obsolete in part and as covered in part by section 1343 (Making a False Statement) of title 18.

46 U.S.C. 83i (section 13 of the Act of September 29, 1965) makes it an offense for anyone to make a false statement in any matter relating to gross and net tonnage measurements of vessels. Section 301 of the bill repeals the section as covered in section 1343 (Making a False Statement) of title 18.

46 U.S.C. 170(15) (section 4472(15) of the Revised Statutes) provides penalties for anyone who, in the violation of provisions regulating the carriage of explosives or dangerous substances, causes the death or bodily injury of any person. Section 301 of the bill repeals section 170(15) on the ground that it is covered to the extent desired in the homicide and personal injury provisions of chapter 16 of title 18, if it is committed in the special jurisdiction of the United States, and as otherwise more appropriately prosecuted by the States. See section 653 of the bill for other amendments to 46 U.S.C. 170.

46 U.S.C. 229e (section 5 of the Act of May 12, 1948) requires an applicant for a license as a radiotelegraph operator to make and subscribe an oath or affirmation as to the truth of the statements in his application. The third paragraph of section 229e, which makes the penalties of perjury applicable to a false oath if the person knows it is false, is repealed by section 301 of the bill as covered in subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18.

46 U.S.C. 231 (section 4445 of the Revised Statutes) requires that an applicant for a license from the Coast Guard as a master, chief mate, engineer, or pilot of a vessel swear to the truth of the information in his application. The third sentence of section 231, describing a false oath, made with the knowledge that the oath was false, as an act of perjury, is repealed by section 301 of the bill as covered in subchapter E (Perjury, False Statements and Related Offenses) of chapter 13 of title 18.

46 U.S.C. 239(i) (section 4450(i) of the Revised Statutes) makes it an offense for anyone to attempt to coerce or induce a witness to testify falsely in connection with a shipping casualty, or to leave the jurisdiction of the United States. Section 301 of the bill repeals section 239(i) as covered in sections 1001 (Criminal Attempt), 1315 (Flight to Avoid Prosecution or Appearance as a Witness), 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), and 1323 (Tampering With a Witness, Victim, or an Informant) of title 18.

46 U.S.C. 324 (section 4376 of the Revised Statutes) makes it an offense for anyone to assault, resist, obstruct, or hinder a customs officer in the execution of a law relating to the enrollment, registry, or licensing of vessels, or any other official duty. Section 301 of the bill repeals the section as covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tampering With a Public Servant) of title 18, and in chapter 16 (Offenses Involving the Person) of title 18.

46 U.S.C. 391a(14)(B)(ii) (section 4417a(14)(B)(ii) of the Revised Statutes) makes it an offense for anyone, in the willful and knowing violation of a provision regulating bulk cargo vessels, to use a dangerous weapon, or engage in conduct that causes bodily injury or fear of imminent bodily injury to an officer authorized to enforce such provisions. Section 301 of the bill repeals section 391a(14)(B)(ii) as covered in sections 1302 (Obstructing a Government Function by Physical Interference), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), and 1823 (Using a Weapon in the Course of a Crime) of title 18, and in subchapter B (Assault Offenses) of chapter 16 of title 18. See section 658 of the bill for an amendment to 46 U.S.C. 391a(14)(B)(i).

46 U.S.C. 403 (section 4425 of the Revised Statutes) makes it an offense for an inspector to certify falsely as to the condition or equipment of a steam vessel. Section 301 of the bill repeals the section as covered in section 1343 (Making a False Statement) of title 18.

46 U.S.C. 707 (section 4605 of the Revised Statutes) authorizes the appropriation of a part of a seaman's wages to cover costs incurred in the course of convicting and punishing that seaman of any offense committed during the voyage. Section 301 of the bill repeals the section as obsolete and inconsistent with federal practice.

46 U.S.C. 838 (section 40 of the Shipping Act, 1916) relates to filing with the Secretary of Commerce of records of sale or other disposition of vessels. The second paragraph, making it an offense for anyone knowingly to make a false statement in the filed record, is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18.

46 U.S.C. 839 (section 41 of the Shipping Act, 1916) relates to obtaining approval of the Secretary of Commerce for certain transactions under the Act, such as restrictions on transfer of shipping facilities during war or national emergency (46 U.S.C. 835). The second paragraph of section 839, making it an offense for anyone knowingly to make a false statement for the purpose of securing the required approval, is repealed by section 301 of the bill, as covered in sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18.

46 U.S.C. 1171(b) (section 601(b) of the Merchant Marine Act, 1936) requires that statements as to financial interest accompany an application for financial aid in operating a vessel in an essential service. The last sentence of section 1171(b), relating to the willful making of a false statement in an application for financial aid or in documents required to be filed with it, is repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18.

The first paragraph of 46 U.S.C. 1228 (section 806(b) of the Merchant Marine Act, 1936) specifies the penalties that apply to an individual or a corporation found guilty of an offense under the Act. Section 301 repeals the first paragraph of 46 U.S.C. 1228 as covered in Part III (Sentences) of title 18, particularly in sections 2001 (Authorized Sentences), 2201 (Sentence of Fine), and 2301 (Sentence of Imprisonment).

46 U.S.C. 1276 (section 1106 of the Merchant Marine Act, 1936) makes it an offense for anyone, for the purpose of receiving a bene-

fit in connection with the Federal Ship Mortgage Insurance program, to make a false statement, or to alter, forge, counterfeit, or pass as true, or cause or procure the alteration, forgery, counterfeiting, or passing as true of, an instrument or document, knowing that it has been altered, forged, or counterfeited, or to willfully overvalue a security, asset, or income. Section 301 of the bill repeals the section as covered in chapter 4 (Complicity) of title 18, in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), and 1344 (Tampering With a Government Record) of title 18, and in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

47 U.S.C. 21 (section 1 of the Submarine Cable Act) makes it an offense for anyone to break or injure, or attempt to break or injure, or in any manner procure, counsel, or assist in the breaking or injury of, a submarine cable. Section 301 of the bill repeals the section as covered in chapter 4 (Complicity) of title 18, and in sections 1001 (Criminal Attempt), 1003 (Criminal Solicitation), 1702 (Aggravated Property Destruction), and 1703 (Property Destruction) of title 18.

47 U.S.C. 22 (section 2 of the Submarine Cable Act) makes it an offense for anyone, by culpable negligence to break or injure a submarine cable in such a way as to interrupt telegraphic communication. Section 301 of the bill repeals the section as covered in sections 1702 (Aggravated Property Destruction) and 1703 (Property Destruction) of title 18.

47 U.S.C. 31 (section 11 of the Submarine Cable Act) authorizes summary trials under sections 391 through 396 of title 33 for offenses involving interference with a submarine cable by vessels laying cables or fishing. Section 301 of the bill repeals the section as outmoded. Sections 391 through 396 of title 33 are also repealed by section 301 of the bill. Such provisions are variously covered in the trial and jurisdictions provisions of title 18, the Federal Rules of Criminal Procedure, and 28 U.S.C. 2461, *et seq.*

47 U.S.C. 409(m) (section 409(m) of the Communications Act of 1934) makes it an offense for anyone to neglect or refuse to attend and testify or to answer a lawful inquiry or produce records in obedience to a subpoena or lawful requirement of the Federal Communications Commission. Section 301 of the bill repeals section 409(m) as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

47 U.S.C. 505 (section 505 of the Communications Act of 1934) relates to venue of trials for offenses under the Act. Section 301 of the bill repeals the section as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18.

48 U.S.C. 1417 (section 5576 of the Revised Statutes) relates to Federal jurisdiction over offenses committed on an island, rock, or key with a guano deposit and not within the jurisdiction of any other government or occupied by citizens of any other government. Section 301 of the bill repeals the section as covered in section 203 (Special Jurisdiction of the United States) of title 18.

48 U.S.C. 1461 (section 8 of the Act of March 22, 1882) prohibits any bigamist or polygamist residing in a territory of the United

States from voting or being eligible for public office. Section 301 of the bill repeals the section as obsolete.

49 U.S.C. 41(1) (section 1(1) of the Act of February 10, 1903) relates to the liability of corporation common carriers for offenses committed by their agents and to specific tariff offenses. The last sentence of section 41(1), relating to venue requirements, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosection and Trial) of the Federal Rules of Criminal Procedure and subchapter B (Venue) of chapter 33 of title 18.

49 U.S.C. 1472(g) (section 902(g) of the Federal Aviation Act of 1958) makes it an offense for anyone to neglect or refuse to attend and testify, or to answer a lawful inquiry or produce records, in obedience to the subpoena or lawful requirement of the Civil Aeronautics Board. Section 301 of the bill repeals section 1472(g) as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(h)(2) (section 902(h)(2) of the Federal Aviation Act of 1958) makes it an offense for anyone to willfully deliver or cause to be delivered for transportation in air commerce, or recklessly cause the transportation in air commerce, of any hazardous material in violation of any regulation concerning transportation of hazardous substances. The last sentence of section 1472(h)(2), relating to sentencing, is repealed by section 301 of the bill since section 1821(a)(3)(B) specifies that it is an offense to violate subsection (h)(2), and makes an offense a Class E felony. See section 692(a)(2) of the bill for an amendment conforming the offense in section 1472(h)(2) to the Code.

49 U.S.C. 1472(j) (section 902(j) of the Federal Aviation Act of 1958) makes it an offense to interfere with flight crew members or flight attendants. The last sentence of section 1472(j), relating to further penalties when a deadly or dangerous weapon is used, is repealed by section 301 of the bill as covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18. While violations of 49 U.S.C. 1472(j) will become Class A misdemeanors by operation of section 2009 (Sentencing Classification of Offenses Outside This Title), offenses against the person of a flight attendant would be covered as felonies in various provisions of chapter 16 (Offenses Against the Person) of title 18 when they are committed in the special jurisdiction of the United States. See e.g., section 1611(c)(1) (Maiming) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(k)(1) (section 902(k)(1) of the Federal Aviation Act of 1958) relates to federal jurisdiction over certain crimes committed aboard aircraft in flight. Section 301 of the bill repeals section 1472(k)(1) as covered in chapter 2 (Jurisdiction) of title 18 and in the jurisdictional provisions for specific offenses in title 18. See section 203(c), (Special Jurisdiction of the United States) and, for example, the jurisdictional provisions in section 1611(c)(1) (Maiming) and 1621(c)(1) (Kidnapping) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(l) (1) and (2) (sections 902(l) (1) and (2) of the Federal Aviation Act of 1958) makes it an offense for anyone to bring or carry a weapon or explosive on board an aircraft. Section 301 of

the bill repeals sections 1472(l) (1) and (2) as covered in section 1824 (Possessing a Weapon Aboard an Aircraft) of title 18. See section 692(a) for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(m) (section 902(m) of the Federal Aviation Act of 1958) makes it an offense for anyone to give false information concerning a crime being committed or to be committed aboard an aircraft, knowing the information to be false. Section 301 of the bill repeals section 1472(m) as covered in sections 1615 (Terrorizing) and 1616 (Communicating a Threat) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(n) (section 902(n) of the Federal Aviation Act of 1958) makes aircraft piracy outside the special aircraft jurisdiction of the United States an offense. Section 301 of the bill repeals section 1472(n) as covered in section 1631 (Aircraft Hijacking) of title 18, with jurisdiction under section 1631(c)(2) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1472(p) (section 902(p) of the Federal Aviation Act of 1958) makes it an offense for anyone knowingly and without authority to remove, conceal, or withhold part of an aircraft involved in an accident or any property on board the aircraft at the time of the accident. Section 301 of the bill repeals section 1472(p) as covered in section 1325 (Tampering With Physical Evidence) of title 18. See section 692(a) of the bill for additional amendments to 49 U.S.C. 1472.

49 U.S.C. 1473(a) (section 903(a) of the Federal Aviation Act of 1958) relates to venue requirements for offenses under the Act. Section 301 of the bill repeals section 1473(a) as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18. See section 692(b) of the bill for an amendment to 49 U.S.C. 1473(c).

49 U.S.C. 1725 (section 25 of the Aircraft and Airway Development Act of 1970) makes it an offense for anyone, with intent to defraud the United States, knowingly to make a false statement in connection with a project submitted for approval or undertaken under the Act, or in a report required to be made under the Act. Section 301 of the bill repeals the section as covered in sections 1301 (Obstructing a Government Function by Fraud), 1343 (Making a False Statement), 1731 (Theft), and 1734 (Executing a Fraudulent Scheme) of title 18.

49 U.S.C. 1809(b) (secton 110(b) of the Hazardous Materials Transportation Act) makes it an offense to willfully violate a provision of the Act or a regulation issued under the Act. The second sentence of section 1809(b), relating to sentencing, is repealed by section 301 of the bill because section 693 of the bill designates a violation as an offense under section 1821 (Explosives Offenses) of title 18.

49 U.S.C. 11903(d) relates to venue requirements for trials regarding rate, discrimination, and tariff violations under this section of the Interstate Commerce Act. Section 301 of the bill repeals section 11903(d) as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18.

49 U.S.C. 11904(a)(3) makes it an offense for anyone to induce or attempt to induce a common carrier to discriminate unreasonably

against another consignor or consignee in the transportation of property. Section 301 of the bill repeals section 11904(a)(3) as covered in section 1751 (Commercial Bribery) of title 18.

49 U.S.C. 11904(c)(3) relates to venue requirements for any trial regarding rate and discrimination violations under this section of the Interstate Commerce Act. Section 301 of the bill repeals section 11904(c)(3) as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18.

49 U.S.C. 11907 makes it an offense for anyone to offer or give anything of value to another person acting for or employed by a rail carrier, or for the latter to solicit, accept, or receive anything of value from the former, with intent to influence the supply, distribution, or movement of railroad cars. Section 301 of the bill repeals the section as covered in section 1751 (Commercial Bribery) of title 18, with jurisdiction under section 1751(c)(1)(H) and (c)(2).

49 U.S.C. 11909 relates to recordkeeping and reporting violations by persons required to make reports to the Interstate Commerce Commission. Subsectons(a)(1), (a)(2), (a)(5) (through "Commission,"), (b)(4), (b)(5), (b)(6), (c)(4), (c)(5), (c)(7) (through "Commission,"), (d)(4), (d)(5), and (d)(6) relates to false entries, falsification of records, mutilation and destruction of records, and filing false reports and are repealed by section 301 of the bill as covered in sections 1343 (Making a False Statement) and 1344 (Tampering With a Government Record) of title 18. The last sentence of section 11909(c), relating to venue requirements for a trial regarding recordkeeping violations under section 11909(c), is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure, and in subchapter B (Venue) of chapter 33 of title 18. See section 694(a) of the bill for amendments to 49 U.S.C. 11909(b)(1), (c)(2), and (d)(2).

49 U.S.C. 11913 makes it an offense for anyone to fail to appear and testify or produce records as required by subpoena or requirement of the Interstate Commerce Commission. Section 301 of the bill repeals the section as covered in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

49 U.S.C. 11914(c) provides a general criminal penalty for violations under the Interstate Commerce Act when specific penalties are not provided. The last sentence of section 11914(c), relating to venue, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rule of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18. See section 694(c) of the bill for additional amendments to 49 U.S.C. 11914.

50 U.S.C. 783(a) (section 4(a) of the Subversive Activities Control Act of 1950) prohibits anyone from knowingly combining, conspiring, or agreeing with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, controlled and directed by any foreign government, organization, or individual. Section 301 of the bill repeals section 783(a) as obsolete. See *Scales* v. *United States*, 367 U.S. 203 (1961).

50 U.S.C. 792(d)(3) (section 13(d)(3) of the Subversive Activities Control Act of 1950) provides penalties for anyone who misbehaves or otherwise obstructs the proceedings of any hearing before the Subversive Activities Control @oard held with respect to Aommunist action or front organizations. Section 301 of the bill repeals section 792 (d)(3) as obsolete.

50 U.S.C. 855 (section 6 of the Act of August 1, 1956) makes it an offense for anyone to willfully violate a provision of the Act or regulations thereunder, which relate to registration of certain persons trained in foreign espionage systems, or willfully to make a false statement of a material fact or omit a material fact in a registration statement. Section 301 of the bill repeals the section as covered in sections 1125 (Failing to Register as a Person Trained in a Foreign Espionage System) and 1343 (Making a False Statement) of title 18.

50 U.S.C. 856 (section 7 of the Act of August 1, 1956) states that the failure to file a registration statement concerning training in a foreign espionage system is a continuing offense for as long as the failure exists, notwithstanding any statute of limitation or other statute to the contrary. Section 301 of the bill repeals the section as covered in section 511(d)(2)(B) (Time Limitations) of title 18.

50 U.S.C. 1809 (section 109 of the Foreign Intellignece Surveillance Act of 1978) makes it an offense for a person intentionally to engage in electronic surveillance under color of law except as authorized by statute, or to disclose or use information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained by electronic surveillance not authorized by statute. Section 301 of the bill repeals section 1809 as covered in section 1521 (Eavesdropping) of title 18.

50 U.S.C. App. 462(b)(3) and (b)(5) (sections 12(b)(3) and (b)(5) of the Military Selective Service Act) makes it an offense for anyone to forge or knowingly destroy or mutilate, or in any manner change a Selective Service certificate, or to possess any such forged or altered certificate that he knows to be forged or counterfeited. Section 301 of the bill repeals sections 462(b)(3) and (b)(5) as covered in subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18 and in section 1344 (Tampering With a Government Record) of title 18. See section 705 of the bill for additional amendments to 50 U.S.C. App. 462.

50 U.S.C. App. 520(2) (section 200(2) of the Soldiers' and Sailors' Relief Act of 1940) makes it an offense for anyone to make or use a false affidavit, or statement, certificate, or declaration declared to be true under penalty of perjury, knowing it to be false, in order to obtain relief under the Act. Section 301 of the bill repeals section 520(2) as covered in subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18.

50 U.S.C. App. 643b (section 1303 of the Act of March 27, 1942) provides for the issuance of court orders and related judicial proceedings to enforce subpoenas of the War Production Board. The last sentence of section 643b, making it an offense for ayone to fail or refuse to attend and testify, or to answer a lawful inquiry or produce documents, in obedience to a subpoena of any agency acting under the Act, is repealed by secton 301 of the bill as cov-

ered in section 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

50 U.S.C. App. 1152(a)(6) (section 2(a)(6) of the Act of June 29, 1940) relates to the jurisdiction of federal courts over violations of provisions of the War and Defense Contract Act. The second sentence of section 1152(a)(6), relating to venue, is repealed by section 301 of the bill as covered in subchapter B (Venue) of chapter 33 of title 18. The amendment is unnecessary. See the notes under 18 U.S.C. App. 1152 in the 1976 edition of the United States Code.

50 U.S.C. App. 1884 (section 4 of the Housing and Rent Act of 1947) authorizes priority in the sale or rental of housing accommodations to veterans of World War II and of the Korean conflict, or their families. Section 301 of the bill repeals the section as obsolete.

50 U.S.C. App. 2156(b) (section 706(b) of the Defense Production Act of 1950) relates to the jurisdiction of federal courts over violations of the Act. The second sentence of section 2156(b), relating to venue of criminal cases, is repealed by section 301 of the bill as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18. See section 711 of the bill for an additional amendment to 50 U.S.C. App. 2156(b).

50 U.S.C. App. 2160(f) (section 710(f) of the Defense Production Act of 1950) makes it an offense for an officer or employee of the United States to use confidential information obtained by virtue of his official duties to speculate on a commodity exchange or to disclose such information in order to aid any other person in such speculation. Section 301 of the bill repeals the section as covered in section 1356 (Speculating an Official Action or Information) of title 18.

50 U.S.C. App. 2255(b) (section 403(b) of the Federal Civil Defense Act of 1950) provides a loyalty oath to be taken by all federal employees of the Federal Civil Defense Administration. The last sentence of section 2255(b) providing penalties for anyone who falsely takes such an oath, is repealed by section 301 of the bill as covered in section 1341 (Perjury) of title 18.

50 U.S.C. App. 2406(b) (section 7(b) of the Export Administration Act of 1969) states that no one may be excused from complying with any requirement to supply information in an enforcement proceeding under the Act because of the privilege against self-incrimination, but that the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (49 U.S.C. 46) shall apply to anyone who specifically claims such privilege. Section 301 of the bill repeals section 2406(b) as covered in subchapter B (Compulsion of Testimony After a Claim of Self-Incrimination) of chapter 31 of title 18. The section is also repealed because 49 U.S.C. 46 was repealed by Public Law 95-473, § 4(b), October 17, 1978, 92 Stat. 1466, and its provisions are covered in subchapter B of chapter 31 of title 18, and in sections 1332 (Failing to Appear as a Witness) and 1333 (Refusing to Testify or to Produce Information) of title 18.

PART B—AMENDMENTS RELATING TO THE CONGRESS, TITLE 2, UNITED STATES CODE

2 U.S.C. 167g (section 3 of the Act of August 4, 1950) provides penalties for offenses in Library of Congress buildings and grounds.

Section 311 of the bill amends the Act by deleting the proviso, relating to punishment for damage to public property, which is covered by subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18.

2 U.S.C. 194 (section 104 of the Revised Statutes) provides for certification by the Speaker of the House or the President of the Senate to the United States Attorney of a statement of fact detailing a person's failure to appear to testify or to produce documents or answer a pertinent question, after being summoned by authority of either House of Congress. Section 312 of the bill amends section 194 by deleting "witness summoned as mentioned in" 2 U.S.C. 192, which is repealed by section 301 of the bill and replaced by a description of the authority under which witnesses covered by section 194 are covered.

2 U.S.C. 455 (section 406 of the Federal Election Campaign Act of 1971) contains a statute of limitation for violations of the Federal Elction Campaign Act of 1971. Section 313 of the bill amends 2 U.S.C. 455 to delete the statute of limitations provision as replaced by that in section 511 (Time Limitations) of title 18, but to retain that part of the section that is 2 U.S.C. 455(b)(2) in current law.

PART C—AMENDMENTS RELATING TO GOVERNMENT ORGANIZATION AND EMPLOYEES, TITLE 5, UNITED STATES CODE

5 U.S.C. 306 is a new section in title 5, United States Code, added by section 321(a) of the bill. 5 U.S.C. 306 requires the head of each federal government department or agency, the head of the Tennessee Valley Authority, and the head of the United States Postal Service, to consider the appropriateness of relinquishing to a State all or part of the legislative jurisdiction in all or part of the lands in its control in the State, and permits the head of the agency, with the concurrence of the Attorney General, to relinquish such jurisdiction.

The section specifically exempts lands in Indian country from the provision. The section also specifies the procedure for relinquishment of jurisdiction, and states that relinquishment of jurisdiction takes effect upon acceptance by the State. While current law contains a number of provisions permitting heads of agencies to relinquish legislative jurisdiction, which are repealed by section 301 of the bill, 5 U.S.C. 306 has several advantages over the current piecemeal approach. First, it encourages agencies to relinquish legislative jurisdiction when appropriate by requiring each agency to examine the continued need for exclusive or concurrent legislative jurisdiction with a State over lands under its jurisdiction. Second, in order to assure a uniform policy concerning relinquishment of jurisdiction, it requires Attorney General concurrence in an agency head's determination to relinquish jurisdiction. Third, it provides uniform procedures for relinquishment. Fourth, it assures notification to the Attorney General of the initiation of relinquishment procedures and of the acceptance by a state of jurisdiction. While 5 U.S.C. 306 relates to both civil and criminal legislative jurisdiction, it is included here as a part of criminal code reform because of the Committee's concern that the federal government has legislative jurisdiction that extends beyond its needs. The Committee is particularly concerned about the continued need for retention of exclusive federal jurisdiction in some areas. The addition of 5 U.S.C. 306 to the law is an expression by the Committee of the same sorts of concerns that prompted it to include those parts of section 205 (Exercise of Concurrent Federal Jurisdiction) of title 18 designed to cause the federal government to use reasonable restraint in exercising jurisdiction when a State has jurisdiction of the same offense. New 5 U.S.C. 306 suggests the need to provide a rational pattern for the existence of federal legislative jurisdiction; new 18 U.S.C. 205 suggests the need for a rational pattern to the exercise of concurrent jurisdiction.

5 U.S.C. 701(b)(1)(B) excludes the courts of the United States from the coverage of the judicial review provisions of the Administrative Procedure Act. Section 322 amends 5 U.S.C. 701(b)(1)(B) to also exclude the United States Sentencing Commission from those provisions.

5 U.S.C. 3374(c)(2) lists the provisions of law under which a State or local government employee is deemed to be an employee of a federal agency while on detail to that agency. The list includes a number of provisions of current title 18. Section 323 of the bill amends 5 U.S.C. 3374(c)(2) to delete the references to provisions of title 18 that are replaced by provisions of the revised title 18, to conform the cross-references of the sections of current title 18 that are moved to title 18 Appendix by section 201(a)(1), and to make clear that a State or local government employee on assignment to the federal government is a federal public servant as defined in section 111 (General Definitions) of title 18.

5 U.S.C. 7313(a) makes a person convicted of a felony relating to inciting or participating in a riot or civil disorder ineligible for federal government employment. Section 324 of the bill conforms the language of section 7313(a) with that in section 1831 (Leading a Riot) and section 1833 (Engaging in a Riot) of title 18.

5 U.S.C. 8312 provides that a government employee, or his survivor or beneficiary, will be denied an annuity or retirement pay if the employee is convicted of an offense listed in subsection (b) or (c). Section 325(a) of the bill conforms the section numbers and descriptions of title 18 offenses listed in 5 U.S.C. 8312(b)(1) to those in corresponding sections in revised title 18. Section 325(b) of the bill conforms the section numbers and descriptions of title 18 offenses listed in 5 U.S.C. 8312(c)(1) to those in corresponding sections in revised title 18.

5 U.S.C. 8312(b), 8312(c), 8313 and 8315 list types of offenses which if committed by a government employee will result in the denial of annuity or retired pay for the government employee or his survivor or beneficiary. Section 325(c) of the bill states that the changes in terminology and section numbers in sections 325(a) and (b) of the bill will not apply to violations occurring before the effective date of the proposed code.

PART D—AMENDMENTS RELATING TO AGRICULTURE, TITLE 7, UNITED STATES CODE

7 U.S.C. 8 (section 6(a) of the Commodity Exchange Act) permits the Commodity Futures Trading Commission to revoke or suspend the contract market designation of a board of trade for not enforcing the rules of the Commodity Futures Trading Commission or for

violating a provision of the Act or regulation thereunder. Section 331(a) of the bill amends section 8 to include sections 1731 (Theft) (if there is jurisdiction under subsection (c)(19)) and 1763(a)(1) (Commodities Exchange Offenses) of title 18 as activities which result in revocation and suspension, since those provisions cover offenses originally covered in the Act.

7 U.S.C. 9 (section 9(b) of the Commodity Exchange Act) provides for the termination of trading privileges for a person other than a contract market who, among other things, manipulates or attempts to manipulate the market price of commodities or violates a provision of the Act or a regulation thereunder. Section 331(a) of the bill amends section 9 to include sections 1731 (Theft) and 1763(a)(1) (Commodities Exchange Offenses) of title 18 as activities which result in termination of trading privileges, since those provisions cover acts that were violations of the Act before it was amended by this bill.

7 U.S.C. 13(b) (section 9(b) of the Commodity Exchange Act) provides penalties for the manipulation of commodity prices, cornering the commodity, knowingly issuing false information affecting commodity prices, etc. Section 331(b)(1) of the bill amends section 13(b) by deleting the maximum penalty set forth in the subsection and substituting a cross-reference to section 1763 (Commodities Exchange Offenses) of title 18. This amendment is consistent with the Committee's decision to cover all felonies in title 18.

7 U.S.C. 13(c) (section 9(c) of the Commodity Exchange Act) specifies that violations of certain provisions of the Commodity Exchange Act are to be classified as misdemeanors, except as otherwise provided. Section 331(b)(2) of the bill conforms section 13(c) to the Code by deleting the reference to subsection (a), which was repealed by section 301 of the bill as covered in section 1731 (Theft) of title 18, and substituting a cross-reference to that provision.

7 U.S.C. 13(d) (section 9(d) of the Commodity Exchange Act) prohibits employees or agents of the Commodity Futures Trading Commission from participating in commodities transactions. Section 331(b)(3) of the bill conforms section 13(d) to the Code by deleting the penalty provision and substituting a cross-reference to section 1763 (Commodities Exchange Offenses) of title 18. This amendment is consistent with the Committee's decision to cover all felonies in title 18.

7 U.S.C. 13(e) (section 9(e) of the Commodity Exchange Act) prohibits an employee or agent of the Commodity Futures Trading Commission from imparting or using information obtained by virtue of employment which would affect commodity prices. Section 331(b)(3) of the bill conforms section 13(e) to the code by deleting the reference to penalties and substituting a cross-reference to section 1763 (Commodities Exchange Offenses) of title 18. This amendment is consistent with the Committee's decision to cover all felonies in title 18.

7 U.S.C. 13a–1 (section 6(c) of the Commodity Exchange Act) provides that anyone who violates the Commodity Exchange Act may be subject to Commission-initiated court action to enjoin the violation. Section 331(c) of the bill amends section 13a–1 by adding cross-references to sections 1763 (Commodities Exchange Offenses) and 1731 (Theft) of title 18 in order to make clear that violations

previously covered in the Act but now covered in sections 1763 and 1731 will continue to be enjoinable offenses under 7 U.S.C. 13a-11.

7 U.S.C. 13b (section 6(c) of the Commodity Exchange Act) provides that anyone who, among other things, manipulates or attempts to manipulate the price of commodities or violates a provision of the Act may be subject to a cease and desist order. Section 331(c) of the bill amends section 13b by adding cross-references to sections 1763 (Commodities Exchange Offenses) and 1731 (Theft) of title 18 in order to make clear that violations of sections 1763 and 1731 continue to subject a person to a cease and desist order under 7 U.S.C. 13b. Section 331(d) of the bill amends section 13b to conform to the replacement of section 9(a) of the Commodity Exchange Act (7 U.S.C. 13(a)) by section 1731 (Theft) of title 18 under the jurisdictional base provided in section 1731(c)(19), and with the enactment of section 1763 (Commodities Exchange Offenses) of title 18 as the penalty provision for violations of section 9(b) of the Commodity Exchange Act (7 U.S.C. 13(b)).

7 U.S.C. 13c(a) (section 13(a) of the Commodity Exchange Act) provides that anyone involved in activities violative of the Commodity Exchange Act may be held responsible in administrative proceedings as a principal. Section 331(c) of the bill amends section 13c(a) by adding cross-references to section 1763 (Commodities Exchange Offenses) and 1731 (Theft) of title 18 in order to make clear that anyone involved in activities violative of those provisions will continue to be held responsible as a principal under 7 U.S.C. 13c(a).

7 U.S.C. 15b(k) (section 1952(k) of the United States Cotton Futures Act) provides the penalties for a knowing violation of a regulation made pursuant to the United States Cotton Futures Act (7 U.S.C. 15b), other than a violation subject to 7 U.S.C. 15b(d)(3). Section 332 of the bill conforms section 15b(k) to the Code by substituting for the reference to 7 U.S.C. 15b(d)(3), which is repealed by section 301 of the bill, a reference to sections 1333 (Refusing to Testify or to Produce Information) and 1343 (Making a False Statement) of title 18, which replace it.

7 U.S.C. 60 (section 9 of the United States Cotton Standards Act) lists the types of activities which constitute violations of the United States Cotton Standards Act. Section 333 of the bill amends section 60(b) by deleting the language that makes it an offense for a person licensed to classify cotton to accept money or other consideration for neglect or improper performance of duties, as this offense is covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18. Section 333 of the bill amends section 60(c) by deleting the reference to improper influence of a person licensed to grade cotton as this provision is covered by subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18. Section 333 of the bill amends section 60(d) by deleting the provision which prohibits forcibly assaulting, resisting, impeding, etc. or improperly influencing any person employed under the Cotton Standards Act in the performance of his duties as covered by section 1302 (Obstructing a Government Function by Physical Interference) of title 18 and in subchapter F (Official Corruption and Intimidation) of chapter 16 of title 18 and in chapter 16 (Offenses Anvolving the Person) of title 18.

7 U.S.C. 84(d) (section 8 of the United States Grain Standards Act) specifies that inspectors under contract as inspectors under the Act are generally not to be considered employees of the United States, but are to be deemed employees of the Department of Agriculture for purposes of the bribery, graft, assault, and homicide statutes. Section 334(a) of the bill amends section 84(d) by conforming the terminology and section numbers to the Code.

7 U.S.C. 87c(c) (section 14(c) of the United States Grain Standards Act) specifies that persons employed by the Department of Agriculture to perform weighing functions pursuant to the United States Grain Standards Act are employees of the Department of Agriculture assigned to perform inspection functions for purposes of the assault and murder provisions of title 18. Section 334(b) of the bill amends section 87c(c) by clarifying the continued coverage of those employees under subchapter A (Homicide Offenses), subchapter B (Assault Offenses), and subchapter C (Kidnapping and Related Offenses) of chapter 16 of title 18, by describing the employees as federal public servants who are law enforcement officers for the purposes of those provisions.

7 U.S.C. 136*l*(b)(3) (section 14 (b)(3) of the Federal Insecticide, Fungicide and Rodenticide Act) decribes as a violation of the Federal Insecticide, Fungicide, and Rodenticide Act the disclosure, with intent to defraud, of a formula of a product acquired in connection with the registration requirements of the Act. Section 335 of the bill amends section 136*l*(b)(3) by deleting the penalty provision and substituting language that makes a violation of the provision an unlawful act that is an offense described in section 1737 (Fraud in a Regulated Industry) of title 18. This amendment is consistent with the Committee's decision to cover all federal felonies in title 18.

7 U.S.C. 270 (section 30 of the United States Warehouse Act) describes offenses under the United States Warehouse Act. Section 336(a) of the bill conforms section 270 to the Code by deleting references to forgery, counterfeiting, falsely representing, etc. a license issued by the Department of Agriculture under the Act as these provisions are covered by subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18. Section 336(b) of the bill conforms section 270 to the Code by deleting references to issuing false receipts or certificates concerning agricultural products stored in licensed warehouses or altering such receipts because these offenses are covered by subchapter E (Counterfeiting, Forgery and Related Offenses) of chapter 17 of title 18. Section 336(c) of the bill conforms section 270 to the Code by deleting a reference to conversion of products stored in licensed warehouses, because the offense is covered in section 1731 (Theft) of title 18. Section 336(d) of the bill amends section 270 by dividing one lengthy sentence into two sentences for style and clarity. Section 336(e) of the bill amends section 270 by deleting the word "so" before "converted" since the preceding reference to "converted" was deleted by section 336(c) of the bill. Section 336(f) of the bill amends 7 U.S.C. 270 by adding to the description of the authority to reimburse an owner of agricultural products converted, used, or removed in violation of 7 U.S.C. 270 a reference to section 1731 (Theft) of title 18 and subchapter E (Counterfeiting, Forgery and Related Offenses) of chap-

ter 17 (Offenses Involving Property) of title 18, in order to make clear that reimbursement available for violations covered in section 270 in current law will continue to be available under the Code. Section 336(g) of the bill amends 7 U.S.C. 270 by deleting references to false and fraudulent representation, classifications, and grading of agricultural products as covered by section 1343 (Making a False Statement) of title 18.

7 U.S.C. 473 (section 3 of the Cotton Statistics and Estimates Act) imposes a duty on officers of cotton storage establishments and their representatives or agents, to furnish information to the Department of Agriculture concerning grades and staples of cotton. 7 U.S.C. 473 also specifies that it is an offense to refuse or willfully neglect to supply the answer or willfully to give a false answer or to refuse to permit Department employees to examine cotton. Section 337 of the bill amends section 473 by deleting the offense of willfully making a false statement, which is covered by section 1343 (Making a False Statement) of title 18.

7 U.S.C. 503 (section 3 of the Act of January 14, 1929) imposes a duty on dealers and others to furnish a report on the quantity of leaf tobacco on hand, and specifies that it is an offense to fail to supply this information or to willfully give false or misleading information. Section 338 of the bill amends section 503 by deleting the offense of giving false or misleading answers, which is covered by section 1343 (Making a False Statement) of title 18.

7 U.S.C. 511i(d) (section 10(d) of the Tobacco Inspection Act) describes violations associated with inspecting, sampling and weighing tobacco by an inspector, sampler, or weigher of tobacco. Section 339(a) of the bill amends section 511i(d) by deleting the offenses of issuing false certificates and of accepting money or other consideration for neglect or improper performance of duties, which are covered by section 1343 (Making a False Statement) of title 18 and by subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

7 U.S.C. 511i(h) (section 10(h) of the Tobacco Inspection Act) describes the offenses of falsely representing that tobacco has been inspected, sampled, or weighed, concealing low grade tobacco, or offering deceptively loaded tobacco for inspection or sampling. Section 339(b) of the bill amends section 511i(h) by deleting the offense of offering deceptively loaded cargo for inspection or sampling, which is covered by subsection (a)(1)(E), relating to submitting or inviting reliance on a misleading sample, of section 1343 (Making a False Statement) of title 18.

7 U.S.C. 953 (section 3 of the Act of June 24, 1936) imposes a duty on dealers and others to furnish a report on the quantity of peanuts and peanut oil on hand and makes it an offense to refuse to give the report or willfully to give answers that are false and misleading. Section 340 of the bill amends section 953 by deleting the provision relating to giving false information, which is covered by section 1343 (Making a False Statement) of title 18.

Section 341 amends section 406 of the Sugar Act of 1948 (7 U.S.C. 1156) to delete language covered in section 1343 (Making a False Statement) of title 18. The amendment is apparently unnecessary since, under section 18(a) of Public Law 92–138 (7 U.S.C. 1101 note), the powers of the Secretary under the Act have terminated.

7 U.S.C. 1373(a) (section 373(a) of the Agricultural Adjustment Act of 1938) requires specified persons to provide such information to the Secretary of Agriculture and keep such records as are required by the Secretary. The section also makes it an offense to fail to keep a report or record or to make a false report or record. Section 342(a)(1) of the bill amends section 1373(a) by deleting the provision concerning the making of a false report or record, which is covered by section 1343 (Making a False Statement) of title 18. Section 342(a)(2) of the bill further amends 7 U.S.C. 1373(a) by adding a reference to section 1343 (Making a False Statement) of title 18 in the provision giving a tobacco warehouseman or dealer 15 days after notice of a violation of 7 U.S.C. 1373(a) in which to correct the violation. The added reference to section 1343 retains current law as to notice of violation.

7 U.S.C. 1380o(a) (section 380o(a) of the Agricultural Adjustment Act of 1938) imposes a recordkeeping and reporting requirement on any person subject to the Act, except rice producers, and specifies punishment for failing to make or keep a required record or report or making a false report or record. Section 342(b) of the bill amends section 1380o(a) by deleting the reference to making a false report or record, which is covered by section 1343 (Making a False Statement) of title 18.

7 U.S.C. 2621(b) (section 312(b) of the Potato Research and Promotion Act) specifies the penalty levied against a handler who violates a plan providing for the research, development, advertising and promotion of potatoes or who fails to pay a required fee. Section 343 of the bill amends section 2621(b) by changing the violation from one of a criminal nature to one of a civil nature as suggested by the Department of Agriculture.

PART E—AMENDMENTS RELATING TO ALIENS AND NATIONALITY, TITLE 8, UNITED STATES CODE

8 U.S.C. 1105a(a)(6) (section 106(a)(6) of the Immigration and Nationality Act) specifies the circumstances in which an alien may challenge the validity of a deportation order in a criminal proceeding. Section 351(a)(1) of the bill amends section 1105a(a)(6) by adding references to sections 1331 (Criminal Contempt), 1332 (Failing to Appear as a Witness), 1333 (Refusing to Testify or to Produce Information), and 1334 (Obstructing a Proceeding by Disorderly Conduct) of title 18, as the offenses relate to deportation proceedings, to the description of criminal proceedings in connection with which an alien may challenge the validity of a deportation order. The amendment is necessitated by the deletion from section 242 of the Act (8 U.S.C. 1252) of material covered in those provisions of title 18, and is designed to carry forward current law.

8 U.S.C. 1105a(a)(7) (section 106(a)(7) of the Immigration and Nationality Act) provides that 8 U.S.C. 1105a shall not preclude the Attorney General from refusing to defer deportation of an alien even though the alien has a right to judicial review of a deportation order, or to relieve the alien from compliance with 8 U.S.C. 1252 (d) and (e). Section 351(a)(2) of the bill amends section 1105a(a)(7) by adding references to sections 1331 (Criminal Contempt), 1332 (Failing to Appear as a Witness), 1333 (Refusing to Testify or to Produce Anformation), and 1334 Obstructing a Pro-

ceeding by Disorderly Conduct) of title 18, as the offenses relate to deportation proceedings, after the reference to 8 U.S.C. 1252 (d) and (e), to carry forward current law regarding the alien's compliance with those provisions.

8 U.S.C. 1182(a)(9) (section 212(a)(9) of the Immigration and Nationality Act) describes as one category of excludable aliens those who have been convicted of a crime involving moral turpitude, but permits the granting of a visa to an alien who committed only one such crime while under the age of 18 or to an alien who committed a petty offense or admits to committing a misdemeanor. Section 351(b)(1) of the bill amends section 1182(a)(9) by conforming the description of petty offenses and misdemeanors to the terminology and the terms of imprisonment provided in the sentencing provisions of title 18.

8 U.S.C. 1182(a)(19) (section 212(a)(19) of the Immigration and Nationality Act) describes as one category of excludable aliens those who have obtained or sought to obtain a visa by fraud or making false statements. Section 351(b)(2) of the bill amends section 1182(a)(19) by conforming the language with that in section 1343 (Making a False Statement) of title 18.

8 U.S.C. 1182(i) (section 212(i) of the Immigration and Nationality Act) provides that an alien who is the spouse, parent or child of a citizen of the United States or of an alien lawfully admitted for permanent residence, and who is excludable because he has obtained or sought to obtain a visa by fraud or admitted perjury, may be granted a visa and admitted to permanent residence if he is otherwise admissible. Section 351(b)(3) amends section 1182(i) by conforming the language to that of section 1343 (Making a False Statement) of title 18.

8 U.S.C. 1185(a)(7) (section 215(a)(7) of the Immigration and Nationality Act) makes it an offense in time of war or national emergency, or in time of war between two or more states other than the United States if the President finds restrictions on aliens to be necessary, to use or attempt to use or to furnish to another for use any forged or counterfeited permit or evidence of permission, or an originally valid permit or evidence of permission that is void or invalid. Section 351(c) of the bill amends section 1185(a)(7) by deleting the language relating to forged or counterfeited documentation, which is covered in subchapter B (Offenses Involving Immigration, Naturalization, and Passports) of chapter 12 and subchapter E (Counterfeiting, Forgery and Related Offenses) of chapter 17 of title 18.

8 U.S.C. 1251(a)(5) (section 241(a)(5) of the Immigration and Nationality Act) includes within the category of deportable aliens those who have, among other things, been convicted of violating current 18 U.S.C. 1546, which relates to forging and counterfeiting of visas and other immigration documents, and to related offenses. Section 351 (d)(1) of the bill amends section 1251(a)(5) by deleting the reference to 18 U.S.C. 1546 and substituting a list of the offenses in title 18 that 18 U.S.C. 1546 formerly covered.

8 U.S.C. 1251(a)(7) (section 241(a)(7) of the Immigration and Nationality Act) includes within the category of deportable aliens those who are engaged in espionage or who are members of Communist organizations, other than those who did not know or have

reason to believe the organization was a Communist organization. Section 351 (d)(2) of the bill amends section 1251(a)(7) by deleting a reference to the registration requirement imposed on Communist organizations which was repealed by Public Law 90-237.

8 U.S.C. 11251(a)(17) (section 241(a)(17) of the Immigration and Nationality Act) includes within the category of deportable aliens those who have been convicted of a violation or conspiracy to violate various Acts dealing with national defense. Section 351(d)(3) of the bill amends section 1251(a)(17) to conform to the revision of title 18, including references to provisions relating to treason, sabotage and other offenses listed in chapter 11 (Offenses Involving National Defense), chapter 12 (Offenses Involving International Affairs), and chapter 16 (Offenses Involving the Person), as it relates to the President, of title 18 and other defense-related Acts.

8 U.S.C. 1252(d) (section 242(d) of the Immigration and Nationality Act) requires that aliens against whom a final deportation order has been outstanding comply with certain requirements of supervision. The section makes it an offense to willfully fail to comply with the regulations regarding supervision, to willfully fail to appear or give information as required, or to knowingly give false information. Section 351(e)(1) of the bill amends the last sentence of section 1252(d) by deleting language relating to failure to appear or to give information and to false statements, which are covered by sections 1332 (Failing to Appear as a Witness), 1333 (Refusing to Testify or to Produce Information), 1341 (Perjury), 1342 (False Swearing), and 1343 (Making a False Statement) of title 18.

8 U.S.C. 1252(e) (section 242(e) of the Immigration and Nationality Act) specifies the nature of and penalties for willful failure to depart from the United States when an outstanding deportation order exists. Section 351(e)(2) conforms section 1252(e) to the Code to specify that an offense under the section is an unlawful act that is an offense described in section 1211(a)(4) (Unlawfully Entering the United States as an Alien) of title 18. The amendment is consistent with the Committee's decision to cover all federal felonies in title 18.

8 U.S.C. 1306(c) (section 266(c) of the Immigration and Nationality Act) makes it an offense to file an application for registration which contains false statements or to fraudulently procure or attempt to procure registration, and delineates the penalty for such violations. Section 351(f)(1)(B) of the bill conforms section 1306(c) to the Code by deleting the penalty provisions as covered by sections 1001 (Criminal Attempt), 1301 (Obstructing a Government Function by Fraud), and 1343 (Making A False Statement) of title 18. Section 351(f)(1) (A) amends the provision by deleting "files" an application and substituting "is convicted of filing" since the penalty provision is deleted

8 U.S.C. 1306(d) (section 266(d) mf the Ammigration and Nationality Act) defines as an offense the duplication of alien registration cards, except as authorized by regulation of the Attorney General, and specifies the penalties for violations of the provision. Section 351(f) (2) of the bill conforms section 1306(d) to the Code by deleting the offense and penalty provisions, leaving only the language regarding authority to issue regulations, because the offense and penalty language is covered by section 1741 (Counterfeiting) of title 18.

8 U.S.C. 1357(b) (section 287(b) of the Immigration and Nationality Act) authorizes an officer or employee of the Immigration and Naturalization Service to administer oaths and receive evidence concerning the privilege extended to aliens to be present in the United States, and provides penalties for knowingly or willfully giving false evidence or swearing to a false statement. Section 351(g) of the bill amends section 1357(b) by deleting the language relating to offenses involving false statements as covered in subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18.

8 U.S.C. 1451(g) (section 340(g) of the Immigration and Nationality Act) provides that the judge in a case in which the defendant is convicted of violating current 18 U.S.C. 1425, which makes it an offense to knowingly procure naturalization or evidence of citizenship contrary to law, shall declare void the final order admitting the person to citizenship and cancel the certificate of naturalization. Section 351 (h)(1) of the bill conforms section 1451(g) by deleting the reference to 18 U.S.C. 1425 and substituting a reference to section 1215 (Fraudulently Acquiring or Improperly Using Evidence of Citizenship) of title 18, which replaces the earlier provision. Section 351(h)(2) further conforms 8 U.S.C. 1451(g) to the Code by adding cross-references to other provisions of the revised Code which are covered in current 18 U.S.C. 1425, including sections of chapter 13 (Offenses Involving Government Processes) which cover actions involving fraud or false statements as these sections relate to procuring naturalization, and sections of subchapter E (Counterfeiting, Forgery and Related Offenses) of chapter 17 (Offenses Involving Property) as these sections relate to procuring naturalization.

8 U.S.C. 1481(a)(7) (section 349(a)(7) of the Immigration and Nationality Act) provides that a person loses his nationality by committing an act of treason, or an offense under current 18 U.S.C. 2383, 2384, or 2385 under specified circumstances. Section 351(i) of the bill amends the cross-references in section 1481(a)(7) to conform to the Code by referring to sections 1101 (Treason) and 1102 (Armed Rebellion or Insurrection) of title 18.

PART F—AMENDMENTS RELATING TO THE ARMED FORCES, TITLE 10, UNITED STATES CODE

10 U.S.C. 772(f) specifies that an actor may wear a military uniform while portraying a member of the Armed Forces only if the portrayal does not discredit the Armed Forces. Section 361 of the bill amends section 772(f) by deleting the prohibition against discrediting the Armed Forces, which was ruled unconstitutional in *Schacht* v. *United States*, 398 U.S. 58 (1970).

10 U.S.C. 807 is amended by section 362 of the bill to add two new subsections to that provision. New subsection (d) provides that members of the armed forces an a foreign country who are charged with an offense agaanst the laws of such country may be apprehended, upon request of competent authority of that country, by a person empowered to apprehend offenders under title 10, and may be delivered to that authority for trial. Pending such delivery the apprehended individual may be arrested and confined. New subsection (e) in effect creates an exception to the Posse Comitatus Act

(current 18 U.S.C. 1385, reenacted as section 1385 of title 18 appendix in section 201 of the bill), by authorizing the armed forces of the United States to be used outside the United States in the detection, investigation, preparation for trial, and apprehension of a federal public servant who is outside the United States because of his official duties, a member of his household residing abroad, or a person accompanying the armed forces of the United States outside the United States, for an offense committed outside the United States and subject to United States jurisdiction. In essence, the provision permits the military forces to be utilized in the investigation of offenses over which federal extraterritorial jurisdiction is established under section 204(i) (Extraterritorial Jurisdiction of the United States) of title 18. Both these new subsections adopt recommendations of the Department of Defense.

10 U.S.C. 2671(c) makes the penalties of local law pertaining to hunting, fishing or trapping violations applicable to similar offenses on a military installation. Section 363 of the bill conforms section 2671(c) to the Code by specifying that a violation of the section is an offense under section 1861 (Violating State or Local Law in an Enclave) of title 18.

PART G—AMENDMENTS RELATING TO BANKS AND BANKING, TITLE 12, UNITED STATES CODE

12 U.S.C. 92a(h) (section 1(h) of the Act of September 28, 1962) makes it unlawful for a national banking association to lend to an officer, director, or employee money from funds held in trust. Section 371 of the bill conforms section 92a(h) to the Code by deleting the penalty provision and substituting a cross-reference to section 1731 (Theft) of title 18, since the offense constitutes a misapplication of funds held by a national credit institution.

12 U.S.C. 93(a) (section 5239 (a) of the Revised Statutes) provides that if the directors violate or permit the violation of the National Banking Act, the rights, privileges, and franchises of the national banking association are forfeited. Section 372 of the bill amends section 93(a) by adding to the reference to "this Title" cross-references to section 333 (Mutilation of National Bank Obligation) of title 18 Appendix, and to sections 1731 (Theft) and 1743 (Criminal Endorsement of a Written Instrument) of title 18, since those provisions, as they apply to a national banking association, cover offenses previously described in the Title of the Revised Statutes from which 12 U.S.C. 93(a) is derived. Section 372 of the bill further amends section 93(a) to make clear that the suit described in 12 U.S.C. 93(a) is one to determine forfeiture rather than prosecution for violating one of the criminal provisions cited.

12 U.S.C. 209 (section 209 of the Bank Conservation Act) provides that conservators appointed pursuant to the Bank Conservation Act are subject to certain provisions of current title 18. Section 373 of the bill conforms section 209 to the Code by amending the cross-references to refer to the sections in title 18 and title 18 Appendix which cover the same subject matter, and to specify that the conservators are deemed to be agents or employees of the bank for purposes of specific provisions of title 18 in order to assure federal jurisdiction over those offenses if they are committed by conservators.

12 U.S.C. 327 (paragraph 7 of section 9 of the Federal Reserve Act) provides that a member bank of the Federal Reserve System which fails to comply with the requirements of the Federal Reserve Act will lose its stock in the Federal Reserve System and its rights and privileges of membership. Section 374(a) of the bill conforms 12 U.S.C. 327 to the Code provision by adding cross-references to sections of title 18 which deal with making false statements, counterfeiting, bribery, etc., offenses which were previously covered in the Act, as offenses which will result in forfeiture.

12 U.S.C. 503 (section 22(f) of the Federal Reserve Act) makes officers of banks, which are members of the Federal Reserve System, liable in their individual capacity for violations of provisions of the Federal Reserve Act dealing with purchases of securities from bank directors, loans to bank directors by member banks, interest rates on deposits, regulations of the Federal Reserve Board, and specified provisions of title 18. Section 374(b) of the bill conforms section 503 to the Code by amending the cross-references to provisions of title 18 to conform to the appropriate sections in the revised version of title 18.

12 U.S.C. 617 (section 25 of the Federal Reserve Act) prohibits a corporation organized to engage in foreign banking from engaging in commerce or trading in commodities except as otherwise provided and forbids it from fixing or attempting to fix the price of commodities. Section 374(c) of the bill amends 12 U.S.C. 617 by deleting the penalty provision and substituting a cross-reference to section 1763 (Commodities Exchange Offenses) of title 18, which makes it an offense to violate 12 U.S.C. 617. This amendment is consistent with the Committee's decision to cover all Federal felonies in title 18.

12 U.S.C. 622 (the sixteenth paragraph of section 25(a) of the Federal Reserve Act) provides that if a corporation organized to do foreign banking violates a provision of the Act, its rights, privileges, and franchises under the Act may be forfeited. Section 374(d) of the bill amends section 622 to make clear that these violations include offenses described in section 1343(a)(2), concerning false statements in a credit institution record, of title 18, and in sections 1731 (Theft), 1743 (Criminal Endorsement of a Written Instrument), and 1744 (Criminal Issuance of a Written Instrument) of title 18.

12 U.S.C. 1457(e) (section 308(e) of the Federal Home Doan Eortgage Corporation Act) states that the terms "agency" and "agencies" shall include the Federal Home Loan Mortgage Corporation when used with reference to an agency or agencies in specified sections of title 18. Section 375 of the bill conforms section 1457(e) to the Code by amending the cross-references to sections of title 18 to the new sections in title 18 and title 18 Appendix. Section 375 further amends section 1457(e) by including officers or employees of the Corporation in the definition of federal public servant for purposes of specified sections of title 18 and title 18 Appendix an order to assure the applicability mf those provisions to officers and employees of the Corporation.

12 U.S.C. 1457(f) (section 308(f) of the Federal Home Loan Mortgage Corporation Act) extends certain provisions of chapter 25 (Counterfeiting and Forgery) of current title 18 to include the Corporation and includes within the terms "obligation or other secu-

rity" and "obligations or other securities" any obligation or other security of or issued by the Corporation. Section 375 of the bill amends section 1457(f) to conform to the Code by making clear that the definition of obligation of the United States in section 1747 (Definitions for Subchapter E) of chapter 17 (Counterfeiting, Forgery, and Related Offenses) of title 18 includes an obligation or other security of or issued by the Corporation.

12 U.S.C. 1709-2 (section 912 of the Housing and Urban Development Act of 1970) defines as an offense engaging in a pattern or practice of purchasing one- to four-family dwellings subject to a loan in default, failing to make payments under the mortgage, and applying or authorizing the application of rent for personal use; and specifies penalties for such pattern or practice. Section 376 of the bill amends section 1709-2 by deleting the penalty provision and substituting a cross-reference to secton 1737 (Fraud in a Regulated Industry) of title 18, which specifies that a violation of 12 U.S.C. 1709-2 is an offense under subsection (a)(2) and grades the offense as a Class E felony in subsection (b). The amendment is consistent with the Committee's decision to cover all Federal felonies in title 18.

12 U.S.C. 1715z-4(b) (section 239(b) of the National Housing Act) makes it an offense for an owner of multifamily housing which is security for a mortgage to, while the mortgage is in default, willfully and knowingly use or authorize the use of rents or other funds derived from the property for any purpose other than to meet the actual and necessary expenses of the property. Section 377 of the bill conforms section 1715z-4(b) to the Code by deleting the penalty provision and substituting a cross-reference to section 1737 (Fraud in a Regulated Industry) of title 18, which makes violation of 12 U.S.C. 1715z-4(b) an offense in subsection (a)(2) and specifies in subsection (b) that an offense is a Class E felony. The amendment is consistent with Committee's decision to cover all felonies in title 18.

12 U.S.C. 1957 (section 127 of chapter 2 of title I of the Act of October 26, 1970) makes it an offense willfully to violate a regulation under the Act, under 12 U.S.C. 1829b (relating to banks insured by the Federal Deposit Insurance Company), or under 12 U.S.C. 1730d (relating to institutions insured by the Federal Savings and Loan Insurance Corporation) which relate to recordkeeping requirements for banks and other financial institutions, if the offense is committed in furtherance of the commission of a Federal felony. Section 378 of the bill deletes the penalty provision in the section and substitutes a statement that a violation of section 1957 is an offense punishable under section 1762 (Monetary Offenses) of title 18. Under section 1762, the offense of violating 12 U.S.C. 1957 is described in subsection (a)(1), and the grading for the offense is set forth in subsection (b).

31 U.S.C. 1059 (section 210 of the Currency and Foreign Transactions Reportang Act) makes it an offense to willfully violate a provision of the Act in furtherance of the commission of any other violation of law or as part of a pattern of illegal activities involving transactions exceeding $100,000 in a twelve-month period. Section 379 of the bill amends 31 U.S.C. 1059 by deleting the penalty provision and substituting a statement that a violation is an unlawful

act that is an offense punishable under section 1762 (Monetary Offenses) of title 18. The offense of violating 31 U.S.C. 1059 is described in subsection (a)(2) of section 1762, and the offense is graded as a Class D felony in subsection (b).

PART H—AMENDMENTS RELATING TO THE CENSUS, TITLE 13, UNITED STATES CODE

13 U.S.C. 211(2) specifies that anyone who retains any part of the compensation paid to any person appointed as an officer or employee of the Department of Commerce is subject to criminal penalties. Section 381 of the bill amends section 211(2) to describe the appointed positions to which the subsection applies in order to conform the subsection to the repeal by section 301 of 13 U.S.C. 211(1).

13 U.S.C. 225(a) specifies which offenses apply in connection with the conducting of a survey. 13 U.S.C. 225(b) makes the provision for imprisonment in connection with a violation of 13 U.S.C. 222 inapplicable to specified types of surveys. 13 U.S.C. 225(c) makes certain criminal provisions of title 13 inapplicable to surveys of governments and surveys taken more frequently than annually from the offense provisions. Section 382(a) of the bill amends sections 225(a), (b), and (c) by adding a cross-reference to section 1343 (Making a False Statement) of title 18 to make clear that that section applies to false statements in connection with the surveys, with the limitations specified in 13 U.S.C. 225(b) and (c).

13 U.S.C. 225(d) exempts a religious organization, which is required by doctrine to withhold requested information from the offense provisions accompanying the survey provisions. Section 382(b) of the bill conforms section 225(d) to 13 U.S.C. 225(a), (b), and (c) by adding a cross-reference to section 1343 (Making a False Statement) to title 18 to make clear that the exemption also applies to that provision.

PART I—AMENDMENTS RELATING TO COMMERCE AND TRADE, TITLE 15, UNITED STATES CODE

15 U.S.C. 1 (section 1 of the Sherman Act) provides that any contract, combination, or conspiracy in restraint of trade or commerce is illegal and specifies the punishment for a violation. Section 391 of the bill conforms section 1 to the Code by deleting the penalty provision and substituting a cross-reference to section 1764 (Antitrust Offenses) of title 18, which provides that a person who violates section 1 of the Sherman Act is guilty of an offense under section 1764, and specifies that such an offense is a Class E felony. The amendment is consistent with the Committee's decision to cover every Federal felony in title 18.

15 U.S.C. 2 (section 2 of the Sherman Act) provides that anyone who monopolizes or attempts to monopolize, or combines or conspires with any person to monopolize, any part of trade or commerce among the states or with foreign nations is guilty of a felony. Section 391 of the bill conforms section 2 to the Code by deleting the penalty provision and substituting a cross-reference to section 1764 (Antitrust Offenses) of title 18, which provides that a person who violates section 2 of the Sherman Act is guilty of an offense under section 1764, and specifies that such an offense is a

Class E felony. The amendment is consistent with the Committee's decision to cover every Federal felony in title 18.

15 U.S.C. 3 (section 3 of the Sherman Act) specifies that any contract, or combination, or conspiracy, in restraint of trade or commerce is illegal. Section 391 of the bill amends section 3 by deleting the penalty provision and substituting a cross-reference to section 1764 (Antitrust Offenses) of title 18, which provides that a person who violates section 3 of the Sherman Act is guilty of an offense under section 1764, and specifies that such an offense is a Class E felony. The amendment is consistent with the Committee's decision to cover every Federal felony in title 18.

15 U.S.C. 23 (section 13 of the Clayton Act) provides that in any civil or criminal action brought by or on behalf of the United States a subpoena for witnesses may be issued. Section 392 of the bill amends section 23 by deleting the reference to the issuance of a subpoena in a criminal case as covered by Rule 17 of the Federal Rules of Criminal Procedure.

15 U.S.C. 50 (section 10 of the Federal Trade Commission Act) describes in the second paragraph as offenses, willfully making false entries or statements in reports required to be filed or in records required to be kept, and failing to file required reports, among related others. Section 393 of the bill amends the second paragraph of the section by deleting the reference to making false statements in a report and substituting a statement that the paragraph provides penalties for violations of the paragraph except where the offense is covered by section 1333 (Refusing to Testify or to Produce Information), 1343 (Making a False Statement), or 1344 (Tampering With a Government Record) of title 18. The amendment makes clear that the penalties in those provisions apply in lieu of those for a violation of 15 U.S.C. 50 whenever an offense is covered by one of those provisions.

15 U.S.C. 77v(a) (section 22(a) of the Securities Act of 1933) grants the district courts of the United States jurisdiction over offenses and violations of the Securities Act of 1933 and concurrent jurisdiction with State and Territorial courts of suits in equity and actions at law to enforce a liability or duty created by the Securities Act of 1933. Section 394(a) of the bill amends section 77v(a) by deleting the reference to offenses, thereby covering only civil jurisdiction in the provision, while leaving the description of criminal jurisdiction to section 3301 (Jurisdiction of District Courts Over Offenses) of title 18.

15 U.S.C. 77x (section 24 of the Securities Act of 1933) specifies the penalties for willful violations of the Securities Act of 1933 or of rules or regulations issued thereunder, and for willfully making an untrue statement in a registration statement filed thereunder. Section 394(b) of the bill amends section 77x by deleting the penalty provision and substituting a statement that a violaton is an unlawful act that is an offense punishable under section 1761 (Securities Offenses) of title 18. Section 1761 specifies in subsection (a)(1) that a violation of 15 U.S.C. 77x is an offense and in subsection (c) that it is a Class D felony. The amendment is consistent with the Committee's decision to cover all Federal felonies in title 18.

15 U.S.C. 77vvv(b) (section 322(b) of the Trust Indenture Act of 1939) describes jurisdiction and venue over offenses and violations

of the Trust Indenture Act of 1939. Section 395(a) of the bill amends section 77vvv(b) by deleting the reference to offenses, thereby covering only civil jurisdiction and venue in the section, while criminal jurisdiction is covered in section 3301 (Jurisdiction of District Courts Over Offenses) of title 18, and venue in criminal cases is covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in subchapter B (Venue) of chapter 33 of title 18.

15 U.S.C. 77yyy specifies the penalties for willful violations of the Trust Indenture Act of 1939, or of a rule, regulation, or order thereunder, and for willful making of an untrue statement of a material fact or an omission to state a material fact in a document filed or required to be kept under the Act. Section 395(b) of the bill amends section 77yyy by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1761 (Securities Offenses) of title 18. Section 1761 specifies in subsection (a)(2) that a violation of 15 U.S.C. 77yyy is an offense, and subsection (c) grades the offense as a Class D felony.

15 U.S.C. 78*o*(b)(4)(B)(iv) (section 15(b)(4)(B)(iv) of the Securities Exchange Act of 1934) requires that the Securities and Exchange Commission censure, place limitations on, or revoke the registration of a broker or dealer, if it is in the public interest and the Commission finds that the broker or dealer, or person associated with a broker or dealer, has been convicted of any one of the offenses listed in the section, including perjury, making a false statement, or theft, counterfeiting, or forgery of securities, or of a violation of a section of title 18 listed in the section. Section 396(a) of the bill amends section 78o(b)(4)(B)(iv) by conforming the cross-references to sections of title 18 that cover the same offenses.

15 U.S.C. 78aa (section 27 of the Securities Exchange Act of 1934) grants the district court of the United States exclusive jurisdiction over violations of the Securities Exchange Act of 1934 or of rules or regulations issued thereunder and specifies the venue in which that jurisdiction may be exercised. Section 396(b) of the bill conforms the language of section 78aa to the repeal of the language relating to criminal jurisdiction by section 301 of the bill.

15 U.S.C. 78ff(a) (section 32(a) of the Securities Exchange Act of 1934) specifies penalties for willful violations of the provisions of the Securities Exchange Act of 1934 and for willfully and knowingly furnishing false information or statements in reports or documents required to be filed under the Act. Section 396(c)(1) of the bill amends section 78ff(a) by deleting the penalty provision and substituting a statement that a violation of 15 U.S.C. 78ff(a) is an unlawful act that is an offense punishable under section 1761 (Securities Offenses) of title 18. Section 1761 provides in subsection (a)(3) that a violation of 15 U.S.C. 78ff(a) is an offense and in subsection (c) that the offense is a Class D felony. The amendment is consistent with the Committee's decision to cover all Federal felonies in title 18.

15 U.S.C. 78ff(c)(1), (c)(2), and (c)(3) (section 32(c)(1), (c)(2), and (c)(3) of the Securities Exchange Act of 1934) provide the penalties for violating 15 U.S.C. 78dd-1(a), which relates to commercial bribery, by an issuer of a class of securities registered pursuant to sec-

tion 12 of the Securities Exchange Act of 1934, or that is required to file a report under section 15(d) of the Act, or by an officer, director, employee, or agent of the issuer, or by a stockholder acting in behalf of the issuer, of a foreign official or foreign political party or official thereof, or the offering, giving, or agreeing to give anything of value to any other person, knowing that it will be offered, given, or agreed to be given to a foreign official or to a foreign political party or official thereof. Subsection (c)(1) of section 78ff specifies the fine applicable to a violation by an issuer, (c)(2) specifies the penalty applicable to an officer or director of an issuer or to a stockholder acting on behalf of the issuer, who willfully violates 15 U.S.C. 78dd-1(a), and subsection (c)(3) specifies the penalties applicable to an employee or agent, other than an officer, director, or stockholder, of an issuer if the issuer is found to have violated section 78dd-1(a) and the employee or agent willfully carried out the act or practice constituting the offense. Sections 396(c)(2) and (c)(3) delete the penalty provisions in subsections (c)(1), (c)(2), and (c)(3) of 15 U.S.C. 78ff and substitute in each subsection a statement that a violation is an unlawful act that is an offense described in section 1751(a)(2) (Commercial Bribery) of title 18. Section 1751, in turn, in subsection (a)(2) makes a violation of section 32(c)(1), (c)(2), or (c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(c)(1), (c)(2), and (c)(3)) an offense, and in subsection (b)(1) grades the offense as a Class D felony. The amendments are consistent with the Committee's decision to cover all Federal felonies in title 18.

15 U.S.C. 78ff(c)(4) (section 32(c)(4) of the Securities Exchange Act of 1934) prohibits an issuer from paying a fine incurred by an officer, director, stockholder, agent or employee of the issuer. Section 396(c)(2) of the bill amends section 78ff(c)(4) to conform to the fact that fines for violating paragraph (2) or (3) of the subsection are imposed under title 18 rather than under those paragraphs.

15 U.S.C. 78dd-2 (section 104 of the Foreign Corrupt Practices Act of 1977) contains provisions parallel to those of 15 U.S.C. 78dd-1 except that they apply to domestic concerns other than those covered by 15 U.S.C. 78dd-1. Subsection (b)(1)(A) specifies the fine applicable to a violation by a domestic concern other than one described in subsection (b)(1)(B), subsection (b)(1)(B) specifies the penalty for an individual who is a domestic concern and who willfully violates 15 U.S.C. 78dd-2(a), subsection (b)(2) specifies the penalty applicable to an officer or director of a domestic concern, or a stockholder acting on behalf of a domestic concern, who willfully violates 15 U.S.C. 78dd-2(a), and subsection (b)(3) specifies the penalties applicable to an employee or agent other than an officer, director, or stockholder, of a domestic concern if the domestic concern is found to have violated section 78dd-2(a) and the employee or agent willfully carried out the act or practice constituting the offense. Section 396A (a) and (b) of the bill delete the penalty provisions in subsections (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) of section 78dd-2 and substitute in each subsection a statement that a violation is an unlawful act that is an offense described in section 1751(a)(2) (Commercial Bribery) of title 18. Section 1751, in turn, in subsection (a)(2) makes a violation of section 104(b)(1), (b)(2), or (b)(3) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(b)(1), (b)(2), or (b)(3)) an offense, and in subsection (b)(1) grades the of-

fense as a Class D felony. The amendments are consistent with the Committee's decision to cover all Federal felonies in title 18.

15 U.S.C. 78dd-2(b)(4) (section 104(b)(4) of the Foreign Corrupt Practices Act of 1977) prohibits a domestic concern from paying a fine incurred by an officer, director, stockholder, employee, or agent of the concern. Section 396A(c) amends section 78dd-2(b)(4) to conform to the fact that fines for violating paragraph (2) or (3) of the subsection are imposed under title 18 rather than under those paragraphs.

15 U.S.C. 79y (section 25 of the Public Utility Holding Company Act of 1935) grants the district court of the United States jurisdiction and venue over offenses and suits concerning violations of the Public Utility Holding Company Act of 1935. Section 397(a) of the bill conforms the language of section 79y to the repeal of the language relating to criminal jurisdiction by section 301 of the bill.

15 U.S.C. 79z-3 (section 29 of the Public Utility Holding Company Act of 1935) specifies penalties for willful violations of the provisions of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder, and for willfully making false statements in documents or reports required to be kept or filed under the Act, knowing the statements to be false. Section 397(b) of the bill amends section 79z-3 by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense described in section 1761 (Securities Offenses) of title 18. Section 1761, in turn, in subsection (a)(4) states that a violation of 15 U.S.C. 79z-3 is an offense and in subsection (c) that an offense is a Class D felony.

15 U.S.C. 80a-43 (section 44 of the Investment Company Act of 1940) grants the district court of the United States jurisdiction over offenses and suits concerning violations of the Investment Company Act of 1940. Section 398(a) of the bill conforms the language of section 80a-43 to the repeal of the language relating to criminal jurisdiction by section 301 of the bill.

15 U.S.C. 80a-48 (section 49 of the Investment Company Act of 1940) specifies penalties for willful violations of the provisions of the Investment Company Act of 1940 or of a rule, regulation, or order thereunder, and for willfully making false statements in documents or reports required to be kept or filed under the Act. Section 398(b) of the bill amends section 80a-48 by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense described in section 1761 (Securities Offenses) of title 18. Section 1761, in turn, in subsection (a)(5) provides that a violation of 15 U.S.C. 80a-48 is an offense and in subsection (c) that an offense is a Class D felony.

15 U.S.C. 80b-3(e)(2)(D) (section 203(e)(2)(D) of the Investment Advisers Act of 1940) requires that the Securities and Exchange Commission impose sanctions on an investment adviser who had been convicted of an offense in title 18 such as making false oaths or statements, bribery, or fraud, counterfeiting or forgery of securities. Section 399(a) of the bill amends section 80b-3(e)(2)(D) by amending the cross-references to title 18 provisions to refer to the analogous provisions of revised title 18: sections 1351 (Bribery), 1734 (Executing a Fraudulent Scheme) and 1735 (Bankruptcy Fraud) of title 18, and subchapter E (Perjury, False Statements,

and Related Offenses) of chapter 13 and subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18.

15 U.S.C. 80b-14 (section 214 of the Investment Advisers Act of 1949) grants the district court of the United States jurisdiction over offenses and suits concerning violations of the Investment Advisers Act of 1940. Section 399(b) of the bill conforms the language of section 80b-14 to the repeal of the language relating to criminal jurisdiction by section 301 of the bill.

15 U.S.C. 80b-17 (section 217 of the Investment Advisers Act of 1940) specifies penalties for violations of the Act, or of rules, regulations or orders of the Securities and Exchange Commission pursuant to the Act. Section 399(c) of the bill amends section 80b-17 by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1761 (Securities Offenses) of title 18. Section 1761, in turn, provides in subsection (a)(6) that a violation of 15 U.S.C. 80b-17 is an offense and in subsection (c) that an offense is a Class D felony.

15 U.S.C. 645(b)(4) (section 16(b)(4) of the Small Business Act) makes it an offense to give unauthorized information concerning future plans of the Administration that might affect the value of securities, or to speculate on such information. Section 400 of the bill deletes the language relating to speculation as covered in section 1356 (Speculating on Official Action or Information) of title 18. The remainder of 15 U.S.C. 645(b) is repealed by section 301 of the bill.

15 U.S.C. 714m(e) (section 15(e) of the Commodity Credit Corporation Charter Act) expressly makes the general penal statutes of the United States applicable to acts involving the Corporation except as they relate to crimes already punishable pursuant to sections 714m(a), (b), (c), and (d) of title 15. Section 401 of the bill amends section 714m(e) by deleting the reference to subsections (a) through (d), which are repealed by section 301 of the bill.

15 U.S.C. 715i(c) (section 10(c) of the Act of February 22, 1935) grants the district court of the United States jurisdiction over violations of the Connolly Hot Gil Act. Section 402 mf the bill conforms the language of section 715i(c) to the repeal by section 301 of the bill of the language relating to criminal jurisdiction.

15 U.S.C. 717u (section 22 of the Natural Gas Act) grants the district court of the United States jurisdiction over violations of the Natural Gas Act, Section 403 of the bill conforms the language of section 717u to the repeal by section 301 of the bill of the language relating to criminal jurisdiction.

15 U.S.C. 1176 (section 6 of the Act of January 2, 1951) provides penalties for violations of sections of chapter 24 (Transportation of Gambling Devices) of title 15 which provide for such things as labelling gambling devices. Section 404 of the bill conforms section 1176 to the Code by amending the section to make clear that the penalty set forth in the section does not apply to an offense described in section 1343 (Making a False Statement) of title 18, which specifies in section 1343(c) the grade of offense applicable to a violation.

15 U.S.C. 1611(1) (section 112(1) of the Truth in Lending Act) makes it an offense to willfully and knowingly fail to provide information when required under the Act, provide inaccurate informa-

tion, understate the annual percentage rate, or otherwise fail to comply with requirements under the Act. Section 405(a) of the bill conforms section 1161(1) to the Code by deleting the reference to giving false or inaccurate information as covered in section 1343 (Making a False Statement) of title 18.

15 U.S.C. 1644(a) and 15 U.S.C. 1644(d) (section 134(a) and (d) of the Truth in Lending Act) provide that anyone who knowingly uses, or attempts or conspires to use, a forged, counterfeited, or stolen credit card in a transaction affecting interstate or foreign commerce, or who knowingly receives money or anything else of value with a lost or fictitious, forged, counterfeited, or stolen credit card is guilty of an offense. Section 405(b)(1) of the bill conforms sections 1644(a) and 1644(d) to the Code by making the sections inapplicable to offenses covered by section 1731 (Theft) of title 18 by adding a cross-reference to section 1731. See the jurisdictional base provided in section 1731(c)(6).

15 U.S.C. 1644(a) and 15 U.S.C. 1644(f) (section 134(a) and (f) of the Truth in Lending Act) provide that anyone who uses a forged, counterfeited, stolen, lost or fictitious credit card or who furnishes money or anything else of value through use of a forged, counterfeited, stolen, lost, or fictitious credit card in excess of $1,000 is subject to a penalty. Section 405(b)(2) of the bill amends sections 1644(a) and 1644(f) by clarifying that an aggregation of a series of transactions totalling $1,000 will satisfy the requirements for an offense.

15 U.S.C. 1644(a), (b), (c), (d), and (f) (section 134(a), (b), (c), (d), and (f) of the Truth in Lending Act) provide penalties for obtaining, concealing, or furnishing anything of value by means of a forged, counterfeited, lost, stolen, or fictitious credit card and for transporting or using an instrumentality of interstate commerce to transport such a credit card. Section 405(b)(3) amends section 1644(a), (b), (c), (d) and (f) to clarify that to reach the value specified in each subsection, violations using more than one credit card may be aggregated to satisfy the requirements for an offense.

15 U.S.C. 1693n(a)(1) (section 916(a)(1) of the Electronic Fund Transfer Act) provides that anyone who knowingly and willfully provides false or inaccurate information or fails to provide information as required by the Board of Governors of the Federal Reserve System under the Act will be penalized. Section 406 of the bill amends section 1693n(a)(1) by deleting the reference to giving false or inaccurate information, which is provided for in section 1343 (Making a False Statement) of title 18.

15 U.S.C. 1717 (section 1418 of the Interstate Land Sales Full Disclosure Act) makes it an offense willfully to violate the Act or rules or regulations issued pursuant to the Act or willfully to file a record or issue a report containing an untrue statement of a material fact or omitting to state a material fact. Section 407(1) of the bill amends section 1717 by deleting the reference to making untrue statements, which is provided for in section 1343 (Making a False Statement) of title 18. Section 407(2) of the bill amends the remaining portion of 15 U.S.C. 1717 by deleting the penalty provision and substituting a statement that a violation of the section is an unlawful act that is an offense punishable under section 1737(a)(3) (Fraud in a Regulated Industry) of title 18. Section

1737(a)(3), in turn, provides in subsection (a) that a violation of 15 U.S.C. 1717 is an offense and in subsection (b) that an offense is a Class D felony.

15 U.S.C. 1825(a)(2)(B) (section 6(a)(2)(B) of the Horse Protection Act of 1970) makes it an offense for anyone knowingly to make a false entry or statement in any record, report, account, memorandum, notification or other information required by the Secretary of Agriculture pursuant to the Horse Protection Act of 1970, which governs the show, sale or auction of horses. 15 U.S.C. 1825(a)(2)(B) also describes offenses relating to failure to keep records, or removing, destroying, or refusing to submit documentary evidence. Section 408(1) of the bill amends section 1825(a)(2)(B) by deleting the offense of making a false entry or statement which is provided for by section 1343 (Making a False Statement) of title 18. Section 408(2) of the bill further amends section 1825(a)(2)(B) by deleting a reference to language deleted by section 408(1) of the bill. Section 408(3) of the bill further amends section 1825(a)(2)(B) by clarifying that the records, accounts, etc. are those required by the Secretary of Agriculture. The amendment is necessary to conform to the deletion made by section 408(1) of the bill. Section 408(4) of the bill further amends section 1825(a)(2)(B) by deleting the provisions relating to removing, destroying, or refusing to submit documentary evidence as provided in section 1344 (Tampering With a Government Record) and section 1333 (Refusing to Testify or to Produce Information) of title 18.

15 U.S.C. 2615(b) (section 16(b) of the Toxic Substances Control Act) provides criminal penalties in addition to or instead of the civil penalties for failure to comply with promulgated rules, failure to maintain records or allow access to them, using chemicals processed in violation of this chapter and failure to permit inspection of facilities. Section 409 of the bill amends section 2615(b) by excluding from coverage of the provision failure to permit inspection or entry into a facility in which chemicals are manufactured, stored, processed or held. That offense is covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tampering With a Public Servant) of title 18.

PART J—AMENDMENTS RELATING TO CONSERVATION, TITLE 16, UNITED STATES CODE

16 U.S.C. 1a-6(b)(1) (section 10(c)(1) of the Act of August 18, 1970) grants the Secretary of the Interior authority to designate Federal or State employees as special policemen in the areas of the National Park System. Section 411 of the bill conforms section 1a-6(b)(1) to the Code by deleting references to 16 U.S.C. 1a-6(a)(1), (2) and (3), which are repealed by section 301 of the bill, and cross-referencing to sections 3001(a)(9) (giving primary responsibility for detecting and investigating offenses committed within the National Park System to the Department of the Interior if primary responsibility for a particular offense is not assigned to another agency) and 3022 (Department of the Interior) of title 18, which replace the repealed provisions.

16 U.S.C. 57 (section 1 of the Act of June 2, 1920), 16 U.S.C. 95 (section 1 of the Act of June 30, 1916), 16 U.S.C. 117 (section 1 of the Act of April 25, 1928), 16 U.S.C. 124 (section 1 of the Act of

August 21, 1916), 16 U.S.C. 163 (section 1 of the Act of August 22, 1914), 16 U.S.C. 198 (section 1 of the Act of March 2, 1929), 16 U.S.C. 204 (section 1 of the Act of April 16, 1928), 16 U.S.C. 395 (section 1 of the Act of April 19, 1930), 16 U.S.C. 403c-1 (section 1 of the Act of August 19, 1937), 16 U.S.C. 403h-1 (section 1 of the Act of April 29, 1942), and 16 U.S.C. 408i (section 1 of the Act of April 16, 1928) give sole and exclusive jurisdiction to the United States over National Parks as specified, reserving certain rights, such as the right to serve process, to states wherein the National Parks are located. Section 412 of the bill conforms these sections to the terminology of the Code by deleting the term "crime" each place it appears in these sections and substituting the term "offense". See the definition of "crime" in section 111 (General Definitions) of title 18. All of these provisions should be read in conjunction with 5 U.S.C. 306, as enacted by section 321, which requires the head of each agency to reexamine the continued need for legislative jurisdiction over lands under the agency's control and section 3031 (General Arrest Authority on Federal Lands) of title 18.

16 U.S.C. 114 (section 4 of the Act of June 29, 1906) makes it an offense for any person to willfully remove, disturb, destroy or molest evidences of ancient civilization or other property from the Mesa Verde National Park. Section 413 of the bill conforms section 114 to the Code by deleting the terms "remove" and "destroy" because they describe offenses covered in section 1731 (Theft) of title 18 and in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18.

16 U.S.C. 117c (section 4 of the Act of April 25, 1928) bans fishing, except in season, and hunting as well as any act that will injure or spoil the Mesa Verde National Park. Section 414(1) of the bill amends section 117c by deleting the descriptions of the offenses of willfully removing or destroying any evidence of an ancient civilization from the park because those offenses are covered in section 1731 (Theft) of title 18 and in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18. Section 414(2) of the bill further amends section 117c by adding a cross-reference to subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18. This amendment makes clear that a person who damages or removes property from the park may be required to restore it, as in current law.

16 U.S.C. 146 (section 6 of the Act of January 9, 1903) specifies as offenses the unlawful intrusion upon Wind Cave National Game Preserve, the appropriation of any object, the injury or waste to Wind Cave National Game Preserve, and the violation of any rule or regulation relating to the Preserve. Section 415 of the bill amends section 146 by deleting references to offenses covered in sections 1713 (Criminal Trespass), and 1731 (Theft) of title 18, and in subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18.

16 U.S.C. 354 (section 8 of the Act of February 26, 1917) provides criminal penalties for violations relating to Mount McKinley National Park. Section 416 of the bill amends section 354 to make clear that, if an offense is a violation of subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18, the

penalties for violations of those title 18 provisions apply in lieu of the penalties prescribed in section 354.

16 U.S.C. 364 (section 4 of the Act of March 3, 1891) makes it an offense for a person to make a false oath or affirmation in the course of an investigation by the Secretary of the Interior of the business nature of a person who applies for a lease to bathhouses or a contract to use hot water for bathhouses in Hot Springs National Park. Section 417 of the bill amends section 364 by deleting the language concerning false oaths or affidavits as covered in sections 1341 (Perjury) and 1342 (False Swearing) of title 18.

16 U.S.C. 371 (the Act of March 2, 1911) provides that a person who is unable to afford the costs of bathing in the water of Hot Springs National Park and who needs to do so for medical reasons may bathe at the free bathhouse upon swearing as to his inability to pay. Section 418 of the bill amends section 371 by deleting the penalty provision for false swearing as covered by sections 1343 (Making a False Statement) and 1342 (False Swearing) of title 18.

16 U.S.C. 373 (section 3 of the Act of April 20, 1904) makes it an offense to damage, injure, or spoil anything in Hot Springs Mountain Reservation. Section 419(a) of the bill amends section 373 by deleting the penalty provision and substituting a cross-reference to subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 of title 18, since that subchapter covers the offenses described in section 373.

16 U.S.C. 374 (section 4 of the Act of April 20, 1904) makes it an offense for any person to enter or attempt to enter to bathe in the Hot Springs unless in compliance with rules and regulations promulgated by the Secretary of the Interior. Section 419(b) of the bill amends section 374 by deleting the penalty provision and substituting a cross-reference to section 1713 (Criminal Trespass) of title 18, since that section covers the offense described in section 374.

16 U.S.C. 414 (section 2 of the Act of March 3, 1897) makes it an offense to trespass on national military parks for the purpose of hunting or to hunt or set traps, nets, and other devices to catch game thereon. Section 420 of the bill amends section 414 by deleting the language creating the offense of trespass since the offense is covered in section 1713 (Criminal Trespass) of title 18.

16 U.S.C. 422d (section 5 of the Act of June 2, 1926), 16 U.S.C. 423f (section 7 of the Act of June 3, 1926), 16 U.S.C 425g (section 8 of the Act of February 14, 1927), 16 U.S.C. 426i (section 10 of the Act of March 3, 1927), 16 U.S.C. 428i (section 10 of the Act of March 26, 1928), 16 U.S.C. 430i (section 7 of the Act of March 2, 1917) and 16 U.S.C. 430g (section 8 of the Act of June 21, 1934) create offenses relating to destruction or damage to or removal of specified property from specified national parks. Section 421 of the bill conforms these sections to the Code by making clear that the penalties set forth for violating section 1731 (Theft) of title 18 and for violating subchapter A (Arson and Other Property Destruction Offenses) apply in appropriate cases in lieu of the penalties set forth in these sections.

16 U.S.C. 460k-3 (section 4 of the Act of September 28, 1962) grants the Secretary of the Interior the power to issue permits and establish charges and fees for the use of conservation areas, and to issue regulations to carry out the purposes of the Act that created

the national conservation recreation areas. The section specifies that a violation of such a regulation is a petty offense as defined in 18 U.S.C. 1. Section 422 of the bill conforms section 460k-3 to the Code by deleting the term "petty offense" and substituting the term "misdemeanor".

16 U.S.C. 460n-8 (section 9 of the Act of October 8, 1964) provides for the appointment of a United States Commissioner for that portion of the Lake Mead National Recreation Area situated in Mohave County, Arizona and defines the commissioner's functions. Section 423(a) of the bill changes the references in the section to the commissioner to references to the magistrate, since magistrates have replaced commissioners pursuant to Public Law 88-639. Section 423(b) of the bill revises the second paragraph of section 460n-8 to conform to the jurisdiction of magistrates under title 18 and to the rules of the Supreme Court prescribed for magistrates.

16 U.S.C. 552d (section 4 of the Act of May 28, 1940) provides that a violation of a regulation issued by the Secretary of Agriculture for the protection of a watershed in a national forest is subject to the penalty prescribed in 15 U.S.C. 50. Section 424 of the bill conforms section 552d to the Code by deleting the penalty provision and substituting a reference to Class A misdemeanors.

16 U.S.C. 668b(a) (section 3(a) of the Act of June 8, 1940), 16 U.S.C. 668dd(f) (section 4(f) of the National Wildlife Refuge System Administration Act of 1966), 16 U.S.C. 690e(a) (section 6 of the Act of April 23, 1928), 16 U.S.C. 706 (section 5 of the Migratory Bird Treaty Act), 16 U.S.C. 727(a) (section 8(a) of the Upper Mississippi River Wildlife and Fish Refuge Act), and 16 U.S.C. 742j-1(d) (section 13(d) of the Fish and Wildlife Act of 1956) describe the arrest and search and seizure authority of an Interior Department employee appointed by the Secretary of the Interior to enforce each of the statutes cited. Section 425 of the bill conforms these sections to the Code by deleting the sentences specifying what authority is delegated and what powers the employees will have and adding a sentence providing for the enforcement of any rules and regulations by the employee as provided in section 3022 (Department of the Interior) of title 18, which contains a unified provision relating to law enforcement authority.

16 U.S.C. 690g (section 9 of the Act of April 23, 1928) provides penalties for theft, injury, or disturbance of wildlife or property of the Bear River Migratory Bird Refuge or a violation of a regulation issued by the Secretary of the Interior relating to the Refuge, Section 426 of the bill conforms section 690g to the Code by making clear that, if an offense is described in chapter 17 (Offenses Involving Property) of title 18, as well as in this section, the provisions of title 18 apply.

16 U.S.C. 718f (section 6 of the Act of March 16, 1934) provides that judges, magistrates, and Department of the Interior employees shall have the same power for carrying into effect the laws, rules and regulations for the protection of waterfowl as for the protection of migratory birds. Section 427 of the bill conforms section 718f to the Code by updating the reference to United States magistrates and conforming 16 U.S.C. 718f to section 3022 (Department of the Interior) of title 18.

16 U.S.C. 776b (section 4 of the Sockeye Salmon or Pink Salmon Fishing Act of 1947) makes it an offense for anyone to fail to make, keep for furnish any record or report, or to furnish false information in any record or report, required by the International Pacific Salmon Fisheries Commission. Section 428 of the bill conforms section 776b to the Code by deleting the reference to furnishing false information as provided for by section 1343 (Making a False Statement) of title 18.

16 U.S.C. 825p (section 317 of the Federal Power Act) grants the district courts of the United States jurisdiction over violations of the Federal Power Act. Section 429 of the bill conforms the section to the deletion of coverage of criminal jurisdiction by section 301 of the bill.

16 U.S.C. 916e (section 7 of the Whaling Convention Act of 1949) makes it an offense for anyone to fail to make, keep, or furnish a record or report or to furnish false information in any record or report required to be filed by the International Whaling Commission. Section 430(a) of the bill conforms section 916e to the Code by deleting the reference to false information as provided for by section 1343 (Making a False Statement) of title 18. Section 430(b) of the bill further amends section 916e to carry forward from current law prohibitions that result from a conviction under the section to apply to the part of the offense to be covered in section 1343 (Making a False Statement) of revised title 18.

16 U.S.C. 1030(b)(1) (section 11(b)(1) of the North Pacific Fisheries Act of 1954) states that it is an offense for anyone to violate any provision of the International Convention for the High Seas Fisheries of the North Pacific Ocean or the Act, or any regulation issued pursuant thereto, to forcibly interfere with an enforcement officer, to resist arrest or to ship, transfer, sell, etc. any fish taken in violation of the International Convention or the Act. Section 431(a) of the bill amends section 1030(b)(1) by deleting the reference to forcibly interfering with an officer or resisting arrest as covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tampering With a Public Servant) and in subchapter B (Assault Offenses) of chapter 16 of title 18.

16 U.S.C. 1030(b)(2) (section 11(b)(2) of the North Pacific Fisheries Act of 1954) provides penalties for offenses described in 16 U.S.C. 1030(b)(1) and imposes a harsher penalty when, in the commission of the offense, the person uses a weapon or causes or threatens to cause bodily injury. Section 431(b) of the bill deletes the provision imposing the harsher penalty as covered in subchapter B (Assault Offenses) of chapter 16 of title 18 and in section 1823 (Using a Weapon in the Course of a Crime) of title 18.

16 U.S.C. 1859(b) (section 309(b) of the Fishery Conservation and Management Act of 1976) specifies penalties for the violation of specific provisions of the Act. Section 432 of the bill amends the first sentence of section 1859(b) to state that a violation of section 1857(1)(D), (E), (F), or (H) is an offense punishable as prescribed by title 18. Paragraph (D) relates to refusing to permit an officer to board a fishing vessel to carry out his enforcement functions, and is covered in sections 1302 (Obstructing a Government Function by Physical Interference) and 1357 (Tampering With a Public Servant) of title 18. Paragraph (E) makes it an offense to forcibly assault,

intimidate, or interfere with an enforcement officer in the conduct of a search or inspection, and is covered in section 1302 and 1357 of title 18 and in subchapter B (Assault Offenses) of chapter 16 of title 18. Paragraph (F) makes it an offense to resist lawful arrest, and is covered in subchapter B (Assault Offenses) of chapter 16 of title 18. Paragraph (H) relates to interfering with the arrest of another person, and is covered in section 1311 (Hindering Law Enforcement) of title 18. The existing provision also enhances the sentence if a weapon is used in the course of an offense or if the defendant's conduct results in bodily injury to an enforcement officer or places an officer in fear of imminent bodily injury. It is unnecessary to carry this sentencing enhancement provision forward because it is covered in section 1823 (Using a Weapon in the Course of a Crime) of title 18 and in subchapter B (Assault Offenses) of chapter 16 of title 18.

PART K—AMENDMENTS RELATING TO COPYRIGHTS TITLE 17, UNITED STATES CODE

17 U.S.C. 116(d) provides a fine for the knowing misrepresentation of a material fact in an application for a certificate to operate a coin-operated phonorecord player, alteration of such a certification, or affixing the certificate to a phonorecord player other than the one it covers. Section 441 of the bill deletes the reference to misrepresenting a material fact as covered in section 1343 (Making a False Statement) of title 18.

17 U.S.C. 506(a) makes it an offense to willfully infringe a copyright for commercial advantage or private financial gain. Section 442 of the bill amends section 506(a) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense described in section 1738 (Criminal Anfringement of a Copyright) of title 18.

PART L—AMENDMENTS RELATING TO CUSTOMS DUTIES, TITLE 19, UNITED TATES CODE

19 U.S.C. 283 (section 3113 of the Revised Statutes) makes it an offense to fail to report, make entries, and pay duties on articles purchased for use of or sale on board any vessel, such as saloon stores or supplies. Section 451 of the bill amends section 283 by deleting the criminal penalty as covered by section 1411 (Smuggling) of title 18.

PART M—AMENDMENTS RELATING TO FOOD AND DRUGS, TITLE 21, UNITED STATES CODE

21 U.S.C. 104 (section 6 of the Act of August 30, 1890) prohibits and provides penalties for the importation of diseased cattle, sheep, etc. Section 461 of the bill amends section 104 by adding a cross-reference to section 1411 (Smuggling) of title 18, which will be used for serious violations of the section to make clear that a vessel that violates section 1411 with regard to importing diseased animals is subject to the forfeiture provisions in this section.

21 U.S.C. 134e(a) (section 6(a) of the Act of July 2, 1962) provides penalties for violations of regulations relating to clean and sanitary conditions for animals transported, and to the movement of dis-

eased animals, into the United States. Section 462 of the bill amends the section to make clear that the most serious violations of the section are to be covered under section 1411 (Smuggling) of title 18.

21 U.S.C. 145 (section 5 of the Act of February 15, 1927) provides penalties for the knowing violation of the "Import Milk Act." Section 463 conforms section 145 to the Code by making clear that the provisions of section 1411 (Smuggling) of title 18 are to apply whenever a violation described in this section comes within the terms of section 1411.

21 U.S.C. 333(a) and 333(b) (section 303 of the Federal Food, Drug, and Cosmetic Act) provide penalties for the violation of the series of prohibited acts listed in section 301 (21 U.S.C. 333) of the Food, Drug, and Cosmetic Act. Sections 464(a) and 464(b) of the bill conform sections 333(a) and 333(b) to the Code by clarifying that the general penalty provisions do not apply to offenses described in title 18. The provisions of title 18 that may apply to a violation of section 301 of the Act include: sections 1343 (Making a False Statement), 1741 (Counterfeiting), 1742 (Forgery), 1811 (Trafficking in an Opiate) as that provision applies to counterfeit substances, 1812 (Trafficking in Drugs) as that provision applies to counterfeit substances, and 1851(a)(4) (Fraud in a Health Related Industry).

21 U.S.C. 454(c)(1) (section 5(c)(1) of the Poultry Products Inspection Act) requires the Secretary of Agriculture to notify the Governor of a State of the possible imposition of Federal regulation of poultry products in the State because it has not developed or enforced adequate regulations relating to poultry inspection. Section 465(a)(1) of the bill amends section 454(c)(1) by adding cross-references to sections 1851 (Fraud in a Health Related Industry) and 1852 (Distributing Adulterated Food) of title 18 to the list of provisions of the Act that State law is required to equal in order for the Act not to apply in the State. Section 465(a)(2) of the bill further conforms section 454(c)(1) to the Code by adding a cross-reference to title 18.

21 U.S.C. 454(c)(3) (section 5(c)(3) of the Poultry Products Inspection Act) allows the Secretary of Agriculture to remove sanctions against a State that complies with the Poultry Products Inspection Act, and permits later redesignation of a State as coming under the Act. Section 464(c)(2) conforms section 454(c)(3) of title 21 to the Code by adding a cross-reference to title 18 to the description of provisions that State law must equal in order to avoid Federal enforcement under the Act.

21 U.S.C. 461(a) (section 12(a) of the Poultry Products Inspection Act) provides penalties for violations of certain provisions of the Poultry Products Inspection Act, with a higher penalty for those violations committed with intent to defraud or that involve distribution or attempted distribution of an adulterated article. Section 465(b)(1)(A) of the bill conforms section 461(a) to the Code by clarifying that the penalty provision does not apply to an offense described in the section that is also covered by title 18. These provisions include sections 1851(a)(1) (Fraud in a Health Related Industry) and 1852(a)(1) (Distributing Adulterated Food) of title 18. Section 456(b)(1)(B) further amends section 461(a) by deleting the penalty provision for violations with intent to defraud and those in-

volving distribution of adulterated food as covered in sections 1851 and 1852 of title 18.

21 U.S.C. 461(b) (section 12(b) of the Poultry Products Inspection Act) exempts a carrier from the penalties for violating the Act, other than section 11 (21 U.S.C. 460) (which relates to recordkeeping, registration of a business engaged in transporting poultry products in commerce, and barring transportation of diseased poultry) for transporting poultry products. Section 465(a)(2) of the bill amends section 461(b) by adding cross-references to sections 1851 (Fraud in a Health Related Industry) and 1852 (Distributing Adulterated Food) of title 18 to the list of sections that do not apply to a carrier of poultry products.

21 U.S.C. 661(c)(1) (section 301(c)(1) of the Federal Meat Inspection Act) requires the Secretary of Agriculture to notify the Governor of a State that adequate regulations relating to meat inspection have not been developed or enforced so federal inspection will be imposed. Section 466(a)(1) of the bill amends section 661(c)(1) by adding cross-references to sections 1851(a)(2) (Fraud in a Health Related Industry) and 1852(a)(2) (Distributing Adulterated Food) of title 18 to the list of provisions of the Act that State law is required to equal in order for federal meat inspection not to be imposed on the State.

21 U.S.C. 661(c)(3) (section 301(c)(3) of the Federal Meat Inspection Act) allows the Secretary of Agriculture to remove sanctions previously imposed against a State that meets the standards of the Act and to reinstate them if the requirements of the Act are not complied with. Section 466(a)(2) of the bill amends section 661(c)(3) of title 21 by adding cross-references to sections 1851 (Fraud in a Health Related Industry) and 1852 (Distributing Adulterated Food) of title 18 to the description of provisions that State law must at least equal in order to avoid federal enforcement under the Act.

21 U.S.C. 676(a) (section 406(a) of the Federal Meat Inspection Act) provides penalties for violations of the Act which have no other penalty. Rection 466(b)(1) of the bill amends section 676(a) to make the general penalty provision inapplicable to offenses covered in title 18 as well as to those specifically penalized in other provisions of the Act. Section 466(b)(1) of the bill also makes the offenses described in proposed subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 in applicable to offenses described in the Act. See the definition of "written instrument" in section 1746(i) (Definitions for Subchapter E) of title 18. Section 466(b)(2) further amends section 676(a) by adding cross-references to section 1851 (Fraud in a Health Related Industry) and 1852 (Distributing Adulterated Food) of title 18, excepting violations of these sections from the general penalty provision of 21 U.S.C. 676(a).

21 U.S.C. 802(10) (section 102(10) of the Controlled Substances Act) defines the term "dispense". Section 467(a)(1) of the bill amends section 802(10) by deleting the term "lawful", thereby neutralizing the definition to have the issue of legality to be resolved in litigation in an appropriate case.

21 U.S.C. 802(15) (section 102(15) of the Controlled Substances Act) defines "marihuana". Section 467(a)(2) of the bill amends section 802(15) to clarify that all species of the cannabis plant are em-

braced within the term. See *United States* v. *Gaines*. 489 F. 2d 690 (5th Cir. 1974).

21 U.S.C. 802(25) (section 102(25) of the Controlled Substances Act) defines the term "ultimate user" to mean a person who has "lawfully" obtained a controlled substance. Section 467(a)(3) of the bill amends section 802(25) by deleting the term "lawful", thereby neutralizing the definition to leave the issue of legality to be resolved in litigation in an appropriate case.

21 U.S.C. 812 (section 202 of the Controlled Substances Act) classifies controlled substances into five Schedules. Section 467(b)(1) amends the Schedules to move phencyclidine from Schedule III to Schedule I(c), thus placing additional controls on the drug. The amendment was originally added to S. 1437 in the 95th Congress because of the high potential for abuse of PCP. See Cong. Rec., pp. S540–43, daily ed., January 26, 1978.

21 U.S.C. 841(d) (section 401(d) of the Controlled Substances Act) provides penalties for the possession of piperidine with intent to manufacturer, or knowing or having reasonable cause to believe that it will be used to manufacture, phencyclidine. Section 467(c) of the bill amends section 841(d) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1814 (Violating a Drug Regulation) of title 18.

21 U.S.C. 842(c)(2)(A) (section 402(c)(2)(A) of the Controlled Substances Act) provides the penalty for a knowing violation of section 842 of title 21, which describes offenses regarding dispensing and manufacturing of controlled substances by registered manufacturers, distributors, and dispensers of controlled substances. Section 467(d) of the bill deletes the penalty language and substitutes a statement that a knowing violation is an unlawful act that is an offense punishable under section 1814 (Violating a Drug Regulation) of title 18.

21 U.S.C. 843(c) (section 403(c) of the Controlled Substances Act) provides in paragraph (1) the penalty for violating a provision of 21 U.S.C. 843, which relates to distribution of controlled substances by registrants, the use of labeling implements to render a drug a counterfeit substance, the presentation of false identification to obtain piperidine, and, in subsection (a)(4)(A), making a false statement in a document required to be kept under the Act or under the Controlled Substances Import and Export Act. Subsection (b) was repealed by section 301 of the bill. Section 467(e) rewrites 21 U.S.C. 843(c) to separate the penalty provision into two paragraphs. Paragraph (1) provides that a violation of any part of subsection (a) other than paragraph (4)(A) is an unlawful act that is an offense punishable under section 1814 (Violating a Drug Regulation). Paragraph (2) of revised 21 U.S.C. 843(c) specifies that a violation of subsection (a)(4)(A) is an unlawful act punishable under section 1343 (Making a False Statement) of title 18.

21 U.S.C. 871(b) (section 501(b) of the Controlled Substances Act) permits the Attorney General to promulgate any rules, regulations and procedures necessary to enforce the provisions of the Controlled Substances Act. Section 467(f) of the bill amends section 871(b) to include subchapter B (Drug Offenses) of chapter 18 of title

18 as among the provisions for which regulations may be promulgated.

21 U.S.C. 881(a) (section 511(a) of the Controlled Substances Act) provides that property used in violation of the Controlled Substances Act, including, among others, controlled substances, containers, and, with some exceptions, carriers used to transport controlled substances, is subject to forfeiture to the United States and that no property rights exist in them. 21 U.S.C. 881(b) requires that seizure be made under process that is issued by a federal district court, with some exceptions. 21 U.S.C. 881(f) and (g)(1) provide for seizure and summary forfeiture of certain controlled substances in Schedule I and certain plants from which Schedule I and II controlled substances may be derived. Section 467(g)(1) and (g)(2) of the bill amend sections 881(a)(1), (a)(2), (a)(4)(A), (a)(5), (a)(6), (b)(4), (f), and (g)(1) to cross-references to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that those provisions apply in the case of offenses whose descriptions have been moved from the Controlled Substances Act to title 18.

21 U.S.C. 882(a) (section 512(a) of the Controlled Substances Act) vests power in the United States district courts to enjoin violations of the Controlled Substances Act. Section 467(h) of the bill amends section 882(a) by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the injunction authority continues to apply to the drug offenses that have been moved from the Act to title 18.

21 U.S.C. 883 (section 513 of the Controlled Substances Act) provides that the Director of the Bureau of Narcotics and Dangerous Drugs (now the Drug Enforcement Administration) may require that a person alleged to have violated the Controlled Substances Act be given notice and an opportunity to be heard before the violation is reported to the United States Attorney for institution of criminal proceedings. Section 467(i) of the bill amends section 883 by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the authority of the Director continues to apply to the offenses moved from the Act to title 18.

21 U.S.C. 885(a)(1) (section 515(a)(1) of the Controlled Substances Act) states that it is unnecessary for the government to state in pleadings or proceedings, that an exemption or exception pursuant to the Controlled Substances Act does not exist and places the burden of going forward with the evidence on the party claiming the benefit. Section 467(j)(1) of the bill conforms section 885(a)(1) to the Code by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the rule of evidence set forth in section 885(a)(1) continues to apply to the offenses moved from this Act to title 18.

21 U.S.C. 885(c) (section 515(c) of the Controlled Substances Act) provides that the burden of proving that a vehicle was used in accordance with the Controlled Substances Act is on the party using such vehicle. Section 467(j)(2) of the bill conforms section 885(c) to the Code by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the rule of evidence set forth in section 885(c) continues to apply to the offenses moved from this Act to title 18.

21 U.S.C. 885(d) (section 515(d) of the Controlled Substances Act) precludes officers, lawfully enforcing laws relating to controlled substances, from criminal or civil liability. Section 467(j)(3) of the bill conforms sections 885(d) to the Code by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the rule continues to apply with regard to offenses moved from this Act to title 18.

21 U.S.C. 886(a) (section 516(a) of the Controlled Substances Act) allows the Attorney General to pay anyone for information concerning a controlled substances violation, and 21 U.S.C. 886(c) gives the Attorney General authority to direct the Treasury Department to advance funds to make such payment. Section 467(k) of the bill conforms sections 886(a) and 886(c) to the Code by adding cross-references to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the Attorney General's authority continues to apply to offenses moved from this Act to title 18.

21 U.S.C. 960(a) (section 1010(a) of the Controlled Substances Import and Export Act) defines offenses concerning exporting or importing controlled substances, using vehicles to export or import, and manufacturing or distributing controlled substances. 21 U.S.C. 960(b) and (c) are repealed by section 301 of the bill. Section 468(a) of the bill rewrites 21 U.S.C. 960 to contain the substance of current 21 U.S.C. 960(a), amended to reorganize the section to bar illegal importation or exportation of opiates in subsection (a) as a violation of section 1811 (Trafficking in an Opiate) of title 18 and to bar illegal importation or exportation of a controlled substance other than an opiate in subsection (b) as a violation of section 1812 (Trafficking in Drugs) mf title 18. Current 21 U.S.C. 960(a)(3), relating to violations of 21 U.S.C. 959, is omitted because section 959 is repealed by section 301 of the bill.

21 U.S.C. 961(2) (section 1011(2) of the Controlled Substances Import and Export Act) provides the penalty for a violation of 21 U.S.C. 954, relating to transshipment of controlled substances through the United States, that is committed knowingly or intentionally. Section 468(b) of the bill conforms section 961(2) to the Code by deleting the penalty provision and substituting a statement that a knowing violation of section 1004 of the Act (21 U.S.C. 954) is an unlawful act that is an offense punishable under section 1814 (Violating a Drug Regulation) of title 18.

21 U.S.C. 965 (section 1015 of the Controlled Substances Import and Export Act) makes the administrative and enforcement provisions of the Controlled Substances Act applicable to the Controlled Substances Import and Export Act. Section 468(c) of the bill conforms section 965 to the Code by adding a cross-reference to subchapter B (Drug Offenses) of chapter 18 of title 18 to make clear that the provision continues to apply to offenses moved from the Act to title 18.

21 U.S.C. 1041(a) (section 12(a) of the Egg Products Inspection Act) provides penalties for violations of the Egg Products Inspection Act. Section 469(a) of the bill amends section 1041(a) by adding a cross-reference to proposed title 18 excepting offenses covered therein from penalty provisions of 21 U.S.C. 1041(a). The offenses in title 18 applicable to violations of the Act include sections 1343

(Making a False Statement), 1851(a)(3) (Fraud in a Health Related Industry) and 1852(a)(3) (Distributing Adulterated Food).

21 U.S.C. 1041(b) (section 12(b) of the Egg Products Inspection Act) exempts warehousemen and carriers receiving eggs or egg products which are shipped in violation of the Egg Products Inspection Act from liability for penalties of the Act other than those for recordkeeping and reporting. Section 469(b) of the bill adds cross-references to sections 1851(a)(3) (Fraud in a Health Related Industry) and 1852(a)(3) (Distributing Adulterated Food) of title 18 to make clear that the penalties for violating those provisions continue to be inapplicable to carriers and warehousemen even though the offenses have been moved from the Act to title 18.

PART N—AMENDMENTS RELATING TO FOREIGN RELATIONS AND INTERCOURSE, TITLE 22, UNITED STATES CODE

22 U.S.C. 287c(b) (section 5(b) of the United Nations Participation Act of 1945) provides penalties for anyone who willfully violates, or attempts to violate, any order, rule, or regulation imposed by the President on international economic relations and communications. Section 471 of the bill amends section 287c(b) to make the provision applicable only to an intentional violation of a known legal duty under an order, rule or regulation, to delete the penalty provision and substitute a statement that a violation is an unlawful act that is an offense punishable under section 1206 (Engaging in an Unlawful International Transaction) of title 18, to omit the reference to attempts as covered by section 1001 (Criminal Attempt) of title 18, and to omit language covered in chapter 4 (Complicity) of title 18. The amended culpability language carries forward the judicial interpretation in *United States* v. *Lizarraga-Lizarraga,* 541 F.2d 826 (9th Cir. 1976) of the term "willful" set forth an a similar statute, 22 U.S.C. 1934, which has since been repealed.

26 U.S.C. 447(c) (section 7(c) of the Act of November 4, 1939) makes it unlawful for anyone to purchase, sell, or exchange obligations of a government named in a presidential proclamation that declares that the government is involved in a war and that it is necessary to protect the security or preserve the peace of the United States or to protect the lives of United States citizens. Section 472(a) of the bill amends section 447(c) by deleting language covered in chapter 4 (Complicity) of title 18, and by deleting the penalty provision and substituting a statement that a violation of the section is an unlawful act that is an offense described in section 1206 (Engaging in an Unlawful International Transaction) of title 18.

22 U.S.C. 450(a) (section 10(a) of the Act of November 4, 1939) provides that the President may require the master of a ship suspected to be carrying men, arms, ammunition, information, etc. to a state named in a presidential proclamation that there is a war involving the state, if evidence is not sufficient to justify forbidding departure pursuant to 18 U.S.C. 967, to give bond with sufficient sureties conditioned that the vessel will not deliver the men or cargo to a ship of a state named in the proclamation. Section 472(b) of the bill amends section 450(a) by deleting the reference to 18 U.S.C. 967 and substituting a reference to section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

22 U.S.C. 455 (section 15 of the Act of November 4, 1939) contains a general penalty provision applicable to offenses under the joint resolution not otherwise penalized by the resolution. Section 472(c) of the bill amends section 455 to make clear that its penalty provision does not apply to offenses described in section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18.

22 U.S.C. 461 (section 14 of the Act of March 4, 1909) provides that the United States District Court shall take cognizance of complaints filed as a result of capture of a vessel for violating neutrality and that the President may order the use of military force to take possession and detain any vessel. Section 473(a)(1) of the bill conforms section 461 to the coverage of section 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft) of title 18 by adding coverage of an "aircraft" as well as a "vessel". Section 473(a)(2) of the bill further conforms section 461 to the Code modernizing the description of foreign powers to use that used in subchapter A (Offenses Involving Foreign Relations) of chapter 12 of title 18. Section 473(a)(3) of the bill further amends section 461 by making grammatical corrections necessitated by the change in terminology made by subsection (b).

22 U.S.C. 462 (section 15 of the Act of March 4, 1909) permits the President to use land or naval forces to compel a foreign vessel to leave, or to detain such a vessel, if the action is consistent with the law of nations. Section 473(b)(1) of the bill modernizes the description of the armed forces in the section, and section 473(b)(2) adds coverage of aircraft to its provisions.

22 U.S.C. 463 (section 16 of the Act of March 4, 1909) requires an armed vessel sailing out of the jurisdiction of the United States to post bond conditioned on the vessel's not being used to commit hostilities against a foreign power with which the United States is at peace. Section 473(c) of the bill modernizes the description of the foreign powers in 22 U.S.C. 463.

22 U.S.C. 464 (section 17 of the Act of March 4, 1909) permits customs officials to detain a warlike vessel that is probably going to commit hostilities against the people of a nation with which the United States is at peace. Section 473(c) of the bill modernizes the description of the foreign powers.

22 U.S.C. 618(a) (section 8(a) of the Foreign Agents Registration Act of 1938) provides penalties for willful violations of the registration requirements for foreign agents and willfully filing documents that include false statements or omit material facts. Section 474(a) of the bill makes the penalty provisions in 22 U.S.C. 618(a) inapplicable to violations of sections 1126 (Failing to Register as, or Acting as, a Foreign Agent) and 1343 (Making a False Statement) of title 18. Section 474(c) of the bill amends the section to delete offenses covered in sections 1126 and 1343 of title 18.

22 U.S.C. 1179 (section 2 of the Act of June 30, 1902) makes it an offense for a consular officer to fail to execute a bond or willfully to fail to account for or pay over funds after being requested to do so. Section 475 of the bill deletes the provision concerning accounting for and paying over funds as covered by section 1731 (Theft) of title 18.

22 U.S.C. 1203 (section 1750 of the Revised Statutes) grants the embassy secretary or consular officer authority to administer oaths

and perform notarial acts and provides penalties for perjury and forgery. Section 476 of the bill conforms section 1203 to the Code by deleting the reference to perjury as covered by subchapter F (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18 and the forgery as covered in section 1742 (Forgery) of title 18.

22 U.S.C. 2667 (section 2 of the Act of June 29, 1955) grants to security officers of the Department of State and Foreign Service arrest powers for violations of assault sections of title 18. Section 477 of the bill conforms section 2667 to the Code by amending the cross-references to provisions in current title 18 to the corresponding sections of revised title 18.

22 U.S.C. 2778(c) (section 38(c) of the Foreign Military Sales Act) provides penalties for the willful violation of provisions of the Act relating to the import and export controls on defense articles and the reporting of the payment of fees in connection therewith, and for willfully making false statements in a license application or required report. Section 478(a) of the bill conforms section 2778(c) by designating existing subsection (c) as subsection (c)(2) and adding a new paragraph (1) which makes the felony provision applicable only if the violation involves the intent to conceal information from a government agency authorized to administer the section and if the violation is an intentional violation of a known legal duty under the section, section 39 of the Foreign Military Sales Act, or a rule, regulation, or order issued under section 38. Section 478(b) further specifies that a violation is an unlawful act that is an offense described in section 1206 (Engaging in an Unlawful International Transaction) of title 18. Sections 478(c)(1) and 478(c)(2) amend section 2778(c)(2) by limiting the application of this section to 22 U.S.C. 2779 or any rule or regulation issued pursuant to section 2779. Section 478(c)(3) further amends section 2778(c)(2) by deleting the reference to making an untrue statement of a material fact or omitting a material fact as covered by section 1343 (Making a False Statement) of title 18.

PART O—AMENDMENTS RELATING TO HOSPITALS AND ASYLUMS, TITLE 24, UNITED STATES CODE

24 U.S.C. 154 (section 4 of the Act of March 22, 1906) provides penalties for intruding upon the Battle Mountain Sanitarium Reserve, stealing or damaging public property thereon, or violating any rules or regulations prescribed under the Act. Section 481 of the bill conforms section 154 to the Code by deleting references to intruding upon, stealing from or damaging public property on the Reserve as provided by section 1731 (Theft), 1701 (Arson), 1702 (Aggravated Property Destruction), 1703 (Property Destruction), and 1713 (Criminal Trespass) of title 18.

24 U.S.C. 211 (section 4851 of the Revised Statutes) provides that a person charged with a crime and found to be insane may be confined in St. Elizabeths Hospital. Section 482 of the bill conforms the terminology of section 211 to the Code by deleting the term "crime" and inserting the term "an offense".

24 U.S.C. 211b (section 4855 of the Revised Statutes) provides that a person charged with a crime who is confined in St. Elizabeths Hospital shall be delivered to the court when he is restored to sanity. Section 482 of the bill conforms the terminology of sec-

tion 211b to the Code by deleting the term "crime" and inserting the term "an offense".

PART P—AMENDMENTS RELATING TO INDIANS, TITLE 25, UNITED STATES CODE

25 U.S.C. 399 (section 26 of the Act of June 30, 1919) grants authority to the Secretary of the Interior to leave unallotted Indian reservation lands for the purpose of mining and to, among other things, require the filing of accounts, reports, etc. Section 483 of the bill conforms section 399 to the Code by deleting a reference to filing false statements and the reference to perjury as covered by subchapter E (Perjury, False Statements, and Related Offenses) of chapter 13 of title 18.

25 U.S.C. 1302(7) (section 202(7) of the Act of April 11, 1968) prohibits an Indian tribe exercising powers of self-government from imposing excessive bail, inflicting cruel and unusual punishment, or imposing a term of imprisonment of more than six months or a $500 fine, or both. Section 484 of the bill amends section 1302(7) by raising the limitations on a fine that may be imposed by an Indian court to $25,000, as provided in section 2201(b)(1)(B) of title 18 for an individual convicted of a Class B misdemeanor.

PART Q—AMENDMENTS RELATING TO THE INTERNAL REVENUE CODE, TITLE 26, UNITED STATES CODE

26 U.S.C. 5054(c) (section 5054(c) of the Internal Revenue Code of 1954) makes penal provisions of title 26 applicable to a violation of the tax on beer imposed by 26 U.S.C. 5051. Section 491(a) of the bill amends section 5054(c) by adding a cross-reference to subchapter A (Internal Revenue Offenses) of chapter 14, and subchapter E (Counterfeiting, Forgery, and Related Offenses) of chapter 17 of title 18, and to section 1343 (Making a False Statement) of title 18, provisions of title 18 that cover offenses previously described in title 26.

26 U.S.C. 5114(c)(2) (section 5114(c)(2) of the Internal Revenue Aode of 1954) cross-references to the penalty provision applicable to a violation of 26 U.S.C. 5114(a), which imposes reporting and recordkeeping requirements on wholesale wine and beer dealers. Section 491(b) conforms section 5114(c) to the Code by adding cross-references to the applicable penalty provisions of title 18.

26 U.S.C. 5148(1) (section 5148(1) of the Internal Revenue Code of 1954) cross-references to the penalty provision applicable for willful nonpayment of taxes. Section 491(c) of the bill conforms section 5148(1) to the Code by deleting the "willful" requirement and adding a cross-reference to section 1402 (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 5205(i)(5) (section 5205(i)(5) of the Internal Revenue Code of 1954) cross-references to the penalty provisions relating to stamps, marks, and brands. Section 491(d) of the bill conforms section 5205(i)(5) to the Code by adding cross-references to applicable penalty provisions of title 18.

26 U.S.C. 5207(e) (section 5207(e) of the Internal Revenue Code of 1954) cross-references to the penalty provisions applicable to refusing or neglecting to keep records or making false entries. Section

491(e) of the bill conforms section 5207(e) to the Code by adding cross-references to applicable penalty provisions of title 18.

26 U.S.C. 5271(e)(5) (section 5271(e)(5) of the Internal Revenue Code of 1954) provides authority for the Secretary of the Treasury to suspend or revoke a permit issued under section 5271 for procuring or using distilled spirits free of tax, dealing in denatured spirits, or recovering denatured distilled spirits, if the permit holder has violated or conspired to violate a federal liquor law or committed a felony, or conspiracy to commit a felony, described in the Internal Revenue Code. Section 491(f) amends the section to add cross-references to the provisions that describe felonies covered in current title 26 that have been moved to title 18 by the bill.

26 U.S.C. 5505(i) (section 5505(i) of the Internal Revenue Code of 1954) provides that penalties for forfeitures provided in specified sections of subchapter J (Penalties, Seizures and Forfeitures Relating to Liquor) of chapter 51 of title 26 are applicable to Part I—Vinegar Plants—of title 26. Section 491(g)(1) amends section 5505(i) by deleting "provided in" and adding "provided for violation of" since proposed title 18 encompasses penalties for violations of these sections. Section 491(g)(2) conforms section 5505(i) to the Code by adding cross-references to applicable penalty provisions moved from title 26 to title 18 by this bill.

26 U.S.C. 5558 (section 5558 of the Internal Revenue Code of 1954) cross-references to the appropriate section of title 26 concerning authority of internal revenue enforcement officers. Section 491(h) amends section 5558 by adding a cross-reference to chapter 30 (Investigative and Law Enforcement Authority) of title 18.

26 U.S.C. 5601(a) (section 5601(a) of the Internal Revenue Code of 1954) describes fifteen offenses relating to stills and distillers. Section 491(i) conforms section 5601(a) to the Code by deleting the penalty provision and substituting a statement that a violation of the subsection is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5603(a) (section 5603(a) mf the Anternal Revenue Aode mf 1954) describes a number of offenses relating to recordkeeping and reporting, with intent to defraud the United States, in connection with the tax laws concerning distilled spirits, wine, and beer. Section 491(i) conforms section 5603(a) to the Code by deleting the penalty provision and substituting a statement that a violation of the subsection is an unlawful act that is an offense described in section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5604(a) (section 5604(a) of the Internal Revenue Code of 1954) describes offenses relating to unstamped containers of distilled spirits and unlawful conduct involving stamps, stamped containers, or distilled spirits. Section 491(i) of the bill amends the subsection by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5607 (section 5607 of the Internal Revenue Code of 1954) provides penalties for withdrawing denatured distilled spirits free of tax or using or selling such spirits. Section 491(i) conforms section 5607 to the Code by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an

offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5602 (section 5602 of the Internal Revenue Code of 1954) makes it an offense for a distiller to defraud or attempt to defraud the United States of taxes on distilled spirits. Section 491(j) of the bill conforms section 5602 to the Code by deleting the penalty provision and substituting a statement that a violation of the section is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5606 (section 5606 of the Internal Revenue Code of 1954) provides penalties for the violaton of statutory and regulatory requirements concerning containers for distilled spirits. Section 491(k) conforms section 5606 to the Code by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5608(a) (section 5608(a) of the Internal Revenue Code of 1954) provides civil and criminal penalties for a fraudulent claim for allowance of drawbacks on distilled spirits. Section 491(*l*) of the bill conforms section 5608(a) to the Code by deleting the reference to criminal penalties and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5608(a) (section 5608 (a) of the Internal Revenue Code of 1954) also provides civil and criminal penalties for a person who aids or abets the fraudulent collection of a drawback, or knowingly aids or permits a fraudulent change in spirits shipped in a vessel. 26 U.S.C. 5608(b) (section 5608(b) of the Internal Revenue Code of 1954) makes it an offense, with intent to defraud the United States, to reland or aid and abet in the relanding of distilled spirits which have been shipped for exportation. 26 U.S.C. 5682 (section 5682 of the Internal Revenue Code of 1954) makes it an offense to destroy, break, injure or tamper with any lock or seal secured by an internal revenue officer on any container of distilled spirits. Section 491(m) of the bill conforms sections 5608(a), 5608(b) and 5682 to the Code by deleting the criminal penalty provisions and substituting in each section a statement that a violation of the section is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5661(a) (section 5661(a) of the Internal Revenue Code of 1954) makes it an offense for anyone, with intent to defraud the United States, to fail to pay a wine tax, or violate other cited provisions concerning the wine tax. 26 U.S.C. 5671 makes it an offense to evade or attempt to evade a beer tax, or with intent to defraud the United States, to fail or refuse to keep true records and returns. Section 491(n) of the bill conforms sections 5661(a) and 5671 to the Code by deleting the penalty provision and substituting in each section a statement that a violation of the section is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5691(a) (section 5691(a) of the Internal Revenue Code of 1954) makes it an offense for a person to carry on the business of a brewer, rectifier, liquor or beer dealer, or manufacturer of stills, and willfully fail to pay the special tax. (Section 491(*o*) of the bill

amends section 5691(a) by deleting the penalty provision and substituting a statement that a violation of the section is a unlawful act that is an offense described in section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5762(a) (section 5762(a) of the Internal Revenue Code of 1954) delineates fraud offenses relating to taxes on tobacco products and cigarette papers and tubes, and the corresponding penalties. Section 492 of the bill conforms section 5762(a) to the Code by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1403 (Alcohol and Tobacco Tax Offenses) of title 18.

26 U.S.C. 5871 (section 5871 of the Internal Revenue Code of 1954) provides penalties for a violation of any provision of the National Firearms Act, which relates to the registration of importers, manufacturers, and dealers in firearms and the payment of a special occupational tax. Section 493 of the bill conforms section 5871 to the Code by deleting the penalty provision and substituting a statement that a violation of the section is an unlawful act that is an offense punishable under section 1822 (Firearms Offenses) of title 18.

26 U.S.C. 6103(b)(2)(A) (section 6103(b)(2)(A) of the Internal Revenue Code of 1954) defines "return information", as used in section 6103, relating to confidentiality of returns. Section 494(a) of the bill amends section 6103(b)(2)(A) to make clear that the definition includes not only information relating to liability or offenses under the Internal Revenue Code but also under related provisions of title 18.

26 U.S.C. 6103(h)(4)(D) (section 6103(h)(4)(D) of the Internal Revenue Code of 1954) describes the extent to which a return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration. Section 494(b) of the bill conforms section 6103(h)(4)(D) to the Code by substituting a cross-reference to new Rule 26.2 (Production of Statements of Witnesses) of the Federal Rules of Criminal Procedures, enacted by section 111(r) of the bill, for the reference to 18 U.S.C. 3500.

26 U.S.C. 6531 (section 6531 of the Internal Revenue Code of 1954) delineates the statutes of limitations for various Internal Revenue Code violations. Section 495 of the bill amends section 6531 by deleting all the time limitation provisions in the section as covered in section 511 (Time Limitations) of title 18, but retaining the last sentence which provides that, for purposes of deterining the period of limitations under section 511 (Time Limitations) of title 18, for criminal prosecutions for violations relating to the internal revenue laws, the rules in 26 U.S.C. 6513 (concerning the time when a return is deemed to have been filed and when a tax is considered to have been paid) apply.

26 U.S.C. 6674 (section 6674 of the Internal Revenue Code of 1954) provides tax penalties in addition to the criminal penalties for failing to furnish or furnishing a fraudulent or false statement to an employee. Section 496(a) of the bill conforms section 6674 to the Code by substituting a cross-reference to section 1402(a)(3) (Disregarding a Tax Obligation) of title 18 for the reference to the criminal penalty section in 26 U.S.C. 7204 for the offense.

26 U.S.C. 6685 (section 6685 of the Internal Revenue Code of 1954) provides tax penalties in addition to the criminal penalty prescribed in 26 U.S.C. 7207 for failure of a private foundation to file an annual report. Section 496(b) conforms section 6685 by deleting the reference to section 7207 and substituting a reference to "other penalties provided by law," since the bill repeals section 7207.

26 U.S.C. 6686 (section 6686 of the Internal Revenue Code of 1954) provides civil penalties, in addition to criminal penalties provided in 26 U.S.C. 7203 for failing to file tax returns or filing a return which does not show the information required. Section 496(c) of the bill amends section 6686 by deleting the reference to the penalty provision in 26 U.S.C. 7203 and substituting a reference to "other penalties provided by law".

26 U.S.C. 7123(a) (section 7123(a) of the Internal Revenue Code of 1954) cross-references to 26 U.S.C. 7206, which includes the penalty provisions for concealment of property, false statement or falsifying and destroying records, in connection with a closing agreement, compromise, or offer of compromise. Section 497 of the bill conforms section 7123 to the Code by deleting the reference to 26 U.S.C. 7206. which is deleted by section 301 of the bill, and adding a reference to title 18.

26 U.S.C. 7203 (section 7203 of the Internal Revenue Code of 1954) provides that ayone who willfully fails to pay any tax or estimated tax as required, except for returns required of individuals, or fails to keep records or supply information as required is subject to criminal penalties. Section 498(a) of the bill conforms section 5203 of the Aode by deleting the language relating to failure to make a tax return because the offense is covered by section 1402 (Disregarding a Tax Obligation) of title 18.

26 U.S.C. 7213(a)(4) (section 7213(a)(4) of the Internal Revenue Code of 1954) defines as an offense, and provides penalties for, offering anything of material value in exchange for any tax return information or receiving such information as a result of such a solicitation. Section 498(b) amends section 7213(a)(4) to except from the penalties for violating the section (which will become a Class A misdemeanor by operation of section 2009 (Sentencing Classification of Offenses Outside this title) of title 18), the penalties for offenses described in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

26 U.S.C. 7214(a)(1) (section 7214(a)(1) of the Internal Revenue Code of 1954) makes it an offense for an officer or employee of the United States to commit extortion or willful oppression under color of law. Section 498(c)(1) of the bill amends section 7214(a)(1) by deleting the reference to extortion as covered in section 1722 (Extortion) of title 18.

26 U.S.C. 7214(a) (section 7214(a) of the Internal Revenue Code of 1954) specifies the sentence, including the fine, that may be imposed for a violation of a revenue law by an officer or employee of the United States acting in connection with such law, and allows the judge to award the informant of the revenue law violation a portion of the fine. Section 498(c)(3) of the bill amends section 7214(a) by adding a cross-reference to subchapter F (Official Corruption and Intimidation of chapter 13 of title 18, making clear that the informant reward is available in connection with viola-

tions of such subchapter by a Federal public servant acting in connection with the revenue laws.

26 U.S.C. 7214(b) (section 7214(b) of the Internal Revenue Code of 1954) provides for a fine and the dismissal of any employee of Internal Revenue interested in the manufacturing of tobacco, snuff or cigarettes or in the production of distilled spirits. Section 498(c)(4) of the bill amends section 7214(b) by deleting "internal revenue" and substituting a reference to the Bureau of Alcohol, Tobacco and Firearms to reflect the transfer of responsibility for tobacco and alcohol taxes from the Internal Revenue Service to the Bureau of Alcohol, Tobacco and Firearms.

26 U.S.C. 7232 (section 7232 of the Internal Revenue Code of 1954) makes it an offense for a manufacturer, producer, etc. of gasoline or oil to falsely represent himself as being registered or for anyone willfully to make a false statement on an application for registration. Section 498(d) deletes the reference to making a false statement as covered by section 1343 (Making a False Statement) of title 18.

26 U.S.C. 7240 (section 7240 of the Internal Revenue Code of 1954) makes it an offense for a person acting in an official capacity in the administration of chapter 37 (Sugar) of title 26 to invest or speculate in the production of sugar. Section 498(e) of the bill conforms section 7240 to the Code by deleting the references to "speculating" as covered by section 1356 (Speculating on Official Action or Information) of title 18.

26 U.S.C. 7303(3) (section 7303(3) of the Internal Revenue Code of the 1954) provides for seizure and forfeiture to the United States of all property to which a false or fraudulent statement, account, return, etc. delivered to the Secretary of the Treasury, relates. Section 498(f) of the bill conforms section 7303(3) to the Code by deleting the reference to 26 U.S.C. 7207 and substituting a cross-reference to section 1343 (Making a False Statement) as it relates to internal revenue matters.

26 U.S.C. 7407(b)(1)(A) (section 7407(b)(1)(A) of the Internal Revenue Code of 1954) provides that an income tax preparer who has engaged in criminal conduct subject to the penalties of title 26 may be enjoined from further engaging in such conduct. Section 499 of the bill conforms section 7407(b)(1)(A) by adding a cross-reference to subchapter A (Internal Revenue Offenses) of chapter 14 of title 18, in order to continue applicability of section 7407(b)(1)(A) to such a violator even though the provisions have been moved to title 18.

26 U.S.C. 7608 (section 7608 of the Internal Revenue Code of 1954) delineates the authority of internal revenue officers charged with enforcing the criminal, seizure, or forfeiture provisions of the Internal Revenue Code to carry arms, serve subpoenas, execute search and arrest warrants, make arrests, and seize property. It also delineates the authority of a criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service to carry out all those functions but not to carry firearms. Section 500(a) of the bill conforms section 7608 to the code by deleting language covered by section 3021 (Department of the Treasury) of title 18 and by updating the description of the law enforcement officers.

26 U.S.C. 7609(e) (section 7609(e) of the Internal Revenue Code of 1954) suspends the running of the statute of limitations relating both to the collection and assessment of taxes and criminal prosecutions when the person to whom the summons is directed intervenes in a proceeding to enforce the summons or receives a notice not to comply with the summons. Section 500(b) of the bill conforms section 7609(e) to the Code by amending the cross-reference to the provision concerning the criminal statute of limitations to refer to section 511 (Time Limitations) of title 18.

26 U.S.C. 9012(e)(3) (section 9012(e)(3) of the Presidential Election Campaign Fund Act) and 26 U.S.C. 9042 (section 9042 of the Presidential Primary Matching Payment Account Act) provide penalties in addition to fine and imprisonment for accepting kickbacks or illegal payments in connection with campaign expenses. Section 501 of the bill conforms sections 9012(d)(3) and 9042 to the Code by amending the cross-reference concerning the criminal penalty provision for receiving a kickback to refer to section 1751 (Commercial Bribery) of title 18, to which the applicable penalty provisions have been moved.

Section 502 of the bill makes clear that a violation of title 18, United States Code, that pertains or relates to the internal revenue of the United States shall be considered, for all relevant purposes, to be an offense or matter arising under the revenue laws of the United States.

Section 503 of the bill provides that moneys expended from Internal Revenue Service appropriations to place wagers in connection with investigations of wagering tax violations and subsequently recovered shall be reimbursed to the appropriation current at the time of the deposits.

PART R—AMENDMENTS RELATING TO JUDICIARY AND JUDICIAL PROCEDURE, TTILE 28, UNITED STATES CODE

28 U.S.C. 462, as enacted by section 510(a) of the bill, provides that the power of a court of the United States to punish for criminal contempt is limited to punishment for conduct specified as an offense in section 1331 (Criminal Contempt) of title 18. The provision is derived from the statement in 18 U.S.C. 401 that a court has the power to punish "such contempt of its authority, and none other " as is described in the section.

28 U.S.C. 509 provides that all functions of the Department of Justice, with specific exceptions, are vested in the Attorney General. Section 511(a) amends paragraph (2) and (3) to change the name of the "Federal Prison Industries, Inc." to "Federal Prison Industries." Section 511 (2) and (3) make grammatical changes necessitated by the repeal by section 301 of the bill of paragraph (4), relating to the Board of Parole, which is abolished by the bill.

28 U.S.C. 522(2), which requires the Attorney General to include in his annual report to the Congress statistics on crime under the laws of the United States, is amended by section 512(a) of the bill specifically to require that the statistics include the number of prosecutions brought under each section of title 18 in the preceding fiscal year, identifying the number of prosecutions brought under each jurisdictional base.

28 U.S.C. 533 describes the Attorney General's authority with respect to appointing officials to carry out certain functions, including the detection and prosecution of "crimes". Section 513(a) amends 28 U.S.C. 533 to use the word "offenses" rather than "crimes". See the definitions for those terms in section 111 (General Definitions) of title 18.

28 U.S.C. 534(a)(1) requires the Attorney General to collect and preserve "identification, criminal identification, crime, and other records". The Committee has amended the section, in accord with the suggestion of the Attorney General's Task Force on Violent Crime, to permit serious juvenile delinquency identification records to be collected. It is expected that these would be collected only after adjudication as a juvenile delinquent and only if their submission to the Attorney General is in accord with State law. The amendment also makes clear that the Attorney General should collect information concerning the incidence of juvenile delinquency.

28 U.S.C. 535 describes the authority of the Attorney General and the Federal Bureau of Investigation to investigate violations of title 18 involving government officers and employees. Section 513(a) of the bill amends the section to replace the term "offenses" with the term "crimes". See the definitions for those terms in section 111 (General Definitions) of title 18.

28 U.S.C. 538 is a reenactment and redesignation, without amendment, of current 18 U.S.C. 3578, relating to records of convictions to be kept in the Department fo Justice.

28 U.S.C. 539, enacted by section 512(c) of the bill, describes, the limited situations in which the Attorney General may request assistance from any federal, State, or local agency, including the armed services, in the course of enforcing specific laws of the United States. The section is derived from 18 U.S.C. 112(f), 351(g), 1116(d), 1201(f), and 1751(i), amended to conform the cross-references to sections of title 18 to the new Code provisions and to make clear that the Marine Corps is included in the provisions.

28 U.S.C. 557 (former 28 U.S.C. 567) relates to expenses of United States Marshals. Section 514 of the bill designates the existing text of the section as subsection (a), and reenacts existing 18 U.S.C. 4285, relating to payment of transportation expenses for a person released on bail on a condition of his subsequent appearance before the court, as subsection (b). Subsection (c) of section 514 amends the cross-reference to chapter 207 of title 18 to subchapter A (Release and Detention Pending Judicial Proceedings) of chapter 35 of title 18.

28 U.S.C. 604, relating to duties of the Director of the Administrative Office of the United States Courts, is amended by section 515 of the bill to redesignate existing subsection (e) as subsection (g), and to add new subsections (e) and (f). Subsection (e) is derived from 18 U.S.C. 3656, relating to the Director's duties with regard to probation officers. Subsection (f) is new, and grants the Director the authority to contract with any appropriate public or private agency or any person for supervisory aftercare of an offender in its jurisdiction. The subsection also exempts contracts for such aftercare from the provisions of 41 U.S.C. 5.

28 U.S.C. 636(a)(2) describes the authority of United States magistrates relating to bail hearings. Section 516 of the bill amends the

provision to make clear that the magistrate is authorized to issue orders under section 3502 (Release or Detention of a Defendant Pending Trial) of title 18 relating to release or detention.

28 U.S.C. 651 through 656 contain revised versions of the provisions of 18 U.S.C. 3152 through 3156, pertaining to pretrial services agencies. 28 U.S.C. 651 requires the establishment of a pretrial services agency in every federal district, rather than limiting these agencies to demonstration projects as under 18 U.S.C. 3152. 28 U.S.C. 651 permits the agencies to be established by contract, or directly, or by other method, to the extent and in amounts provided by appropriations Acts. The pretrial services agencies established under the section would be supervised by the chief probation officer or by a chief pretrial services officer appointed pursuant to 28 U.S.C. 952. An agency supervised by a chief pretrial services officer would be under the direction of a panel consisting of the chief judge of the circuit, the chief judge of the district, and a magistrate of the district, or their designees. 28 U.S.C. 653 describes the administration and organization of pretrial services. The provision includes limitations on the use of information gathered by the pretrial agency and requires the Director of the Administrative Office of the United States Courts to issue regulations to implement the statutory policy. 28 U.S.C. 654 essentially carries forward the provisions of 18 U.S.C. 3154, modified to reflect the revision of the Bail Reform Act of 1966, to require preparation reports in some instances concerning pretrial diversion, and to provide necessary contract authority. 28 U.S.C. 655 requires an annual report to Congress, and 28 U.S.C. 656 contains definitions.

28 U.S.C. 1701 through 1714 consist of 18 U.S.C. 3161 through 3174 reenacted by section 518(a) of the bill as sections of chapter 114 of title 28, relating to speedy trial. Section 518(b) of the bill amends the terminology in section 1712(2) to conform the terminology used to describe offenses to that used in the Code.

28 U.S.C. 1864(b) provides that if a person summoned for jury service fails to appear, the court shall order him forthwith to appear and show cause for his failure to comply with the summons. If he fails to appear in response to the order, or if he fails to show cause, he is liable for criminal penalties. Section 519 of the bill amends 28 U.S.C. 1864(b) to delete the reference to the offense of failure to appear in response to the court order as covered in section 1331 (Criminal Contempt) of title 18.

28 U.S.C. 1867(e) states that the provisions of 28 U.S.C. 1867 are the sole means by which a person accused of a federal crime, the Attorney General, or a party to a civil case may challenge a jury on the ground that it was not selected in conformity with the Jury Selection and Service Act of 1968 (28 U.S.C. 1861 *et seq.*). Section 520 of the bill amends 28 U.S.C. 1867(e) to debate the term "crime" and substitute the term "offense". See the definitions of those terms in section 111 (General Definitions) of title 18.

28 U.S.C. 1921 provides for United States Marshall's fees for various services in connection with court proceedings. Section 521 amends section 1921 to make the fee under current law, for services in a misdemeandor case other than summoning of witnesses, applicable to an infraction case.

28 U.S.C. 2077, a new provision enacted by section 522(1) of the bill, parallels for civil cases the provisions of section 3722 (Rulemaking Authority of the Supreme Court for Rules of Appellate Procedure) of title 18 and clarifies the authority of the Supreme Court to promulgate appellate rules for civil cases.

28 U.S.C. 2901 contains the definitions that apply to chapter 175 (Civil Commitment and Rehabilitation of Narcotic Addicts) of title 28. Section 523(a) of the bill amends the definition of "crime of violence" in 28 U.S.C. 2901(c) to substitute the names of offenses used in title 18 for the terminology now used. Section 523(b) amends 28 U.S.C. 2901(e), which defines "felony", to delete the reference to 18 U.S.C. 1.

28 U.S.C. 3101 through 3116 consist of the provisions of 18 U.S.C. 4100 through 4115, reenacted as sections of chapter 177 (Transfer to or From Foreign Countries) of title 28 by section 524 of the bill. 28 U.S.C. 3117 consists of the provisions of 18 U.S.C. 3244, relating to jurisdiction over transferred offenders.

28 U.S.C. 3101(b) (formerly 18 U.S.C. 4100(b)) defines the circumstances in which an offender may be transferred to or from the United States. Section 524(b) of the bill amends the provision to require consent of a parent, guardian, or guardian ad litem, or an appropriate court of the sentencing country, to the transfer of a person who there is reasonable cause to believe may be so mentally incompetent as to be unable voluntarily to consent to the transfer. The amendment also permits the appointment of a guardian ad litem for a juvenile.

28 U.S.C. 3102 (formerly 18 U.S.C. 4101) contains definitions for the chapter. Section 524(a)(1) of the bill amends the definition of "juvenile delinquency" in 28 U.S.C. 3102(d)(1) to delete "crime" and substitute "offense". See the definitions of those terms in section 111 (General Definitions) of title 18. Section 524(c)(2) of the bill amends the definition of "parole" in 28 U.S.C. 3102(f) to include a term of supervised release under section 2303 (Inclusion of a Sentence of Supervised Release After Imprisonment) of title 18. Section 524(c)(3) of the bill amends the definition of "probation" in 28 U.S.C. 3102(g) to delete references to suspended sentences to terms of imprisonment as inconsistent with the concept of probation as a sentence in itself under title 18, and as unnecessary to the definition even as it would apply in a criminal justice system which thinks of probation as a suspended term of imprisonment.

28 U.S.C. 3106(c) (formerly 18 U.S.C. 4105(c)) relates to credits for good time of a prisoner transferred from another country to the United States. The references to good time credits earned by the prisoner after transfer to the United States in 28 U.S.C. 3106(c)(1) and (c)(4) are amended by section 524(d)(1) and (d)(5) of the bill to refer to credit "toward service of sentence for satisfactory behavior", consistent with the terminology of section 3824 (Release of a Prisoner) of title 18. Sections 524(d)(2) and (d)(3) conform cross-references to various provisions of chapter 177 of title 28, as reenacted by section 524. Section 524(d)(4) repeals 28 U.S.C. 3106(c)(3), relating to extra good time deductions under 18 U.S.C. 4162 because that section is repealed by this bill.

28 U.S.C. 3107 (formerly 18 U.S.C. 4106) describes how an offender who is received while on parole from a foreign country will be

supervised, and specifies that the Parole Commission will exercise its authority over setting prison release dates, and over an offender on parole, if the offender is transferred from a foreign country as if he was sentenced in the federal system. Section 524(e)(1) of the bill amends subsection (a) to specify that an offender on parole from another country will be assigned to the Probation System, rather than the Parole Commission, for supervision. This amendment is consistent with the supervisory practice at present. Section 524(e)(2) revises subsection (b) of 28 U.S.C. 3107 to take into account the abolition of the Parole Commission by the bill and the need to distribute the functions provided in this section as to parolees and persons eligible for release on parole pursuant to the law of the foreign country in which the offender was sentenced. Subsection (b) provides that an offender transferred to serve a term of imprisonment shall be released in accord with section 3824(a) (Release of a Prisoner) of title 18 after serving the period of time specified in the applicable sentencing guidelines. If the guideline recommends a term of supervised release for such an offender, the offender will be placed on such a term. The sentence review provisions of Rule 35(b)(2) of the Federal Rules of Criminal Procedure and of section 3723(b) would apply to a sentence under the subsection, with jurisdiction in the United States district court for the district where the prison is located or the person is under supervision. Section 524(e)(3) repeals 28 U.S.C. 3107(c), relating to release on parole, because of the abolition of parole by the Code.

28 U.S.C. 3108(b)(3) (formerly 18 U.S.C. 4107(b)(3)), relating to the consequences of a court decision that the transfer was not effected in accord with the treaty or laws of the transferring country, is amended by section 524(f) of the bill to make the provision applicable whether or not the defendant initiated the review.

28 U.S.C. 3109(a) (formerly 18 U.S.C. 4108(a)) specifies the procedures by which an offender's consent to transfer to the United States is verified. Section 524(g)(1) of the bill amends section 3109(a) to include a requirement that the offender be informed of the term of imprisonment and supervised release in the applicable sentencing guideline as part of the requirement that he be informed of the consequences of a transfer. Section 524(g)(2) of the bill amends section 3109(b)(3) in a manner similar to the amendment by section 524(f).

28 U.S.C. 3115 (formerly 18 U.S.C. 4114) describes the procedures for returning an offender to the transferring country if the transfer was not in accord with the treaties and laws of the United States. Section 524(h)(1) of the bill amends section 3115(a) to require the court to stay its order of return for the 40-day period in which the sentencing country may request the return of the offender. Section 524(h)(2) of the bill amends section 3115(b) to delete authority to file a complaint with a justice as well as a judge, and to add authority to file a complaint for return of the offender to the sentencing country with the court that ordered his release as well as with a court in the jurisdiction where the offender is found. Section 524(g)(3) amends section 3115(g) to permit release or detention of an offender whose return to the sentencing country is sought in accordance with the standards applicable for extradition.

28 U.S.C. 3117 (formerly 18 U.S.C. 3244), relating to jurisdiction of transferred offenders, is amended by section 524(i) to provide exclusive jurisdiction in the United States district courts of proceedings instituted by the United States on behalf of the sentencing country challenging transfer of an offender to the United States.

Section 526 of the bill amends the Federal Rules of Evidence. Rules 404, 410, and 609 are amended by section 524(a) to change references to "crimes" to refer to "offenses". See the definitions of those terms in section 111 (General Definitions) of title 18. Section 526(c) of the bill amends Rule 612 to conform a cross-reference to 18 U.S.C. 3500 relating to demands for production of documents, to indicate that the subject is now covered in the Federal Rules of Criminal Procedure. Section 526(d) of the bill amends Rule 1101(e) to update a reference to "minor and petty offenses" to refer to "misdemeanors and infractions".

PART S—AMENDMENTS RELATING TO LABOR, TITLE 29, UNITED STATES CODE

29 U.S.C. 186(c) (section 302(c) of the Labor Management Relations Act) provides exceptions to the prohibition against employers, associations of employers or labor relations experts, advisers, or consultants to employers giving anything of value to representatives of employees, labor organizations, etc., an excess of their normal compensation in order to influence their actions regarding union organizing. Section 531(a) of the bill amends section 186(c) by adding a cross-reference to sections 1752(a)(1), (a)(3), and (a)(4) (Labor Bribery) of title 18 to make clear that the exceptions described continue to apply to those provisions, which were moved to title 18 from this Act.

29 U.S.C. 186(e) (section 302(e) of the Labor Management Relations Act) grants the district courts of the United States jurisdiction to restrain violations of the restrictions on financial transactions contained in section 186. Section 531(b) of the bill amends section 186(e) by adding a cross-reference to sections 1752(a)(1), (a)(3), and (a)(4) (Labor Bribery) of title 18, to continue the inclusion of these violations within the district court's jurisdiction to enjoin violations previously covered in this Act.

29 U.S.C. 215(a)(5) (section 15(a)(5) of the Fair Labor Standards Act of 1938) makes it an offense to violate the requirements imposed on employers to keep records covering wages, hours, and other conditions of employment, to violate the regulations restricting or prohibiting industrial homework, and to make a statement, report, or record which the offender knows is false in a material respect. Section 532 of the bill amends section 215(a)(5) by deleting the reference to making a false statement in a record filed or required to be kept under the section as covered by section 1343 (Making a False Statement) of title 18.

29 U.S.C. 504(a) (section 504(a) of the Labor Management Reporting and Disclosure Act of 1959) forbids, with certain exceptions, a current or former member of the Communist party or a person convicted of one of a list of specific offenses from holding office in a labor organization. An exception to this limitation may be made if the Board of Parole determines that the person's service in the labor organization would not be contrary to the purposes of the

Act. Section 533(a) of the bill amends section 504(a) by specifying that the sentencing judge, rather than the Parole Commission, will decide whether a person convicted of a federal offense can hold union office. If the offense is a State or local offense, a judge of the United States district court for the district in which the offense was committed may, under the amendment, make the decision upon motion of the United States Department of Justice. Section 533(b) of the bill amends section 504(a) to specify that decisions under the section are to be made pursuant to sentencing guidelines and policy statements promulgated pursuant to 28 U.S.C. 994(a), as enacted by section 126 of the bill. Section 533(d) of the bill further conforms section 504(a) to the Code by deleting a reference to administrative proceedings before the Board of Parole so as to conform with changes made in a reference to the sentencing court.

29 U.S.C. 927(b) (section 454(b) of the Comprehensive Employment and Training Act of 1973) provides that an individual on probation or parole may be selected as an enrollee in the Job Corps only if release from supervision of probation or parole officials is satisfactory to those officials and the Secretary of Labor and does not violate applicable law and regulations. Section 534 of the bill amends section 454(b) to add coverage under this provision of persons on supervised release. This would include persons on release pursuant to section 2303 (Inclusion of a Term of Supervised Release After Imprisonment) of title 18, as well as persons released under similar State laws.

29 U.S.C. 1111(a) (section 411(a) of the Employee Retirement Income Security Act of 1974) prohibits any person convicted of, or imprisoned as a result of conviction for, various crimes such as embezzlement, kidnapping, murder, or conspiracy to commit such crimes, from serving as an administrator, fiduciary, consultant, counsel or employee of any employee benefit plan for five years after the conviction unless such person's citizenship rights have been fully restored or the Board of Parole has determined that such person's services would not be contrary to the purposes of the Employee Retirement Income Security Act. Section 535 of the bill conforms section 1111(a) to the Code by deleting the cross-references to the present title 18 provisions and adding cross-references to the equivalent section of title 18.

PART T—AMENDMENTS RELATING TO MINERAL LANDS AND LEASING, TITLE 30, UNITED STATES CODE

30 U.S.C. 689(b) (section 9(b) of the Act of October 3, 1961) provides that any person who accepts or retains a payment, meant to stabilize the price of lead and zinc ores, to which he is not entitled must refund to the United States in a civil suit treble the amount wrongfully retained and is also subject to criminal prosecution. Section 541(a) of the bill conforms section 689(b) to the Code by delting the language relating to criminal penalties as covered in section 1731 (Theft) of title 18. Section 541(b) further amends section 689(b) by adding cross-references to sections 1001 (Criminal Attempt), 1343 (Making a False Statement), and 1731 (Theft) of title 18 to indicate that a person convicted of one of those offenses in connection with acceptance or retention of a payment made under the Act could no longer receive benefits under the Act. The latter

amendment carries forward current law regarding loss of benefits as set forth in former section 689(a), which was repealed by section 301, and as set forth in section 689(b).

30 U.S.C. 820(h) (section 110(h) of the Federal Mine Safety and Health Act of 1977) makes it an offense to sell or distribute equipment for use in a coal or other mine which is falsely represented as complying with the Act and regulations and specifications issued by the Secretary of Labor pursuant to the Act. Section 542(a) of the bill amends section 820(h) by deleting the reference to the penalty provision of subsection (f), which was repealed by section 301 of the bill as covered in section 1343 (Making a False Statement) of title 18, and substituting a cross-reference to section 1343 of title 18.

30 U.S.C. 825(c) (section 115(c) of the Federal Mine Safety and Health Act of 1977) requires operators of coal or other mines to issue certificates to miners who have completed health and safety training programs and provides penalties for falsifying such certificates. Section 542(b) of the bill amends section 825(c) by deleting the reference to penalty provisions of 30 U.S.C. 820(a) and (f), since they have been repealed or amended as covered in section 1343 (Making a False Statement) of title 18, and substituting a cross-reference to section 1343 of title 18.

30 U.S.C. 1268(i) and 1271(d) (section 518(i) and 521(d) of the Surface Mining and Reclamation Act of 1977) provide that when a state wishes to retain control over surface coal mining and reclamation operations and submits a plan regulating such mining and detailing reclamation operations, acceptance of the plan is contingent upon a penalty structure no less stringent than that specified in sections 1268 and 1271 of title 30. Section 543 of the bill amends sections 1268(i) and 1271(d) by adding a cross-reference to section 1343 (Making a False Statement) of title 18 insuring that State law penalties for false statements in connection with regulation of surface coal mining and reclamation are no less stringent than section 1343 penalties. The amendment carries forward current law and is necessitated by the repeal of the false statement provision in 30 U.S.C. 1268(g) by section 301 of the bill.

PART U—AMENDMENT RELATING TO MONEY AND FINANCE, TITLE 31, UNITED STATES CODE

31 U.S.C. 699b (section 602 of the Act of October 10, 1978) prohibits compensation from any government appropriation to an officer or employee of the government unless the person is a citizen of the United States or has declared his intention to become a citizen, owes allegiance to the United States, is an alien from a specified country who is lawfully admitted to the United States for permanent residence, or has been lawfully paroled into the United States; and makes an affidavit filed by the person receiving compensation prima facie evidence that the person meets the requirements of the section. 31 U.S.C. 699b provides penalties for making a false affidavit. Section 551 of the bill amends section 699b by deleting the reference to criminal penalties and substituting a statement that the filing of a false affidavit is an unlawful act that is an offense described in section 1341 (Perjury) of title 18.

31 U.S.C. 1018 (section 244 of the Revised Statutes) makes it an offense for a clerk employed in the Treasury Department to carry

on a trade or business in the funds or debts of the United States or of a State, or to take or apply to his own use any emolument or gain for negotiating or transacting any business in the department. Section 552 amends section 1018 by deleting the language creating the offense of taking any emolument or gain for transacting business with the Department as covered in subchapter F (Official Corruption and Intimidation) of chapter 13 of title 18.

31 U.S.C. 1034 (section 1 of the Act of August 11, 1955) authorizes the Secretary of the Treasury to administer oaths, issue subpoenas, require the production of records, etc., in any investigation necessary and proper to enforcement of laws regarding smuggling of controlled substances. Section 553 of the bill amends cross-references to the current law provisions regarding smuggling of controlled substances to refer to sections 1411 (Smuggling), 1811(a)(3) (Trafficking in an Opiate), 1812(a)(3) (Trafficking in Drugs), and 1814(a)(3) (Violating a Drug Regulation) of title 18.

31 U.S.C. 1052(k) (section 203(k) of the Currency and Foreign Transactions Reporting Act) specifies that for purposes of the false statements section of current title 18, reports required under the Act are statements and representations in matters within the jurisdiction of an agency of the United States. Section 554 of the bill conforms section 1052(k) to the Code to indicate that the required reports are, for purposes of section 1343 (Making a False Statement) of title 18, statements and representations in a government matter.

31 U.S.C. 1101(a)(1) (section 231(a)(1) of the Currency and Foreign Transactions Reporting Act) requires that anyone who transports or causes to be transported monetary instruments from the United States to or through a place outside the United States, or to a place in the United States from or through a place outside the United States, file a report concerning the transaction as required by the Secretary of the Treasury. Section 555 of the bill amends section 1101(a)(1) to require a person attempting to transport monetary instruments to file the report.

PART V—AMENDMENTS RELATING TO NAVIGATION AND NAVIGABLE WATERS, TITLE 33, UNITED STATES CODE

33 U.S.C. 1 authorizes the Secretary of the Army to issue regulations for the use of the navigable waters of the United States and provides penalties for violations of such regulations. Section 561 of the bill conforms section 1 to the Code by deleting language stating that a United States district court has jurisdiction of an offense committed within its territorial jurisdiction as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in chapter 33 (Jurisdiction and Venue) of title 18.

33 U.S.C. 533 (section 510 of the Act of August 2, 1946) provides that a failure or refusal to comply with an order of the Secretary of the Army or the Chief of Engineers relating to bridges, a failure or refusal to comply with a specific condition relating to the maintenance and operation of bridges, or a refusal to produce records or documents in response to a subpoena or other lawful requirement, is an offense punishable by fine or imprisonment. Section 562 of the bill amends section 533 by deleting the reference to refusal to

produce documents, as covered by section 1333 (Refusing to Testify or to Produce Information) of title 18.

33 U.S.C. 554 (section 2 of the Act of February 21, 1891) provides that an owner, agent, master, or clerk of a vessel arriving at or departing from an area where river and harbor improvements are carried on shall furnish information relating to passengers, freight, tonnage, etc., and provides penalties for violations. 33 U.S.C. 555 (section 11 of the Rivers and Harbor, Appropriation Act of 1922) requires the same information to be furnished to the Secretary of the Army for all ships operating on the navigable waters of the United States. Section 563 of the bill amends sections 554 and 555 by deleting language stating that the United States district court in whose territorial jurisdiction the offense has been committed, may enforce the provisions of the section, as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in chapter 33 (Jurisdiction and Venue) of title 18.

33 U.S.C. 601 (the third sentence of the last paragraph beginning on page 419 of Volume 25 of the United States Statutes at Large) authorizes the Secretary of the Army to issue rules and regulations with respect to reservoirs at the head of the Mississippi and provides penalties for violations of such rules. Section 564 of the bill aonforms section 601 to the Code by deleting language stating that prosecution shall be in the United States district court within whose territorial jurisdiction the offense was committed as covered in Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in chapter 33 (Jurisdiction and Venue) of title 18.

33 U.S.C. 1007(a) (section 9(a) of the Oil Pollution Act, 1961) authorizes the Secretary with authority over the Coast Guard to employ personnel of other Federal agencies or States to enforce laws relating to pollution of the sea by oil and gives such personnel arrest powers. The section also provides that a person arrested under the section shall be brought forthwith before a magistrate, judge, or court of the United States. Section 565 of the bill conforms section 1007(a) to the Code by deleting the reference to magistrate or court procedures and jurisdiction as covered in the Federal Rules of Criminal Procedure and in chapter 33 (Jurisdiction and Venue) of title 18.

33 U.S.C. 1232(b)(1) (section 13(b)(1) of the Ports and Waterways Safety Act) provides criminal penalties for willful and knowing violations of the Act. Section 566 of the bill rewrites section 1232(b) (1) to state that, except for violations of the Act which are covered by section 1702 (Aggravated Property Destruction) or 1703 (Property Destruction) of title 18, a violation is an offense punishable under section 1853 (Environmental Pollution) of title 18.

33 U.S.C. 1319(c)(1) (section 309(c)(1) of the Federal Water Pollution Control Act) provides criminal penalties for willful or negligent violations relating to discharge of pollutants into navigable waters. Section 567(a)(1) of the bill amends section 1319(c)(1) by deleting the fine and imprisonment language and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1853 (Environmental Pollution) of title 18.

33 U.S.C. 1319(c)(2) (section 309(c)(2) of the Federal Water Pollution Control Act) provides penalties for knowingly making any false statement, representation or certification in any record or document required to be filed or maintained under the Act and for tampering with any pollution control monitoring device. Section 567(a)(2) of the bill amends section 1319(c)(2) by deleting the reference to making false statements as covered by section 1343 (Making a False Statement) of title 18.

33 U.S.C. 1344(s)(4)(A) (section 404(s)(4)(A) of the Federal Water Pollution Control Act) provides penalties for willfully or negligently violating a condition or limitation in a permit for the discharge of dredged or fill material into the navigable waters. Section 567(b) of the bill amends section 1344(s)(4)(A) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1853 (Environmental Pollution) of title 18. See 33 U.S.C. 1319(c)(1).

33 U.S.C. 1368(a) (section 508(a) of the Federal Water Pollution Control Act) prohibits a federal agency from entering into a contract with a person who was convicted of an offense under 33 U.S.C. 1319(c) if the contract is to be performed at the facility where the violation occurred. Section 567(c) amends section 1368(a) by adding to the list of offenses conviction for which will bar a federal contract, an offense pursuant to section 1853 (Environmental Pollution) of title 18 and an offense under section 1343 (Making a False Statement) or 1344 (Tampering With a Government Record) of title 18 if the offense relates to a document filed or required to be maintained under the Federal Water Pollution Control Act.

33 U.S.C. 1515(b)(1)(B) (section 16(b)(1)(B) of the Deepwater Port Act of 1974) restricts civil actions by individuals when the Secretary of Transportation or the Attorney General has instituted and is diligently prosecuting a civil or criminal action for violation of the Deepwater Port Act of 1974 but allows for intervention as of right by individuals in such a suit. Section 568(a) amends section 1515(b)(1) (B) by clarifying that intervention is possible in civil but not criminal actions.

33 U.S.C. 1517(b) (section 18(b) of the Deepwater Port Act of 1974) requires an individual in charge of a vessel or deepwater port to notify the Secretary of Transportation of any discharge of oil, provides penalties for failure to notify, and prohibits notification from being used against an individual except in a prosecution for perjury or giving a false statement. Section 568(b) of the bill amends section 1517(b) by adding a reference to false swearing to the list of offenses for which the information in the notification may be used.

PART W—AMENDMENTS RELATING TO PATENTS, TITLE 35, UNITED STATES CODE

35 U.S.C. 25(b) requires that, when filing a document in a patent matter and subscribing to its accuracy in a written declaration rather than by oath, the document must warn the declarant that willful false statements are punishable by fine or imprisonment or both under 18 U.S.C. 1001. Section 571 of the bill amends section 25(b) to conform to the language in section 1343 (Making a False Statement) of title 18.

PART X—AMENDMENTS RELATING TO VETERANS' BENEFITS, TITLE 38, UNITED STATES CODE

38 U.S.C. 3405 provides that whoever directly or indirectly solicits, contracts for, charges or receives any fees, or attempts to do so, except as provided for by law, or whoever withholds from a veteran all or part of a benefit or claim due him shall be fined or imprisoned or both. Section 581 of the bill amends section 3405 by deleting the provision referring to withholding all or part of a claim due a veteran, which is covered by section 1731 (Theft) of title 18. The section also deletes the numbers designating the paragraphs because of the deletion of the second and last paragraph.

38 U.S.C. 3505(b) lists the offenses, conviction for which will cancel the right to veterans' benefits. Section 582 of the bill conforms the cross-references in the section to title 18 provisions to those in the Code.

PART Y—AMENDMENTS RELATING TO POSTAL SERVICE, TITLE 39, UNITED STATES CODE

39 U.S.C. 410(b)(2) specifies that all provisions of title 18 which cover the Postal Service, the mails and officers and employees of the Government of the United States are applicable to the Postal Service. Section 591 of the bill amends section 410(b)(2) by adding a reference to title 18 Appendix, to which some of the provisions of title 18 concerning the Postal Service have been moved, and, consistent with the terminology of title 18, to refer to "federal public servants, or former federal public servants" rather than "officers or employees of the Government of the United States". The language also adds a reference to "property" to assure coverage of property of the Postal Service in addition to the mails.

39 U.S.C. 3001(a) describes nonmailable matter as matter the deposit of which in the mails is punishable under listed provisions relating to gambling, obscenity, mail fraud, foreign divorce information, firearms, injurious articles, certain writings, wrappers with libelous material, and material in violation of the Animal Welfare Act. Section 592 of the bill amends section 3001(a) by conforming the description of nonmailable matter to the new sections of title 18 that provide criminal jurisdiction of the listed offenses.

PART Z—AMENDMENTS RELATING TO PUBLIC BUILDINGS, PROPERTY, AND WORKS, TITLE 40, UNITED STATES CODE

40 U.S.C. 13m (section 8 of the Act of August 18, 1949) provides penalties for violations of restrictions on activity in the vicinity of the Supreme Court. Section 601 of the bill amends section 13m by providing that the penalty provisions do not apply to a violation that is covered by title 18. The provision relating to property damage, was repealed by section 301 of the bill

40 U.S.C. 193h(b) (section 3(b) of the Act of July 31, 1946) provides penalties for violations and attempted violations of restrictions on activity in the vicinity of the Capitol grounds. Section 602 of the bill amends section 193h(b) by providing that the penalty provisions do not apply to a violation that is covered in title 18.

PART AA—AMENDMENTS RELATING TO PUBLIC HEALTH AND WELFARE, TITLE 42, UNITED STATES CODE

42 U.S.C. 242a (section 303 of the Public Health Service Act) describes various functions that the Secretary of Health, Education and Welfare is permitted to perform with regard to mental health, including providing for the privacy of individuals who are subjects of mental health research, and providing training instructions, and traineeships through grants in the mental health area. Section 611(a) of the bill amends section 242a by adding a subsection directing the Secretary of Health and Human Services to promulgate regulations for informed consent procedures pertaining to the use of psychosurgery, electric shock treatment, and psychotropic drugs applicable to a person hospitalized under subchapter B (Offenders with Mental Disease or Defect) of chapter 36 of title 18.

42 U.S.C. 257(a) (section 341(a) of the Public Health Service Act) authorizes the Secretary of Health, Education and Welfare to care for persons who are civilly committed as addicted to narcotic drugs or sentenced pursuant to the Narcotic Addict Rehabilitation Act of 1966 or the Federal Youth Aorrections Act. Section 611(b) of the bill amends section 257(a) by updating the title of the Secretary of Health and Human Services and by deleting the references to the Federal Youth Corrections Act and to persons sentenced for offenses under the Narcotic Addict Rehabilitation Act of 1966 because of the omission of those provisions from title 18.

42 U.S.C. 261(a) (section 346(a) of the Public Health Service Act) makes it an offense for anyone to introduce or attempt to introduce onto the grounds of any Public Health Service hospital which treats persons with drug abuse or dependency problems any habit-forming narcotic drug or controlled substance. Section 611(c) of the bill amends section 261(a) by deleting the penalty provision and substituting a statement that section 1314 (Providing or Possessing Contraband in a Prison) of title 18 applies as though the hospital were an official detention facility.

42 U.S.C. 262(f) (section 351(f) of the Public Health Service Act) provides penalties for violations of provisions relating to the preparation and labelling of biological products such as vaccines, serums and blood, as well as for violations of standards for the maintenance of establishments for the propagation or manufacture and preparation of biological products. Section 611(d) of the bill amends section 262(f) by adding an exception to the penalty provision for those violations punishable pursuant to title 18.

42 U.S.C. 263a(h) (section 353(h) of the Public Health Service Act) provides penalties for willfully violating provisions of the section pertaining to licensing of clinical laboratories, or regulations promulgated pursuant to it. Section 611(e) of the bill amends the section to make clear that a violation described in subsection (h) that is also described in section 1301 (Obstructing a Government Function by Fraud) or 1343 (Making a False Statement) of title 18 is punishable under the title 18 provision rather than under the title 42 provision.

42 U.S.C. 402(u)(1)(A) and (B) (section 202(u)(1)(A) and (B) of the Social Security Act) provides that if anyone is convicted of a listed offense, such as treason, sedition, or subversive activities, the court

may, in addition to the penalty for the offense, provide for a reduction in social security benefits. Section 612(a) of the bill conforms sections 402(u)(1)(A) and (B) to the Code by conforming the section references to those applicable to the same offense in revised title 18.

42 U.S.C. 406(a) (section 206(a) of the Social Security Act) authorizes the Secretary of Health, Education, and Welfare to establish rules and regulations relating to the representation of social security claimants before the Secretary and prescribing the maximum fees which may be charged for representation. The section makes it an offense to collect, or attempt to collect, through fraud or otherwise, a fee in excess of that allowed. Section 612(b) of the bill amends section 406(a) to make the provisions of section 1734 (Executing a Fradulent Scheme) of title 18, rather than those of section 406(a), applicable in an appropriate case.

42 U.S.C. 1383(d)(2) (section 1631(d)(2) of the Social Security Act) authorizes the Secretary of Health, Education, and Welfare to establish rules and regulations relating to the representation of claimants before the Secretary in claims for supplemental security income for the aged, blind, and disabled, and prescribing maximum fees that may be charged for such representation. The section makes it an offense to collect, or attempt to collect, by fraud or otherwise, a fee in excess of that allowed. Section 612(c) of the bill amends section 1383(d)(2) to make the provisions of section 1734 (Executing a Fraudulent Scheme) of title 18 applicable instead of those of this section if the requirements of section 1734 are met.

42 U.S.C. 1395nn(b)(3) (section 1877(b)(3) of the Social Security Act) exempts from the offenses of soliciting or receiving kickbacks in violation of subsection (b)(1) or (b)(2), a properly disclosed discount and pay to an employee. Section 612(d) of the bill amends section 1395nn(b)(3) by deleting the reference to offenses described in 42 U.S.C. 1395nn(b)(1) and 42 U.S.C. 1395nn(b)(2), since they were repealed by section 301 of the bill as covered by section 1751 (Commercial Bribery) of title 18, and substituting a reference to section 1751.

42 U.S.C. 1396h(a) (section 1909(a) of the Social Security Act) provides, in the second sentence, that a person convicted of making a false statement or improperly receiving a benefit under Medicaid can no longer receive benefits. Section 612(e) of the bill amends the reference to the offenses described in "the preceeding provisions of this subsection" to refer instead to sections 1343 (Making a False Statement) and 1731 (Theft) of title 18 since those provisions of title 18 replace the offense described in the first sentence of 42 U.S.C. 1396h(a), which was repealed by section 301 of the bill.

42 U.S.C. 1396h(b)(3) (section 1909(b)(3) of the Social Security Act) exempts certain discounts and renumerations received from inclusion within the offense sections of 1396h(b)(1) and 1396h(b)(2). Section 612(e)(2) of the bill amends section 1396h(b)(3) by deleting the cross-references to sections 1396h(b)(1) and 1396h(b)(2), which are repealed by section 301 of the bill, and substituting a cross-reference to section 1751 (Commercial Bribery) of title 18 which includes those offenses.

42 U.S.C. 1973j(b) (section 12(b) of the Voting Rights Act of 1965) makes it an offense, in an election in which an examiner has been

appointed to secure compliance with the Voting Rights Act of 1975, to destroy, mutilate, or otherwise alter a paper ballot or to alter the official voting record tabulated in a voting machine. Section 613(a) of the bill amends section 1973j(b) by deleting the penalty provision and substituting a statement that a violation of the subsection is an unlawful act that is an offense described in section 1344 (Tampering With a Government Record) of title 18.

42 U.S.C. 1973j(d) (section 12(d) of the Voting Rights Act of 1965) authorizes the Attorney General to institute an action for preventive relief whenever a person has engaged in or there are reasonable grounds to believe a person is about to engage in a violation of the Voting Rights Act of 1965. Section 613(a)(2) amends section 1973j(d) to conform the cross-references to include references to the provisions of title 18 that cover voting rights offenses that were covered in the Act before being repealed by section 301.

42 U.S.C. 1973aa-3 (section 205 of the Voting Rights Act of 1965) makes it an offense to deprive or attempt to deprive a person of his right to vote or register by violating a provision of the Voting Rights Act pertaining to testing, residency requirements, or language requirements as they relate to voting eligibility. Section 613(b) of the bill amends section 197aa-3 by deleting the material covered by section 1001 (Criminal Attempt) of title 18 and by designating a violation as an unlawful act that is an offense described in section 1501 (Interfering With Civil Rights) of title 18.

42 U.S.C. 1973dd-3(b) (section 7(b) of the Overseas Citizens Voting Rights Act of 1975) makes it an offense to violate or attempt to violate voting rights of citizens of the United States who reside overseas. Section 614 amends section 1973dd-3(b) by deleting the reference to attempts as covered by section 1001 (Criminal Attempt) and to designate a violation as an unlawful act that is an offense described in section 1501 (Interfering With Civil Rights) of title 18.

42 U.S.C. 1974a (section 302 of the Civil Rights Act of 1960) makes it an offense for anyone to steal, destroy, conceal, mutilate, or alter a record or paper relating to any act requisite to voting in an election. Section 615 amends section 1974a by designating election records as federal government records for purposes of sections 1344 (Tampering With a Government Record), 1701 (Arson), 1702 (Aggravated Property Destruction), 1703 (Property Destruction), and 1731 (Theft) of title 18.

Section 1989 of the Revised Statutes, as added by section 615A of the bill, makes clear that section 1504 (Unlawful Discrimination) of title 18 does not create any new civil cause of action.

42 U.S.C. 2000b-3 (section 304 of the Civil Rights Act of 1964) defines a complaint for purposes of the Civil Rights Act of 1964 as a writing or document within the meaning of 18 U.S.C. 1001. Section 616(a) of the bill conforms section 2000b-3 to the Code by amending it to provide that a "complaint" is a statement in a government matter within the meaning of section 1343 (Making a False Statement) of title 18.

42 U.S.C. 2000c-6(c) (section 407(c) of the Civil Rights Act of 1964) defines the terms "parent" and "complaint" for purposes of complaints concerning discrimination in education. Section 616(b) of the bill conforms section 2000c-6(c) of the Code by defining "com-

plaint" as used in the section as a statement in a government matter within the meaning of section 1343 (Making a False Statement) of title 18.

42 U.S.C. 2000e–1 (section 702 of the Civil Rights Act of 1964) provides that the equal employment opportunities provisions of the Act do not apply to employers with respect to the employment of aliens outside any State or to employment by a religious corporation or educational institution of persons of a particular religion. Section 616(c) of the bill amends section 2000e–1 by adding a cross-reference to section 1504 (Unlawful Discrimination) of title 18 to make clear that the exception also applies to the offense described in that section.

41 U.S.C. 2273(b) (section 223b. of the Atomic Energy Act of 1954) makes it a two-year offense to knowingly and willfully violate a provision of the Act that results, or could result, in a significant impairment of a utilization facility. Section 617(a) of the bill makes the offense a one-year offense. See section 2009 of title 18.

42 U.S.C. 2274 (section 024 mf the Atomic Energy Act mf 1954) describes the offense of disclosing restricted data. (See sections 1121(a)(2) (Espionage) and 1122(a)(2) (Disseminating National Defense Information). While the bill retains current law penalty provisions for these offenses, section 617(b) of the bill makes clear that an offense described in subsection (a) of section 2274 is a Class A felony for purposes of sections 511 (Time Limitations) and 3502 (Release or Detention of a Defendant Pending Trial) of title 18.

42 U.S.C. 2275 (section 225 of the Atomic Energy Act of 1954) describes an offense relating to receipt of restricted data. Section 617(c) of the bill contains an amendment to section 2275 similar to that for section 2274.

42 U.S.C. 2278a(b) (section 229b(b) of the Atomic Energy Act of 1954) provides penalties for a willful violation of a rule or regulation promulgated by the Nuclear Regulatory Commission for the transportation of a dangerous weapon or material. Section 617(d) of the bill amends section 2278a(b) to make it clear that the provisions of title 18, rather than of this subsection, apply to an offense that comes within its terms.

42 U.S.C. 3611(f) (section 811(f) of the Act of April 11, 1968) makes it an offense for a person willfully to fail or neglect to attend and testify, or to answer a lawful inquiry or produce documents, pursuant to a subpoena or lawful order, or to make a false entry in a document filed pursuant to regulations of the Secretary of Housing and Urban Development concerning fair housing, or to fail to make complete records as required. Section 618 of the bill conforms section 3611(f) to the Code by deleting material covered by sections 1343 (Making a False Statement) and 1344 (Tampering With a Government Record) of title 18. The language relating to failure to attend and testify, or to answer a lawful inquiry or produce documents, was repealed by section 301 of the bill.

42 U.S.C. 4910(a)(1) (section 11(a)(1) of the Noise Control Act of 1972) provides penalties for willful or knowing violations of noise pollution requirements in the manufacture or distribution of new products or of regulations regarding noise emission by railroads or motor carriers in interstate commerce. Section 610(a) of the bill amends section 4910(a)(1) by deleting the penalty provisions and

substituting a statement that a violation is an unlawful act that is an offense described in section 1853 (Environmental Pollution) of title 18.

42 U.S.C. 4912(c) (section 13(c) of the Noise Control Act of 1972) makes it an offense for anyone knowingly to make a false statement in a document filed or required to be maintained under the Act or to tamper with a noise pollution monitoring device. Section 610(b) of the bill amends section 4912(c) by deleting the material relating to filing a false statement as covered by section 1343 (Making a False Statement) of title 18.

42 U.S.C. 6928(d) (section 3008(d) of the Solid Waste Disposal Act) makes it an offense knowingly to transport hazardous waste material to a facility without a permit, to dispose of hazardous waste without a permit, or to make a false statement in a document which must be filed pursuant to the Solid Waste Disposal Act. Section 620 of the bill amends section 6928(d) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1853 (Environmental Pollution) of title 18. The false statements language was repealed by section 301 of the bill.

42 U.S.C. 7413(c)(1) (section 113(c)(1) of the Clean Air Act) makes it an offense knowingly to violate clean air standards. Section 621(a) of the bill amends section 7413(c)(1) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1853 (Environmental Pollution) of title 18.

42 U.S.C. 7413(c)(2) (section 113(c)(2) of the Clean Air Act) makes it an offense for anyone knowingly to make a false statement in a document filed or required to be maintained pursuant to the Clean Air Act or to tamper with a monitoring device measuring pollution levels. Section 621(b) of the bill amends section 7413(c)(2) by deleting the reference to making false statements as covered by section 1343 (Making a False Statement) of title 18.

PART BB—AMENDMENTS RELATING TO PUBLIC LANDS, TITLE 43, UNITED STATES CODE

43 U.S.C. 362 (section 3 of the Act of August 31, 1916) makes it an offense for anyone to willfully injure, destroy, deface, or remove a monument or signpost marking springs, streams, and water holes in arid lands, or to impair such water supplies. Section 631 of the bill amends section 362 by deleting the language relating to "injury, destruction, and defacing monuments or signposts" as offenses covered in sections 1702 (Aggravated Property Destruction) and 1703 (Property Destruction) of title 18.

43 U.S.C. 1350(c) (section 24(c) of the Outer Continental Shelf Lands Act) makes it an ofense for anyone knowingly and willfully to violate a provision of the Act, or of a lease, permit, or license issued pursuant to it, or of a rule or regulation, or to tamper with a monitoring device or reveal any information required by the Act to be kept confidential. Section 632(a) of the bill amends section 1350(c) by designating a violation of the provisions relating to violations of the Act or tampering with a montoring device an offense punishable under section 1853 (Environmental Pollution) of title 18. The offense described in current 43 U.S.C. 1350(c)(4), failure to

keep information confidential, is retained as a separate violation, and becomes a Class A misdemeanor by operation of section 2009 (Sentencing Classification of Offenses Outside This Title).

PART CC—AMENDMENTS RELATING TO RAILROADS, TITLE 45, UNITED STATES CODE

45 U.S.C. 354(a–2)(i)(B) (section 4(a–2)(i)(B) of the Railroad Unemployment Insurance Act) provides that an employee's certification that he left work voluntarily with good cause shall be accepted in connection with calculations of time worked under the unemployment compensation law, unless there is evidence to the contrary, and subject to the provisions of 45 U.S.C. 359(a). Since part of section 359(a) is repealed by section 641(b) of the bill as covered in section 1343 (Making a False Statement) of title 18, section 641(a) of the bill amends 45 U.S.C. 354(a-2)(i)(B) to add a cross-reference to the penalty applicable to violations of section 1343 of title 18.

45 U.S.C. 359(a) (section 9(a) of the Railroad Unemployment Insurance Act) makes it an offense for a person willfully to fail or refuse to make a report required under the Act, to make or aid in the making of a false report pursuant to requirements of the Act, or to make or aid in the making of a false report in order to obtain benefits. Section 641(b) of the bill amends section 359(a) by deleting the references to making a false report and to making such a report in order to obtain benefits as covered by sections 1301 (Obstructing a Government Function by Fraud) and 1343 (Making a False Statement) of title 18.

PART DD—AMENDMENTS RELATING TO SHIPPING, TITLE 46, UNITED STATES CODE

46 U.S.C. 22 (section 4144 of the Revised Statutes) requires a master of a vessel which is to be registered to make an oath that he is a citizen, and makes a knowing false oath punishable by fine but not forfeiture. Section 651 of the bill amends section 22 by deleting the fine provision as covered by section 1341 (Perjury) of title 18.

46 U.S.C. 59 (section 4188 of the Revised Statutes) provides penalties for the willful neglect to do or perform an act as required by various provisions of title 48 of the Revised Statutes, codified to various sections of title 46. Section 652 of the bill amends section 59 by adding cross-references to provisions of title 18 that cover offenses previously covered in those sections: section 1301 (Obstructing a Government Function by Fraud) of title 18 and subchapters E (Perjury, False Statements, and Related Offenses) and F (Official Corruption and Intimidation) of chapter 13 of title 18, maintaining the penalty provision of section 59 if section 1301 or subchapter E or F is not applicable.

46 U.S.C. 170(14) (section 4472(14) of the Revised Statutes) provides criminal penalties and permits forfeiture of a vessel for knowing violations of the section or a regulation relating to carriage on vessels of explosives and other dangerous articles and substances. Section 653 of bill conforms section 170(14) to the Code by deleting the penalty provision and substituting a statement that a

violation is an unlawful act that is an offense described in section 1821 (Explosives Offenses) of title 18.

46 U.S.C. 321 (section 4373 of the Revised Statutes) makes it an offense knowingly to make a record of enrollment or license of any vessel contrary to the intent of title 50 of the Revised Statutes, to collect a fee in excess of that allowed by the Revised Statutes, or to take a gratuity for performing a service under those provisions. It is also an offense for an officer or employee to deliver to an officer or employee designated by the Secretary of the Treasury a false description of a vessel to be enrolled or licensed. Section 654 of the bill amends section 321 to specify that the provisions of title 18 apply, rather than the provisions of this section, whenever an offense described in this section is also a violation of title 18.

46 U.S.C. 322 (section 4374 of the Revised Statutes) makes it an offense for any person authorized and required to perform a duty required by title 50 of the Revised Statutes to neglect or refuse that duty if the offense is not a violation of 46 U.S.C. 321. In conformity with the amendment to 46 U.S.C. 321, section 655 of the bill amends section 322 to make it inapplicable to an offense covered in title 18.

46 U.S.C. 323 (section 4375 of the Revised Statutes) makes it an offense to forge or counterfeit a document required by title 50 of the Revised Statutes to be granted by an officer of the revenue. Section 656 of the bill amends section 323 by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense described in section 1741 (Counterfeiting) or 1742 (Forgery) of title 18.

46 U.S.C. 369(e) (section 5(e) of the Act of May 27, 1936) makes it an offense to deface, remove, or destroy, with intent to deceive or delay an officer of the United States in the performance of his duties, plans or specifications for a passenger vessel approved by the Commandant of the Coast Guard. Section 657 of the bill amends section 369(e) by deleting the penalty provision and sustituting a statement that a violation is an unlawful act that is an offense described in section 1344 (Tampering With a Government Record) of title 18.

46 U.S.C. 391a(14)(B)(i) (section 4417a.(14)(B)(i) of the Revised Statutes) provides criminal penalties for anyone who knowingly and willfully violates section 391a or a regulation thereunder. The section relates to standards of design, construction, and operation of vessels for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. Section 658 of the bill completely rewrites section 391a(14)(B)(i) to indicate that an offense under the chapter or a regulation is an unlawful act that is an offense punishable under section 1853 (Environmental Pollution) of title 18, except that an offense that is covered by section 1702 (Aggravated Property Destruction) or 1703 (Property Destruction) of title 18 is punishable under section 1702 or 1703, as appropriate.

46 U.S.C. 408 (section 4430 of the Revised Statutes) provides that iron or steel plates or other materials, with certain exceptions, used in the construction of boilers or Unfired pressure vessels for use on vessels subject to inspection shall be inspected by the Coast Guard, and that anyone who affixes on a plate or material a coun-

terfeit, forged, or altered seal of inspection, shall be subject to criminal penalties. Section 659 of the bill amends section 408 by deleting provisions covered by sections 1741 (Counterfeiting) and 1742 (Forgery) of title 18.

46 U.S.C. 599(d) (section 10 of the Act of June 26, 1884) provides that no allotment of a seaman's wage is legal other than that permitted by the section. The section makes it an offense to falsely allege to be a relative or savings bank entitled to an allotment. Section 660 of the bill amends section 599(d) by providing that a violation of section 1731 (Theft) of title 18 is subject to the provisions of that section rather than those of section 599(d).

46 U.S.C. 643(g) (section 4515(g) of the Revised Statutes) makes it an offense for anyone to require a seaman to carry a discharge book if he carries an identification certificate or continuous discharge book issued pursuant to the section. The section also makes it an offense for a seaman to make a false statement, knowing that it is false, in applying for a certificate or book under the section. Section 661 of the bill amends section 643(g) by deleting the penalty for false statements and substituting a statement that a violation of the false statement provision is an unlawful act that is an offense described in section 1343 (Making a False Statement) of title 18.

46 U.S.C. 672(d) (section 13(d) of the Act of March 4, 1915) authorizes the collector of customs to call a muster of the crew of any vessel to determine whether it is in violation of the requirements, qualifications, and regulations as to crews set forth in the section. The section makes it an offense for a person knowingly to file a false affidavit that a crew is in violation of the section. Section 662 of the bill amends section 672(d) by deleting the penalty provision relating to filing a false affidavit and substituting a statement that a person who files a false affidavit is guilty of perjury under section 1341 (Perjury) of title 18.

46 U.S.C. 701 (section 4596 of the Revised Statutes) provides penalties to be imposed on any seaman or apprentice who commits any offense specified, such as desertion, absence without leave, etc. Section 663(a) of the bill amends section 701 by adding to those penalties already specified a cross-reference to penalties provided in proposed title 18. Section 663(b) of the bill further amends section 701 by deleting the penalty of being placed in irons for willful disobedience to any lawful command at sea until the disobedience shall cease as outmoded, and substituting a reference to detention. Section 663(c) of the bill further amends section 701 by deleting the punishment of being placed in irons and given bread and water until the continued wiliful disobedience shall cease, and substituting authority for detention. These provisions will permit detention of a seaman who has committed an offense requiring his detention until a trial can be held, if the seriousness of the offense justifies his separation from the rest of the crew. Section 663(d) and 663(e) further amend the bill by deleting the criminal penalty of imprisonment for smuggling, damaging the vessel or damaging or embezzling its cargo because those offenses are covered in sections 1701 (Arson), 1702 (Aggravated Property Destruction), 1703 (Property Destruction), 1731 (Theft), and 1411 (Smuggling) of title 18.

46 U.S.C. 711 (section 4610 of the Revised Statutes) permits the court to imprison an offender convicted under title 53 of the Revised Statutes until payment of the amount of a penalty imposed is made. Section 664 of the bill conforms section 711 to the Code by deleting the provision providing for imprisonment as inconsistent with section 2202 (e) (Imposition of a Sentence of Fine) of title 18.

46 U.S.C. 712 (section 4611 of the Revised Statutes) provides that the master of a vessel shall surrender an officer of the vessel who violated 18 U.S.C. 2191, relating to assault of a seaman. Section 665 of the bill conforms section 712 to the Code by correcting the cross-references to the assault provisions of title 18.

46 U.S.C. 1356 (section 259 of the Act of March 4, 1909) prohibits possessing any right or property in any vessel employed in the transportation or carrying of any slaves and provides for money damages equal to twice the value of the offender's right or property in the vessel and twice the value of his interest in the slaves. Section 666 of the bill amends section 1356 by deleting obsolete provisions concerning forfeiture of a sum of money based on the value of slaves being transported. Criminal penalties for the offense described in 46 U.S.C. 1356 are provided for violation of section 1622 (Aggravated Criminal Restraint) of title 18.

PART EE—AMENDMENTS RELATING TO TELEGRAMS, TELEPHONES, AND RADIO TELEPHONES, TITLE 47, UNITED STATES CODE

47 U.S.C. 27 (section 7 of the Submarine Cable Act) makes it an offense for a person to refuse to exhibit papers reporting infractions or violently to resist a person authorized to investigate infractions of provisions regarding the protection of submarine cables. Section 671(a) of the bill amends section 27 to specify that the provisions of the section do not apply to an offense described in title 18.

47 U.S.C. 33 (section 13 of the Submarine Cable Act) describes jurisdiction for both civil and criminal actions for offenses committed pursuant to the Submarine Cable Act. Section 671(b) of the bill amends section 33 by deleting the criminal jurisdiction provisions as covered by Rule 18 (Place of Prosecution and Trial) of the Federal Rules of Criminal Procedure and in chapter 33 (Jurisdiction and Venue) of title 18.

47 U.S.C. 220(e) (section 220(e) of the Communications Act of 1934) makes it an offense willfully to make a false entry in a record kept by a communication common carrier, or willfully to mutilate, destroy, or otherwise falsify such record, or willfully to neglect or refuse to make complete records of the business of the carrier. Section 672(a) of the bill amends section 220(e) by deleting the references to false statements and to mutilating or damaging documents as covered by sections 1343 (Making a False Statement) and 1344 (Tampering With a Government Record) of title 18.

Section 672(b) of the bill amends the Communications Act of 1934 by adding a new section 606a, which makes it an offense for any communication common carrier, or officer, employee, or agent thereof, or for any landlord, custodian, or other person who has received an order pursuant to section 3104 (Assistance in Interception) of title 18 to disclose the existence of an interception or surveillance or the device used to accomplish it. Exceptions are made for the situation in which disclosure is made in response to legal process, and, even in that circumstance, disclosure may only be made after notice to the appropriate prosecuting officer. A violation of the provision makes the violator subject to civil penalties to be paid to the authority under whose jurisdiction the interception or surveillance was made.

PART FF—AMENDMENTS RELATING TO TERRITORIES AND INSULAR POSSESSIONS, TITLE 48, UNITED STATES CODE

48 U.S.C. 1406d (section 32 of the Organic Act of the Virgin Islands of the United States) authorizes the inferior courts of the Virgin Islands to have concurrent jurisdiction with the district courts over certain matters, including criminal cases in which the maximum penalty does not exceed six months' imprisonment or a $100 fine. Section 681 of the bill amends section 1406d to authorize jurisdiction over criminal cases in which the maximum fine that may be imposed is $25,000, rather the $100 limit provided in current law. The increased limit is consistent with the maximum fine provided in section 2201 (Sentence of Fine) of title 18 for an individual convicted of a Class B misdemeanor.

48 U.S.C. 1421i (section 31 of the Organic Act of Guam) authorizes the application of federal income tax laws in Guam. Section 682 of the bill amends subsections (d)(1) and (f) of section 1421i to add cross-references to subchapter A (Internal Revenue Offenses) of chapter 14 of title 18, in order to make clear that those provisions continue to apply in Guam even though they have moved from title 26 to title 18.

48 U.S.C. 1613 (section 23 of the Revised Organic Act of the Virgin Islands) authorizes the inferior courts, created by local law, to have exclusive original jurisdiction over certain matters, including criminal cases in which the maximum penalty does not exceed six months' imprisonment or a $100 fine, or both. Section 683 of the bill amends section 1613 to authorize jurisdiction over criminal cases in which the maximum fine that may be imposed is $25,000. as opposed to the $100 limit in current law. The increased limit is consistent with the maximum fine provided in section 2201 (Sentence of Fine) of title 18 for an individual convicted of a Class B misdemeanor.

PART GG—AMENDMENTS RELATING TO TRANSPORTATION, TITLE 49. UNITED STATES CODE

49 U.S.C. 20(7)(b) (section 20(7)(b) of Part I of the Interstate Commerce Act, to the extent it remains in effect pursuant to section 4(c) of Public Law 95-473) makes it an offense to knowingly and willfully make a false entry in a report required to be filed under 49 U.S.C. 20, or in records required to be kept, or to knowingly and willfully destroy or otherwise falsify such records, or to knowingly and willfully neglect or fail to make required records. Section 691 of the bill amends section 20(7)(a) by (b) deleting references to making a false entry or destroying, altering, or falsifying a record as covered in sections 1343 (Making a False Statement) and 1344

(Tampering With a Government Record) of title 18, and (b) making grammatical changes because of the deletion.

49 U.S.C. 1472(e) (section 902(e) of the Federal Aviation Act of 1958) makes it an offense for an air carrier, or officer or employee thereof, to knowingly and willfully fail to refuse to make a report required under the Act, to knowingly and willfully mutilate or otherwise falsify such a report, or to knowingly and willfully file a false report. Section 692(a)(1) amends section 1472(e) by deleting the false statement provision as covered in section 1343 (Making a False Statement) of title 18, and by deleting the mutilation of records provision as covered in section 1344 (Tampering With a Government Record) of title 18.

49 U.S.C. 1472(h)(2) (section 902(h)(2) of the Federal Aviation Act of 1958) makes it an offense willfully to deliver or cause to be delivered to an air carrier or the operator of a civil aircraft for transportation in air commerce, or recklessly to cause transportation in air commerce of any property that contains, a hazardous material in violation of a regulation of the Secretary of Transportation. Section 692(a)(2) of the bill deletes the language that specific that the person is "guilty of an offense" and substitutes a statement that violation is an unlawful act that is an offense punishable under section 1821 (Explosives Offenses) of title 18. The specific penalty language in current 49 U.S.C. 1472(h)(2) was repealed by section 301 of the bill.

49 U.S.C. 1472(i) (section 902(i) of the Federal Aviation Act of 1958) makes it an offense to commit or attempt to commit aircraft piracy. Section 692(a)(3) of the bill amends section 1472(i) to delete the offense provision as covered in sections 1631 (Aircraft Hijacking) and 1001 (Criminal Attempt) of title 18. Subsection (i) is also amended to retain the death sentence if death results from an offense, but describes the offense by referring to the offense of murder described in section 1601 of title 18 if the offense is committed during the commission or attempted commision of aircraft hijacking.

49 U.S.C. 1472(*o*) (section 902(*o*) of the Federal Aviation Act of 1958) authorizes the Federal Bureau of Investigation to investigate certain crimes involving aircraft. Section 692(a)(4) of the bill amends section 1472(*o*) to conform cross-references to the Code.

49 U.S.C. 1473(c) (section 903(c) of the Federal Aviation Act of 1958) describes the procedures for the imposition of the death penalty for aircraft piracy that results in death. Section 692(b) of the bill amends section 1473(c) to add paragraphs relating to implementation and appellate review of such a sentence.

49 U.S.C. 1809(b) (section 110(b) of the Hazardous Materials Transportation Act) provides penalties for anyone who willfully violates a provision of the Act or a regulation issued under the Act. Section 693 of the bill conforms section 1809(b) to the Code by designating any such violations as an offense punishable under section 1821 (Explosives Offenses) of title 18.

49 U.S.C. 11909(b)(2), (c)(2), and (d)(2) makes it an offense to willfully fail to specifically, completely, and truthfully answer a question, as required, of the Interstate Commerce Commission, pursuant to subchapter II, III, or IV of chapter 105 of title 49. Section 694(a) of the bill deletes the requirement for truthful answers be-

cause any false answer would constitute an offense under section 1343 (Making a False Statement) of title 18.

49 U.S.C. 11911 makes it an offense for a director, officer, attorney, or agent of a carrier to participate in an unauthorized issuance or disposition of securities or assumption of obligations, or for an officer or director to receive anything of value for his benefit for a negotiation or sale of a security of the carrier. Section 694(b) of the bill conforms section 11911 to the Code by designating a violation as an offense punishable under section 1761 (Securities Offenses) of title 18.

49 U.S.C. 11914 provides general criminal penalties when specific penalties are not provided for violations of law related to transportation that is subject to the jurisdiction of the Interstate Commerce Commission. Section 694(c) of the bill amends section 11914 to provide that the general penalty provisions do not apply if the offense is a violation of title 18.

PART HH—AMENDMENTS RELATING TO WAR AND NATIONAL DEFENSE, TITLE 50, UNITED STATES CODE

50 U.S.C. 167k (section 13 of the Helium Act) provides penalties for willful violations of the Act or of any regulation or order issued under the Act. Section 701 of the bill conforms section 167k to the Code by deleting offense provisions covered in chapter 11 (Offenses Involving National Defense) of title 18.

50 U.S.C. 192 (the first paragraph of section 2 and section 2(a) of the Act of June 15, 1917) provides for seizure and forfeiture of any vessel involved in a violation of, and a fine and imprisonment for any person who violates, a provision regulating vessels in territorial waters during a national emergency. Section 702 of the bill conforms section 192 to the Code, designating such unlawful acts by any person as punishable under section 1113 (Violating an Emergency Regulation) of title 18.

50 U.S.C. 210 (Section 5306 of the Revised Statutes) makes it an offense for anyone to engage, without a license and authority of the President, in trading in a State declared to be in insurrection, to make a false statement to obtain such license and authority, or to commit embezzlement or keep false accounts. Sections 703(a) and (c) of the bill conform section 210 to the Code, deleting material covered in section 1343 (Making a False Statement) of title 18, and subsection (b) conforms the embezzlement provision by cross-referencing to section 1731 (Theft) of title 18 to indicate that section 1731 provisions should be applied in lieu of provisions of the section whenever they are applicable.

50 U.S.C. 405(b) (section 303(b) of the Act of July 26, 1947) relates to the application of conflict of interest laws to an individual who is a member of an advisory committee or who serves in any other part-time capacity under the National Security Act. Section 704 of the bill conforms section 405(b) to other provisions of federal criminal law by amending the section to designate such individuals as "special government employees" under the conflict of interest provisions of chapter 11 of title 18 Appendix (18 U.S.C. 202, *et seq.*, reenacted as 18 U.S.C. App. 202, *et seq.*, by section 201(a)(1) of the bill and amended by section 208 of the bill).

Section 704A of the bill adds a new section 112 to title I of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) that describes the authority of various persons, including public servants, to intercept or assist in interception of communications under the Act. The section is based on current 18 U.S.C. 2511(2)(a)(ii), (2)(b), (2)(c), (2)(e), and (2)(f), modified to conform cross-reference to title 18.

50 U.S.C. App. 16 (section 16 of the Trading with the Enemy Act, as amended) provides penalties for anyone who willfully violates a provision of the Act or a license, rule, or regualtion issued thereunder, or willfully violates an order of the President issued pursuant thereto. Section 705 of the bill amends section 16 to provide that the provisions of section 1206 (Engaging in an Unlawful International Transaction) of title 18 apply in lieu of the provisions of 50 U.S.C. App. 16 whenever they are applicable.

50 U.S.C. App. 462 (section 12 of the Military Selective Service Act) describes offenses and provides penalties for violations of the Act. Sections 706(a) and (b) of the bill amends subsection (a), relating to false classification under the Selective Service System and other acts to evade or refuse service in the armed forces, to specify that the provisions of sections 1114 (Evading Military or Alternative Civilian Service), 1115 (Obstructing Military Recruitment or Induction), and 1343 (Making a False Statement) of title 18 apply in lieu of the provisions of subsection (a) whenever they are applicable and to delete the overlapping language covered in title 18. Section 706(c) of the bill amends subsection (d), relating to the statute of limitations, to retain a special statute of limitations provision as an exception to section 511 (Time Limitations) of title 18.

50 U.S.C. App. 1152(a)(6) (section 2(a)(6) of the Act of June 29, 1940) relates to jurisdiction, venue, and judicial proceedings respecting violations of the War and Defense Contract Acts. Section 707 of the bill amends section 1152(a)(6), deleting material relating to criminal procedure as covered in proposed title 18 and the Federal Rules of Criminal Procedure. The section, therefore, will be limited to civil matters.

50 U.S.C. App. 1191(c)(5)(A) (section 403(c)(5)(A) of the Renegotiation Act) requires contractors subject to the provisions of the War and Defense Contract Act to file annual financial reports. The section also makes it an offense willfully to fail to furnish required information or to knowingly supply false or misleading information in a report. Section 708 of the bill amends section 1191(c)(5)(A) to delete the false statement language as covered in section 1343 (Making a False Statement) of title 18.

50 U.S.C. App. 1193(h) (section 3(h) of the Renegotiation Act of 1948) makes it an offense for anyone willfully to fail to furnish information required by the Act or willfully to furnish information which is false or misleading. Section 709 of the bill amends section 1193(h), deleting material covered in section 1343 (Making a False Statement) of title 18.

50 U.S.C. App. 1215(e)(1) (section 105(e)(1) of the Renegotiation Act of 1951) requires contractors subject to the Act to file financial statements, and makes it an offense for anyone willfully to fail to file information required or knowingly to file false information.

Section 710 of the bill amends section 1215(e)(1), deleting material covered in section 1343 (Making a False Statement) of title 18.

50 U.S.C. App. 2156(b) (section 706(b) of the Defense Production Act of 1950) relates to jurisdiction, venue, and judicial proceedings respecting violations of the Act. Section 711 of the bill amends section 2156(b), deleting material relating to criminal procedure as covered in title 18 and the Federal Rules of Criminal Procedure. The amendment is necessitated by repeal of part of the section by section 301 of the bill.

50 U.S.C. App. 2405(b) (section 6(b) of the Export Administration Act of 1969) makes it an offense for anyone to willfully export anything contrary to the Act, or a regulation, order, or license thereunder, with knowledge that such export will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes. Section 712 of the bill amends section 2405(b) by deleting the penalty provision and substituting a statement that a violation is an unlawful act that is an offense punishable under section 1206 (Engaging in an Unlawful International Transaction) of title 18.

PART II—MISCELLANEOUS AMENDMENTS

The Act of June 6, 1968, 82 Stat. 170, relates to the duties of the United States Secret Service to protect presidential and vice-presidential candidates. Section 713 of the bill amends section 2 of the Act, conforming a cross-reference to the provision for secret service powers in 18 U.S.C. 3056 to the appropriate section in the Code, namely, section 3021(c) (Department of the Treasury) of title 18.

P.L. 87-849 (76 Stat. 1119, October 23, 1962) relates to bribery, graft, and conflicts of interest involving public officials. Section 2 of the Act, relating to exemptions from certain provisions in the Act, is amended by section 714 of the bill to conform to section 206 (Exemptions) of title 18 Appendix (as amended by section 208(c)(1) of the bill).

PART JJ—CROSS-REFERENCES

Section 721 contains a general provision that states that a reference to a provision of law replaced by section 101 (which amends title 18 of the United States Code) or section 201 (which creates and codifies title 18 Appendix of the United States Code) is to be deemed a reference to the corresponding provision enacted by this Act.

Vote Of The Committee

On November 18, 1981, the Committee on the Judiciary met in open executive session at which time the Committee ordered S. 1630, as amended, favorably reported. On a motion to report the bill to the full Senate:

YEAS	NAYS
Thurmond	Mathias
Laxalt	East
Hatch	Grassley
Dole	Denton

Simpson
Biden
Kennedy
Metzenbaum
DeConcini
Baucus

REGULATORY IMPACT STATEMENT

Implementation of the bill, as reported, will not result in increased regulation. While the bill does modernize a broad range of criminal offenses, including some dealing with regulatory offenses, the Committee believes the more effective enforcement of the criminal laws bearing on regulated conduct portended by this bill will have a salutary effect on federal regulation without increasing impact of the overall regulatory scheme involved.

COST ESTIMATE OF CONGRESSIONAL BUDGET OFFICE

A cost estimate of the Congressional Budget Office is on request but was not available at the time of this report.

CHANGES IN EXISTING LAW

In the interest of economy, the Committee felt that the requirement of subsection (4) of rule XXIX of the Standing Rules of the Senate should be waived. To comply with this Rule, almost the entire current title 18 of the United Stated Code, in addition to very lengthy new material would have to be reprinted. The report on the various sections of the bill, as reported, contains a discussion of current Federal law, and will, therefore, reflect changes made by the bill.

COMPARISON CHARTS

(Cautionary note. These tables should be used only as a rough guide, since they attempt to compare materials that are not always comparable. A more complete understanding of the relationship between current law and Q. 1630, as reported, can be found in the individual section-by-section discussion of the provisions of S. 1630, as reported.)

TABLE I

This table compares the provisions of present title 18 to the provisions of S. 1630, as reported. References in the left-hand column are to sections of current title 18 of the United States Code. References in the right-hand column are to the sections of the new title or to the new title 18 Appendix or other titles of the United States Code; references to rules are to the Federal Rules of Criminal Procedure.

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1	111.
2	401.
3	1311.
4	1311.
5	111.

T. 18 Sections	S. 1630, as reported
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7	203.
8	1747.
9	203.
10	111.
11	111.
12	Deleted.
13	1861.
14	Deleted.
15	1747.
31	111.
32	1701-1704, 1611-1613, 1001.
33	1001, 1611-1613, 1701-1704.
34	1601-1603.
35	1616.
41	Title 18 Appendix, 1701-1703.
42	Title 18 Appendix.
43	Title 18 Appendix.
44	Title 18 Appendix.
45	Deleted.
46	Title 18 Appendix.
47	Title 18 Appendix.
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203	Title 18 Appendix, 1351-1354.
204	Title 18 Appendix.
205	Title 18 Appendix.
206	Title 18 Appendix.
207	Title 18 Appendix.
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246	1503, 1504, Title 18 Appendix.
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286	1002, 1301, 1343, 1731.
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288	1343, 1731.

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291	Title 18 Appendix.
292	Title 18 Appendix.
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332	1731, 1742.
333	Title 18 Appendix.
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336	Title 18 Appendix.
337	Title 18 Appendix.
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432	Title 18 Appendix.
433	Title 18 Appendix.
435	Title 18 Appendix.
436	Title 18 Appendix.
437	Title 18 Appendix.
438	Title 18 Appendix.
439	Title 18 Appendix.
440	Title 18 Appendix.
441	Title 18 Appendix.
442	Title 18 Appendix.
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473	1741–1742.
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475	Title 18 Appendix.
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478	1741–1742.
479	1741–1742.
480	1741–1742.
481	1745, 1741–1742.
482	1741–1742.
483	1741–1742.
484	1742.
485	1741–1742.
486	Title 18 Appendix, 1741–1742.
487	1745.
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489	Title 18 Appendix.
490	1741–1742.
491	Title 18 Appendix.
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495	1301, 1343, 1741–1742.
496	1343, 1741–1742.
497	1741–1742, 1343.
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499	1301, 1343, 1741–1742.
500	1301, 1731–1732, 1741–1744.
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503	1741–1742, 1745.
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506	1343–1344, 1741–1742, 1745.
507	1001, 1741–1742.

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547	1411, 1412, 1413.
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549	1344, 1411, 1712, 1731, 1732, 1733, 1412, Title 18 Appendix.
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552	1001, 1411, 1842.
591	Deleted.
592	Deleted.
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595	1503, 1511, 1514, 1515.
596	Deleted.
597	1511.
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601	Title 18 Appendix.
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603	1516.
604	Deleted.
605	Deleted.
606	1515.
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845	Title 15.
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916	Title 18 Appendix.
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925	Title 18 Appendix.
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964	1001, 1204, 4001.
965	Title 18 Appendix, 1001, 1204, 4001.
966	Title 18 Appendix, 1001, 1204, 4001.
967	Title 18 Appendix, 1001, 1204, 4001.
969	Deleted.
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1117	1002, 1601-1602.
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1154	Title 18 Appendix.
1155	Deleted.
1156	Deleted.
1158	Title 18 Appendix.
1159	Title 18 Appendix.
1160	Deleted.

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1661	Deleted.
1691	Deleted.
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2156	1002, 1111-1112.
2157	Deleted.
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2342	Title 18 Appendix, 1805.
2343	Title 18 Appendix.
2344	Title 18 Appendix, 1805
2345	Title 18 Appendix.
2346	Title 18 Appendix.
2381	1101.
2382	Deleted.
2383	1102.
2384	1002, 1101-1103.
2385	1002, 1103.
2386	Deleted.
2387	111, 1116.

T. 18 Sections	*S. 1630, as reported*
2388	1002, 1116, 1311.
2389	1203.
2390	1203.
2391	Deleted.
2421	1843.
2422	1621-1623, 1843.
2423	1621-1623, 1843.
2424	Deleted.
2510	111, 1526.
2511	1521.
2512	1522.
2513	4001.
2515	3107.
2516	3101.
2517	3107.
2518	3102-3106.
2519	3108.
2520	4102.
3005	Deleted.
3006A	3401-3405.
3012	3502.
3041	3303.
3042	3303.
3043	3501.
3045	Deleted.
3047	Deleted.
3049	Rule 40.
3050	3014.
3052	3011.
3053	3013.
3054	Title 18 Appendix.
3055	Deleted.
3056	1302, 3001, 3021, Title 18 Appendix.
3057	Title 18 Appendix.
3058	Title 18 Appendix.
3059	3141.
3060	Rule 5(c).
3061	3025.
3103a	Deleted.
3105	Rule 41(d).
3107	3011.
3109	Rule 41(d).
3112	Title 18 Appendix.
3113	Deleted.
3141	3501.
3142	3507.
3143	3502.
3144	3509.
3146	3502.
3147	3505.
3148	3503.
3149	3504.
3150	1312.
3151	Deleted.
3152	Title 28.
3153	Title 28.
3154	Title 28.
3155	Title 28.
3156	111, Title 28.
3161	Title 28.
3162	Title 28.
3163	Title 28.
3164	Title 28.
3165	Title 28.
3166	Title 28.
3167	Title 28.

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3168	Title 28.
3169	Title 28.
3170	Title 28.
3171	Title 28.
3172	Title 28.
3173	Title 28.
3174	Title 28.
3181	3211.
3182	3202.
3183	Deleted.
3184	3212.
3185	Deleted.
3186	3216.
3187	3303.
3188	3212, 3213.
3189	3214.
3190	3214.
3191	Deleted.
3192	3217.
3193	3217.
3194	3217.
3195	3218.
3231	206, 3301.
3235	Deleted.
3236	3311.
3237	3311.
3238	3312.
3239	Deleted.
3240	3313.
3241	3301.
3242	203.
3243	Title 25.
3244	Title 28.
3281	511.
3282	511.
3283	511.
3284	511.
3285	Deleted.
3286	Deleted.
3287	Deleted.
3288	511.
3289	511.
3290	511.
3291	Deleted.
3321	Deleted.
3331	Rule 6.1.
3332	Rule 6.1.
3333	Rule 6.1.
3334	Rule 6.1.
3401	3302.
3402	3302.
3432	Rule 16(f).
3435	404.
3481	Deleted.
3487	Deleted.
3488	Deleted.
3491	Rule 15.
3492	Rule 15.
3493	Rule 15.
3494	Rule 15.
3495	Rule 15.
3496	Rule 15.
3497	Deleted.
3500	Rule 17(d), Rule 16(a)(2).
3501	3713.
3502	3715.

T. 18 Sections	*S. 1630, as reported*
3503	Rule 15.
3504	3107.
3563	Deleted.
3564	Deleted.
3565	3813.
3566	3841.
3567	Deleted.
3568	2305
3569	Deleted.
3570	Deleted.
3575	Deleted.
3576	3725.
3577	3715.
3578	Title 28.
3611	4001.
3612	4001.
3613	Deleted.
3514	Deleted.
3615	Title 18 Appendix.
3617	Deleted.
3618	Deleted.
3619	Deleted.
3620	Title 18 Appendix.
3651	2101-2105.
3653	Rule 32, 3806.
3654	3802.
3655	3803.
3656	Title 28.
3691	Deleted.
3692	Deleted.
3731	3724.
3771	3702.
3772	3722.
4001	Title 28.
4002	Title 28.
4003	Title 28.
4004	3014.
4005	Title 28.
4006	Title 28.
4007	Title 28.
4008	Title 28.
4009	Title 28.
4010	Title 28.
4011	Title 28.
4041	Title 28.
4042	Title 28.
4081	Title 28.
4082	3821-3822.
4083	Deleted.
4084	3821.
4085	3823.
4086	3013.
4100	Title 28.
4101	Title 28.
4102	Title 28.
4103	Title 28.
4104	Title 28.
4105	Title 28.
4106	Title 28.
4107	Title 28.
4108	Title 28.
4109	Title 28.
4110	Title 28.
4111	Title 28.
4112	Title 28.
4113	Title 28.

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4114	Title 28.
4115	Title 28.
4121	Title 28.
4122	Title 28.
4123	Title 28.
4124	Title 28.
4125	Title 28.
4126	Title 28.
4127	Title 28.
4128	Title 28.
4161	3824.
4162	Deleted.
4163	3824.
4164	3824.
4165	Deleted.
4166	Deleted.
4201	Deleted.
4202	Deleted.
4203	Deleted.
4204	Deleted.
4205	Deleted.
4206	Deleted.
4207	Deleted.
4208	Deleted.
4209	2303.
4210	2303.
4211	2303.
4212	Deleted.
4213	Deleted.
4214	Deleted.
4215	Deleted.
4216	Deleted.
4217	Deleted.
4218	Deleted.
4241	Deleted.
4242	3614.
4243	Deleted.
4244	3611.
4245	Deleted.
4246	3611.
4247	3616.
4248	3616.
4251	Deleted.
4252	Deleted.
4253	Deleted.
4254	Deleted.
4255	Deleted.
4281	3824.
4282	3507.
4283	3804.
4284	3824.
4285	3508.
4321	Deleted.
4351	Title 28.
4352	Title 28.
4353	Title 28.
5001	3601.
5002	Deleted.
5003	Title 28.
5005	Deleted.
5006	Deleted.
5010	Deleted.
5011	Deleted.
5012	Deleted.
5013	Deleted.
5014	Deleted.

T. 18 Sections	*S. 1630, as reported*
5015	Deleted.
5016	Deleted.
5017	Deleted.
5018	Deleted.
5019	Deleted.
5020	Deleted.
5021	Deleted.
5022	Deleted.
5023	Deleted.
5024	Deleted.
5025	Deleted.
5026	Deleted.
5031	3605.
5032	3601, 3603.
5033	3602.
5034	Deleted.
5035	3602.
5036	3602.
5037	3603.
5038	3604.
5039	3603.
5040	3603.
5041	Deleted.
5042	Deleted.
6001	111, 3115.
6002	3121.
6003	3122.
6004	3123.
6005	3124.
1201 App	Title 18 Appendix.
1202 App	Title 18 Appendix.
1203 App	Title 18 Appendix.
Public Law 91-538	3201, 3203.

TABLE II

This table identifies those provisions of the United States Code outside of title 18 and title 18 Appendix which are subject to conforming amendments as part of the codification of the Federal Criminal Code.

Set forth below with respect to each title of the United States Code to be amended, are: (1) those sections which are repealed in whole or in part as covered by provisions of title 18; (2) those sections which are modified to some extent, but retained within their present format; and (3) those sections currently embodied in title 18 which are transferred to other titles in the United States Code, except those transferred to title 18 Appendix.

TITLE 2. THE CONGRESS

Sections Amended by S. 1630: 2 U.S.C. 167g, 192, 194, 390, 441j, 455.

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

Sections Amended by S. 1630: 5 U.S.C. 306, 701(b)(1)(B), 3374 (c)(2), 7313(a), 8312.

TITLE 7. AGRICULTURE

Sections Amended by S. 1630: 7 U.S.C. 8, 9, 13, 13a-1, 13b, 13c(a), 15b, 60, 84, 87b, 87c, 87f, 136l(b), 215, 270, 473, 473c-1, 503, 511i, 615, 620, 953, 1156, 1373(a), 1379i, 1380o(a), 2024, 2048, 2148, 2146(b), 2621(b), 2622(b).

TITLE 8. ALIENS AND NATIONALITY

Sections Amended by S. 1630: 8 U.S.C. 1105a, 1182, 1185, 1251, 1252, 1306, 1324, 1325, 1326, 1327, 1328, 1357(b), 1451(g), 1481(a)(7).

TITLE 10. ARMED FORCES

Sections Amended by S. 1630: 10 U.S.C. 772(f), 847, 2304 note, 2671(c), 2683.

TITLE 12. BANKS AND BANKING

Sections Amended by S. 1630: 12 U.S.C. 92a(h), 93(a), 95a(3), 209, 327, 503, 617, 622, 630, 1141j(b), 1457, 1709-2, 1715z-4(b), 1730a (j), 1784(c), 1818(n), 1847(a), 1957.

TITLE 13. CENSUS

Sections Amended by S. 1630: 13 U.S.C. 211, 213, 225.

TITLE 15. COMMERCE AND TRADE

Sections Amended by S. 1630: 15 U.S.C. 1, 2, 3, 23, 50, 65, 77t(b), 77v(a), 77x, 77vvv(b), 77yyy, 78o, 78u, 78aa, 78dd-2, 78ff, 78jjj(c), 79r, 79y, 79z-3, 80a-36, 80a-41, 80a-43, 80a-48, 80b-3, 80b-9, 80b-14, 80b-17, 298(a), 645, 714m, 715i(c), 717m(d), 717u, 1172, 1176, 1281, 1282, 1644, 1693n, 1717, 1825, 2615(b).

Sections Transferred into Title 15: 18 U.S.C. 841, 842, 843, 844, 845, 846, 847, 848.

TITLE 16. CONSERVATION

Sections Amended by S. 1630: 16 U.S.C. 1a-3, 1a-6(b), 57, 95, 114, 117, 117c, 124, 146, 163, 198, 204, 354, 364, 371, 373, 374, 395, 403c-1, 403h-1, 408i, 413, 414, 422d, 423f, 425g, 426i, 428i, 430i, 430q, 460k-3, 460n-8, 552d, 558b(a), 668dd, 690e(a), 690g, 706, 718e(b), 718f, 727 (a), 742j-1(d), 776b, 825f(c), 825p, 831t, 916e, 1030, 1338(a), 1849 (b).

TITLE 17. COPYRIGHTS

Sections Amended by S. 1630: 17 U.S.C. 116(d), 506, 507(a).

TITLE 18. CUSTOMS DUTIES

Sections Amended by S. 1630: 19 U.S.C. 283, 1341, 1436, 1455, 1465, 1581(c), 1708(b), 1919, 2316, 2349.

TITLE 20. EDUCATION

Sections Amended by S. 1630: 20 U.S.C. 581, 1087-4.

TITLE 21. FOOD AND DRUGS

Sections Amended by S. 1630: 21 U.S.C. 17, 104, 134e(a), 145, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 333, 454(c), 461, 622, 661(c), 675, 676(a), 802, 812, 841, 842(c), 843, 844, 845, 846, 847, 848, 849, 850, 851, 871(b), 878, 881, 882(a), 883, 884, 885, 886, 955, 959, 960, 961(2), 962, 965, 1041.

TITLE 22. FOREIGN RELATIONS AND INTERCOURSE

Sections Amended by S. 1630: 22 U.S.C. 141 to 183, 287c(b), 447(c), 450(a), 455, 461, 462, 463, 464, 615, 618, 1179, 1198, 1200, 1203, 2667, 2778(c).

Sections Transferred to Title 22: 18 U.S.C. 951, 1116(b)(4).

TITLE 24. HOSPITALS, ASYLUMS, AND CEMETERIES

Sections Amended by S. 1630: 24 U.S.C. 154, 211, 211b.

TITLE 25. INDIANS

Sections Amended by S. 1630: 25 U.S.C. 232, 399, 450d, 1302(7).

Sections Transferred into Title 25: 18 U.S.C. 1151, 1152, 1153.

TITLE 26. INTERNAL REVENUE CODE

Sections Amended by S. 1630: 26 U.S.C. 5054(c), 5114(c)(2), 5148 (1), 5205(i)(5), 5207(e), 5271(e)(5), 5505(i) 5557(a), 5558, 5601(a), 5602, 5603, 5604(a), 5605, 5606, 5608, 5661, 5671, 5682, 5685, 5691(a), 5762, 5871, 6103, 6531, 6533(3), 6674, 6685, 6686, 7123(a), 7201, 7202, 7203, 7204, 7206, 7208, 7209, 7213(a)(4), 7214, 7215(a), 7232, 7240, 7303(3), 7407(b)(1)(A), 7608, 7609(e), 9012, 9042.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

Sections Amended by S. 1630: 28 U.S.C. 509, 522(2), 533, 535, 557, 604, 1291, 1864(b), 2901, 2902(e).

Sections Transferred to Title 28: 18 U.S.C 112(f), 351(g), 1116(d), 1201(f), 3152, 3153, 3154, 3155, 3156, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3578, 4001, 4002, 4003, 4005, 4006, 4007, 4008, 4009, 4010, 4011, 4041, 4042, 4081, 4100, 4101, 4102, 4103, 4104, 4105, 4106, 4107, 4108, 4109, 4110, 4111, 4112, 4113, 4114, 4115, 4121, 4122, 4123, 4124, 4125, 4126, 4127, 4128, 4351, 5002, 5003, 5011.

TITLE 29. LABOR

Sections Amended by S. 1630: 29 U.S.C. 186, 215(a)(5), 439, 461, 501(c), 504(a), 522, 528, 629, 666(g), 927(b), 1111(a).

TITLE 30. MINERAL LANDS AND MINING

Sections Amended by S. 1630: 30 U.S.C. 689, 820, 825(c), 941, 1232 (d), 1268, 1271(d), 1294.

TITLE 31. MONEY AND FINANCE

Sections Amended by S. 1630: 31 U.S.C. 233, 699b, 1018, 1034, 1052(k), 1059, 1060.

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

Sections Amended by S. 1630: 33 U.S.C. 1, 364,391, 392, 393, 394, 395, 396, 447, 506, 533, 554, 555, 601, 682, 931, 938, 990, 1007(a), 1232(b), 1319(c), 1344(s)(4)(A), 1368(a), 1515(b)(1)(B), 1517(b).

TITLE 35. PATENTS

Section Amended by S. 1630: 35 U.S.C. 25(b).

TITLE 38. VETERANS BENEFITS

Sections Amended by S. 1630: 38 U.S.C. 787, 3405, 3501, 3502, 3506(b), 5007.

TITLE 39. POSTAL SERVICE

Section Amended by S. 1630: 39 U.S.C. 410(b)(2), 1008(b), 3001(a).

TITLE 40. PUBLIC BUILDINGS, PROPERTY, AND WORKS

Sections Amended by S. 1630: 40 U.S.C. 13m, 101, 193h, 193s, 833.

TITLE 41. PUBLIC CONTRACTS

Section Amended by S. 1630: 41 U.S.C. 54.

TITLE 42. THE PUBLIC HEALTH AND WELFARE

Sections Amended by S. 1630: 42 U.S.C. 242a, 257(a), 261, 262(f), 263a(h), 300e-17(h), 402(u)(1)(A) and (B), 406, 408, 1314(h), 1383(d)(2), 1383a, 1395nn, 1396h, 1713, 1760(g), 1761(o), 1973i, 1973j, 1973aa-1(i), 1973aa-3, 1973bb(b), 1973dd-3, 1974a, 1975d(d), 1987, 1989, 1992, 1995, 2000b-3, 2000c-6(c), 2000e-1, 2000e-13, 2000h, 2000h-1, 2187(a), 2278a, 2971f, 3425, 3426, 3611(f), 3631, 3791, 3792, 3793, 4910(a), 4912, 5157, 6928(d), 7413(c).

TITLE 43. PUBLIC LANDS

Sections Amended by S. 1630: 43 U.S.C. 104, 362, 1350(c), 1733(a).

TITLE 45. RAILROADS

Sections Amended by S. 1630: 45 U.S.C. 354(a-2)(i)(B), 359(a).

TITLE 46. SHIPPING

Sections Amended by S. 1630: 46 U.S.C. 22, 58, 59, 62, 83i, 170, 229e, 231, 239, 321, 322, 323, 324, 369(e), 391a(14)(B), 403, 408, 599(d), 643, 658, 672(d), 701, 707, 711, 712, 838, 839, 1171(b), 1228, 1276, 1356.

TITLE 47. TELEGRAPH, TELEPHONES, AND RADIOTELEGRAPHS

Sections Amended by S. 1630: 47 U.S.C. 21, 22, 27, 31, 33 220, 409(m), 505.

TITLE 48. TERRITORIES AND INSULAR POSSESSIONS

Sections Amended by S. 1630: 48 U.S.C. 1406d, 1417, 1421i, 1461, 1613.

Title 49. Transportation

Sections Amended by S. 1630: 49 U.S.C. 20(7), 41(1), 1472, 1473, 1725, 1809, 11903(d), 11904, 11907, 11909, 11911, 11914.

Title 50. War and National Defense

Sections Amended by S. 1630: 50 U.S.C. 167k, 192, 210, 405(b), 783(a), 792(d)(3), 855, 856, 1809.

Sections Transferred Into Title 50: 18 U.S.C. 793, 794, 798.

Title 50. Appendix

Sections Amended by S. 1630: 50 U.S.C. App. 16, 462, 520(2), 643b, 1152(a), 1191(c)(5)(A), 1193(b), 1215(e)(1), 1884, 2156(b), 2160(f), 2255(b), 2405(b), 2406(b).